

OHIO
PROBATE CODE
ANNOTATED

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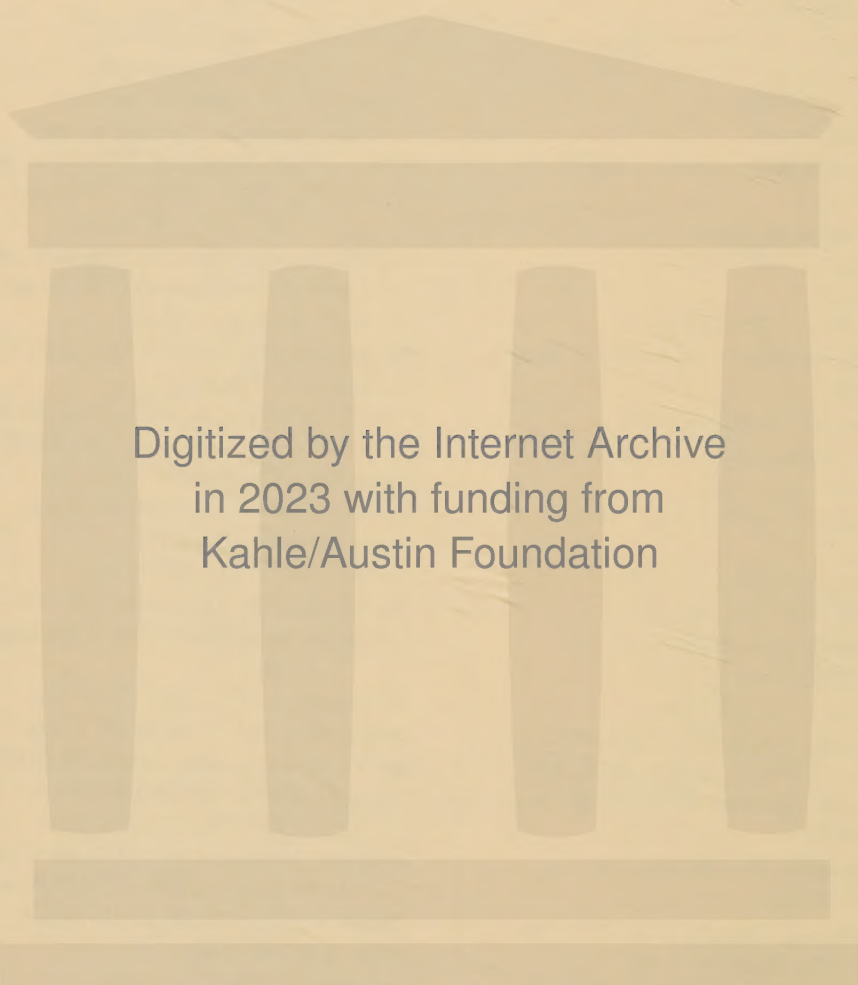
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Ohio Revised Code

ANNOTATED

Containing the text of the Official Ohio Revised Code, effective October 1, 1953, with the addition of all statutes of a general nature enacted by the General Assembly up to and including September, 1976; the Ohio Rules of Juvenile Procedure promulgated by the Supreme Court of Ohio, effective July 1, 1972, including all amendments up to and including July 1, 1976, and notes construing the laws and rules.

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This 1976 Replacement Volume Contains

TITLE 21: COURTS—PROBATE—JUVENILE
OHIO RULES OF JUVENILE PROCEDURE



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ABBREVIATIONS

AkronLRev—Akron Law Review	LRA(NS)—Lawyers Reports Annotated, New Series
ALR—American Law Reports	NE—Northeastern Reporter
ALR2d—American Law Reports, Second Series	NE(2d)—Northeastern Reporter, Second Series
ALR3d—American Law Reports, Third Series	NoKyStLF—Northern Kentucky State Law Forum
ALRFed—American Law Reports, Federal	NP—Ohio Nisi Prius Reports
AmLRec—American Law Record	NP(NS)—Ohio Nisi Prius Reports, New Series
AmLReg—American Law Register	O—Ohio Reports
App—Ohio Appellate Reports	OAG—Opinions of the Attorney General
AppR—Ohio Rules of Appellate Procedure	OApp(2d)—Ohio Appellate Reports, Second Series
Bull—Weekly Law Bulletin	OBar—Ohio State Bar Association Report
CapitalULRev—Capital University Law Review	OCA—Ohio Court of Appeals Reports
CaseWestResLRev—Case Western Reserve Law Review	OD—Ohio Decisions
CC—Ohio Circuit Court Reports	OFD—Ohio Federal Decision
CCA—U.S. Circuit Court of Appeals	OL—Ohio Laws
CC(NS)—Ohio Circuit Court Reports, New Series	OLA—Ohio Law Abstract
CD—Ohio Circuit Decisions	OLJ—Ohio Law Journal
CinLRev—Cincinnati Law Review	OLR—Ohio Law Reporter
CivR—Ohio Rules of Civil Procedure	OMisc—Ohio Miscellaneous Reports
ClevBJ—Cleveland Bar Journal	ONorthLRev—Ohio Northern Law Review
ClevMarLRev—Cleveland Marshall Law Review	OO—Ohio Opinions
ClevStLRev—Cleveland State Law Review	OO(2d)—Ohio Opinions, Second Series
CP—Common Pleas Court	OO(3d)—Ohio Opinions, Third Series
CSCR—Cincinnati Superior Court Reports	OS—Ohio State Reports
Const—Constitution of Ohio	OS(2d)—Ohio State Reports, Second Series
D—Disney	OSB—Ohio State Bar Association Service Letter
Dayton—Dayton (Laning)	OSLJ—Ohio State Law Journal
DaytonTermRep—Dayton Term Report (Iddings)	OSLRev—Ohio State Law Review
DecRep—Ohio Decisions, Reprint	OSU—Ohio Supreme Court Decision (Unreported)
(Ed.)—Editorial in Weekly Law Bulletin	OSupp—Ohio Supplement
Eff—Effective	P&A—Page and Adams' Code (1912)
Fed—Federal Reporter	PC—Probate Court
F(2d)—Federal Reporter, Second Series	RC—Revised Code
FSupp—Federal Supplement	RS—Revised Statutes
GC—General Code	S—Senate Bill
Gaz—Weekly Law Gazette	S&C—Swan and Critchfield's Statutes
Goebel—Goebel's Probate Reports	S&S—Swan and Saylor's Statutes
H—Handy's Reports or House Bill	T—Tappan's Reports
Hosea—Hosea's Reports	ToledoLRev—Toledo Law Review
JuvR—Ohio Rules of Juvenile Procedure	US—United States Reports
LEd—Lawyers' Edition, U.S. Reports	V—Volume, Ohio Laws
LEd(2d)—Lawyers' Edition, Second Series, U.S. Reports	W—Wright's Reports
LEd—Lawyers' Edition, Second Series, U.S. Reports	WestResLRev—Western Reserve Law Review
LRA—Lawyers Reports Annotated	WLJ—Western Law Monthly
	WLJ—Western Law Journal
	WLM—Western Law Monthly

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REFERENCES TO OTHER PUBLICATIONS

A&H; A&H Probate	Addams & Hosford's Ohio Probate Practice
Anderson Fam. L.	Anderson's Ohio Family Law
Koykka	Koykka, The Ohio Appellate Process
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Forms

1 A&H Probate FORM 2101a et seq: Probate court; jurisdiction, procedure.

§2101.01 Probate division; location; equipment; employees.

A probate division of the court of common pleas shall be held at the county seat in each county in

an office furnished by the board of county commissioners, in which the books, records, and papers pertaining to the probate division shall be deposited and safely kept by the probate judge. The board shall provide suitable cases for the safekeeping and preservation of the books and papers of the court and furnish such blankbooks, blanks, and stationery as the probate judge requires in the discharge of official duties. The board shall also authorize expenditures for accountants, financial consultants, and other agents required for auditing or financial consulting by the probate division whenever the probate judge considers these services and expenditures necessary for the efficient performance of the division's duties. The probate judge shall employ and supervise all clerks, deputies, referees, and employees of the probate division.

As used in the Revised Code, "probate court" means the probate division of the court of common pleas, and "probate judge" means the judge of the court of common pleas who is judge of the probate division. All pleadings, forms, journals, and other records filed or used in the probate division shall be entitled "In the Court of Common Pleas, Probate Division," but are not defective if entitled "In the Probate Court."

HISTORY: GC § 10501-4; 114 v 320; 133 v H 7 (EF 11-19-69); 136 v S 145. EF 1-1-76.

For an analogous section, see former GC § 1583.

The provisions of § 3 of SB 145 (136 v —) read as follows:

SECTION 3. Sections 1 and 2 of this act shall take effect on January 1, 1976, and apply only to estates resulting from deaths that occur on and after that date.

For text of RC § 2101.01 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

County commissioners to provide county buildings, RC §§ 153.21 et seq, 307.01.

See RC §§ 2101.32, 2103.02, 2109.01, 2109.29, 2111.01, 2111.07, 2111.43 which refer to Chapter 2101. et seq.

See RC § 2131.02 which refers to this chapter.

Forms

1 A&H Probate FORM 2101.03a et seq: Oath, bond of probate judge.

Research Aids

Records:

O-Jur2d: Courts § 19

Am-Jur2d: Courts § 32

Law Review

Ohio Probate Reform: Old Dogs New Tricks. Comment. 1 OhioNorthLR 427

Wills and estates; survey of Ohio law, 1953. 5 WestRLRev 318.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. A Probate Court located in the courthouse, being a court of general jurisdiction, has a paramount right to use of space therein necessary for the proper and efficient operation of such court, however, the necessity for such space presents a question of fact and such court is entitled to such space as against other branches of government only where it is shown that such space is reasonably necessary as distinguished from being merely desirable: *State ex rel Finley v. Pfeiffer et al*, 163 OS 149, 56 OO 190, 128 NE(2d) 57.

2. This section authorizes the county commissioners to furnish designated books; but compensation for copying or recording cost bills in such books cannot be allowed, unless there is some statutory provision for it: *Commissioners v. Millard*, 4 NP 53, 4 OD 419 [affirmed, *Millard v. Commissioners*, 13 CC 518, 7 CD 115].

3. Under GC § 2419 (RC § 307.01) and this section it is the duty of the county commissioners to provide suitable files and cases for the safe-keeping and preservation of the books and papers of the probate court, and the probate judge is without power to purchase the same out of the appropriation made for the administrative expense of his office, pursuant to GC § 10501-5 (RC § 2101.11): 1942 OAG No.5465.

§ 2101.02 Judge of probate division; election; qualifications; term.

Every six years, in each county having a separate judge of the probate division of the court of common pleas, one probate judge shall be elected who is qualified as required by section 2301.01 of the Revised Code. He shall hold office for six years, commencing on the ninth day of February next following his election.

HISTORY: GC § 10501-1; 114 v 320; 116 v 481; 123 v 467; 125 v 107 (EF 10-2-53); 133 v H 7. EF 11-19-69.

Comment:

For related constitutional provisions see Ohio Constitution Art. IV, §§ 7, 8, 14 (Repealed 5-7-68).

Cross-References to Related Sections

Election of probate judges, RC § 2301.02

Provision for additional probate judge, Const. Art. IV, § 7.

Oath of probate judge, RC § 3.23.

Removal of judge, RC § 3.07.

Salary of probate judge, RC § 141.04.

Vacancy, how filled, RC § 107.08.

By virtue of RC § 3.11 a probate judge may not hold any of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney.

See RC § 2101.02.1 which refers to this section.

Comparative Legislation

Probate judge:

Cal.—Probate Code, § 300

Ill.—Rev Stat, 1965, ch 37, § 72.1

Ind.—Burns' Stat, § 33-4-4-3

Ky.—KRS, § 25.150

Mich.—MCLA, § 701.1

N.Y.—SCPA, § 2603

Pa.—Purdon's Stat, Tit. 20, § 731

Fla.—FSA, § 26.012

Forms

1 A&H Probate FORM 2101.03a et seq: Oath, bond of probate judge.

Research Aids

Election and tenure:

O-Jur2d: Judges §§ 6-12

Am-Jur2d: Judges §§ 9-11, 13-20

Probate judge:

O-Jur2d: Judges §§ 38, 39

Qualifications:

O-Jur2d: Judges §§ 13-18

Am-Jur2d: Judges §§ 7, 8, 12

CASE NOTES AND OAG

1. The qualifications for the office of probate judge not having been prescribed by the constitution, the general assembly has power to fix and determine the essential qualifications for the office. Pursuant to that authority the legislature in this section prescribed two alternative tests of qualification: training and experience by serving in the office as probate judge immediately prior to the election in question, or admission to the practice as an attorney and counselor at law: *State ex rel Lippincott v. Metzger*, 137 OS 307, 18 OO 286, 29 NE(2d) 361.

[§ 2101.02.1] § 2101.021 [One additional probate judge for Cuyahoga county.]

There shall be one additional probate judge for the probate court of Cuyahoga County.

Such additional judge shall be elected at the general election to be held in 1954 and every six years thereafter, for a term of six years commencing on the first day of January next following his election.

The judge elected pursuant to this section shall comply with the qualifications provided for in section 2101.02 of the Revised Code.

The probate judge who is senior in point of service shall be the presiding judge and shall have the care and custody of the files, papers, books and records belonging to the probate court of Cuyahoga county and shall have all the other powers and duties of the judge as provided in section 2101.11 of the Revised Code.

HISTORY: 125 v 161. EF 10-2-53.

Cross-References to Related Sections

Election of probate judges, RC § 2301.02

Research Aids

Number of judges:

O-Jur2d: Judges § 5, 38

§ 2101.03 Bond of probate judge. (GC § 10501-2)

Before entering upon the discharge of his duties, the probate judge shall give a bond to the state in a sum not less than five thousand dollars. Such bond shall have sufficient surety, approved by the board of county commissioners, or by the county auditor and county recorder in the absence from the county of two of the mem-

bers of the board, and shall be conditioned that such judge will faithfully pay over all moneys received by him in his official capacity, enter and record the orders, judgments, and proceedings of the court, and faithfully and impartially perform all the duties of his office. Such bond, with the oath of office required by sections 3.22 and 3.23 of the Revised Code indorsed thereon, shall be deposited with the county treasurer and kept in his office. As the state of business in his office renders it necessary, the board may require the probate judge to give additional bond.

HISTORY: GC § 10501-2; 114 v 320, § 1. **Eff** 10-1-53. For an analogous section, see former GC § 1581.

Cross-References to Related Sections

Official bonds, RC § 3.30 et seq.

See RC § 2101.11 which refers to this section.

Forms

1 A&H Probate FORM 2101.03a et seq.

Research Aids

Necessity of bond:

O-Jur2d: Judges § 16

Am-Jur2d: Judges § 12

CASE NOTES AND OAG

1. In the absence of a specific statutory provision, a public officer is not relieved from liability for money received by him by the fact that such money was deposited in a bank which subsequently failed; *State ex rel Struble v. Ferris*, 12 NP(NS) 171, 23 OD 328.

2. A probate judge is not liable to an estate for accepting a bond of an administrator with the sureties' names forged and upon such bond issuing letters of administration; *Ingersoll v. Smith*, without opinion, 55 OS 664, 48 NE 1114, 36 Bull 302.

§ 2101.04 Rules of practice submitted to supreme court. (GC § 10501-13)

The several judges of the probate court shall make rules regulating the practice and conducting the business of the court, which they shall submit to the supreme court. In order to maintain regularity and uniformity in the proceedings of all the probate courts, the supreme court may alter and amend such rules and make other rules.

HISTORY: GC § 10501-13; 114 v 320 (323); 125 v 903 (958). **Eff** 10-1-53. For an analogous section, see former GC § 1591.

Comment

Uniform rules of practice in the probate courts of Ohio were approved by the supreme court of the state of Ohio on February 24, 1932, [For rules of practice in the probate courts of Ohio, approved by the Supreme Court, February 24, 1932, see *ADDAMS and HOSFORD'S OHIO PROBATE PRACTICE AND PROCEDURE*, Davies revision] with "explanations", by the probate code committee of the probate judges' association. However, there is grave doubt as to the constitutionality of this section. On March 14, 1933, the following letter was written by Chief Justice Weygandt of the supreme court of Ohio to Hon. William C. Wiseman, judge of the probate court of Montgomery county at Dayton, Ohio:

"In answer to your communication with reference

to the Rules of the Probate Courts of Ohio, we have again examined Section 10501-13, General Code, and have some question as to its constitutionality and cannot at this time make any final declaration in regard to it. Sufficient is it to say that the rules proposed by the probate judges' association and approved by this court last year might be followed by your court so far as practicable, and if additional rules, not inconsistent with the Constitution and the state statutes, seem necessary to you in the transaction of your business, you are of course privileged to adopt them.

"The approval which this court has already given the rules submitted by the probate judges' association is not to be regarded as a finality, as such approval, granted upon request of the association, involved no concrete case. In the event a record should come before us, involving the conflict of any such rules with the Ohio Constitution, the state statutes or the decisions of this court, we should, of course, give the matter careful consideration."

In 8 OBar 447, it is stated that Judge Hugh R. Gilmore transmitted to the Ohio supreme court a draft of rules for the common pleas court of Preble county, prepared under the provisions of GC § 12223-47. In a letter, after acknowledging receipt of the rules, Chief Justice Carl V. Weygandt wrote to Judge Gilmore:

"After due consideration of the matter the court has instructed me to advise you of its adherence to the views expressed in the case of *Meyer v. Brinsky*, 129 Ohio St. 371 [2 OO 373]. Courts are vested with inherent power to establish rules regulating their proceedings and facilitating the administration of justice. Under the Constitution of Ohio the supreme court has no control over the rule-making power of other courts except through the usual testing process of proceedings in error. You are therefore at liberty to promulgate your court rules in the usual manner without first submitting them to this court for approval.

"In order that there may be no confusion about this matter I am sending a copy of this letter to the presiding judge[s] of the constitutional courts of the state, namely the courts of appeals, the courts of common pleas and the courts of probate."

In *Meyer v. Brinsky*, 129 OS 371, 2 OO 373, 169 NE 291, a rule of the Lake county common pleas court required the employment of local co-counsel by counsel actually of record but not maintaining an office in that county. It was held that while courts are vested with inherent power to establish rules regulating their proceedings and facilitating the administration of justice, nevertheless court rules must not contravene either the organic law or a valid statute and must be reasonable in their operation. The rule in question was held invalid because when the supreme court of Ohio has duly admitted a person to practice as an attorney and counselor at law, the privilege thereby conferred is not restricted to one county but is statewide and cannot be abridged by a local court rule.

Research Aids

Rules of Practice:

O-Jur2d: Courts § 198

Law Reviews

Avoiding probate of decedents' estates, Gilbert A. Sheard. 36 CinLRev 70.

Pre-trial practice and procedure. Article by Ellis R. Diehm of the Cleveland bar. 10 ClevBJ (No. 11) 167.

Inherent power of courts to make rules. Article by Abraham Gertner of the Columbus bar. 10 CinLRev 32.

The rule-making power of Ohio courts. (Case note.) 7 OBar (No. 45) 630.

CASE NOTES AND OAG

1. Court rules must not contravene either the organic law or a valid statute, and they must be reasonable in their operation: *Meyer v. Brinsky*, 129 OS 371, 2 OO 373, 169 NE 291.

2. Courts are vested with inherent power to establish rules regulating their proceedings and facilitating the administration of justice: *Meyer v. Brinsky*, 129 OS 371, 2 OO 373, 169 NE 291.

3. Rule 13 of the uniform rules of practice in the probate courts of Ohio, adopted pursuant to this section, and prescribing the time within which a petition shall be filed to secure a review of the allowance made to a widow or children under GC § 10509-77 (RC § 2117.22), is reasonable and valid: *Brown v. Mossop*, 139 OS 24, 21 OO 518, 37 NE(2d) 598.

4. Rule 27 of the uniform rules of practice in the probate courts of Ohio, adopted pursuant to this section, and providing that "in applications for the appointment of guardians for . . . incompetents . . . the notice to the proposed ward must be served by the sheriff or some other disinterested person," is reasonable and salutary, supplements GC § 10507-4 (RC § 2111.04) and does not contravene GC § 10501-21 (RC §§ 2101.26-2101.28): *In re Irvine*, 72 App 405, 27 OO 332, 52 NE(2d) 536.

5. Rule 13 of the rules of practice of the probate court of Cuyahoga county adopted pursuant to this section, prescribing the time within which a petition shall be filed to secure a review of the allowance made to a widow or children under RC § 2117.22, is reasonable and valid, and when the time established by rule 13 has elapsed the probate court does not have the power to diminish the allowance for support fixed in the first instance by the appraisers of the husband's estate and approved by the court, for the reason that such allowance is excessive: *In re Johnson*, 80 OLA 180, 150 NE(2d) 501 (App).

§ 2101.05 Oaths and depositions. (GC §§ 10501-3, 10501-19)

A probate judge may administer oaths, take acknowledgment of instruments in writing required to be acknowledged, and take depositions.

Depositions taken according to sections 2319.05 to 2319.31, inclusive, of the Revised Code, to be used on the trial of civil cases, may be taken and used on the trial of any question before the probate court.

HISTORY: GC §§ 10501-3, 10501-19; 114 v 320 (321, 325). Eff 10-1-53. For analogous sections, see former GC §§ 1582, 11203.

Research Aids

May administer oaths:

O-Jur2d: Oath and affirmation § 4; Judges § 38

Am-Jur2d: Oath and affirmation § 7

May take acknowledgments:

O-Jur2d: Acknowledgments § 11; Judges § 38

Am-Jur2d: Acknowledgments § 12

ALR

Practice or procedure for testing validity or scope of command of subpoena duces tecum. 130 ALR 327.

§ 2101.06 Master commissioners; appointment and bond; duties. (GC §§ 10501-33, 10501-36)

The probate judge, upon motion of a party or his own motion, may appoint a special master commissioner in any matter pending before such judge. Such commissioner shall be an attorney at law, and shall be sworn faithfully to discharge his duties. When requested by the probate judge, such commissioner shall execute a bond to the state in such sum as the court directs, with surety approved by the court, and conditioned that such commissioner will faithfully discharge his duties and pay over all money received by him in that capacity. Such bond shall be for the benefit of anyone aggrieved and shall be filed in the probate court.

Such commissioner shall take the testimony and report such testimony to the court with his conclusions on the law and the facts involved therein, which report may be excepted to by the parties, and confirmed, modified, or set aside by the court.

HISTORY: GC §§ 10501-33, 10501-36; 114 v 320 (328, 329). Eff 10-1-53.

Cross-References to Related Sections

See RC § 2101.31 which refers to this section.

Comparative Legislation

Appointment of master commissioners:

Cal.—Probate Code, § 609

Ind.—Burns' Stat, § 29-2-21

Ky.—KRS, § 25.280

Pa.—Purdon's Stat, Tit. 20, § 751

Forms

1 A&H Probate FORM 2101.06a et seq.

Outline of Procedure

Appointment of master commissioner. *Leyshon* No. 44; A&H No. 15

Research Aids

Appointment of master commissioners:

O-Jur2d: Judges § 38; References § 9

Law Review

See explanatory article 4 OBar 127

CASE NOTES AND OAG

1. In an action against decedent's bookkeeper under GC § 10506-67 to recover embezzled assets, reference to a commissioner was proper in the absence of a jury demand: *In re Leiby's Estate*, 60 OLA 245, 101 NE(2d) 214.

§ 2101.07 Master commissioners; powers; fees. (GC §§ 10501-34, 10501-35, 10501-37)

A special master commissioner of the probate court may administer all oaths required in the discharge of his duties, may summon and enforce the attendance of witnesses, compel the production of books and papers, grant adjournments the same as the court, and, when the court

directs, such commissioner shall require the witnesses severally to subscribe their testimony.

All process and orders issued by such commissioner, shall be directed to the sheriff and shall be served and return thereof made, as if issued by the probate judge.

The court shall allow such commissioner such fees as are allowed to other officers for similar services, which fees shall be taxed with the costs.

HISTORY: GC §§ 10501-34, 10501-35, 10501-37; 114 v 320 (329). **EFF** 10-1-53.

Cross-References to Related Sections

See RC § 2101.31 which refers to this section.

Forms

1 A&H Probate FORM 2101.07a et seq.

Research Aids

Authority to compel attendance of witnesses:

O-Jur2d: References §§ 23, 15, 9; Witnesses § 56

Authority to compel issuance of process and orders:

O-Jur2d: References § 9

Authority to compel production of books and papers:

O-Jur2d: References §§ 23, 9; Witnesses § 59

Compensation or fees:

O-Jur2d: References § 16

Am-Jur2d: References § 20

Statutory provisions:

O-Jur2d: References § 9

CASE NOTES AND OAG

1. Where a master commissioner is appointed on the motion of plaintiff, his reasonable compensation for services is a part of plaintiff's costs for which he is liable to the master commissioner, notwithstanding as between plaintiff and defendant, the latter is bound to pay: *In re Raffenberg*, 71 App 201, 26 OO 17, 48 NE(2d) 885.

2. The taxing as costs of a fee to a master commissioner in a hearing on exceptions to an administrator's account, is authorized by GC § 10501-37 (RC § 2101.07): *Merkle v. Hadbevy*, 40 OLA 466 (App).

§ 2101.08 Stenographic reporter. (GC § 10501-63)

The probate judge may appoint a stenographic reporter and fix his compensation in the manner provided for the court of common pleas in sections 2301.18 to 2301.26, inclusive, of the Revised Code.

HISTORY: GC § 10501-63; 118 v 78 (80), § 3. **EFF** 10-1-53.

Forms

1 A&H Probate FORM 2101.08a et seq.

Research Aids

Appointment of stenographic reporter:

O-Jur2d: Courts § 29; Judges § 38

CASE NOTES AND OAG

1. Where the oral testimony, objections of counsel and rulings of the court thereon at a Probate Court hearing are taken down in shorthand by a privately employed reporter, and a typewritten transcript thereof is made but is not filed with or delivered to the Probate Court, but a copy thereof is sold to the opposing counsel, a

record has been taken in such Probate Court hearing, and the only appeal therefrom is to the Court of Appeals: *In re Estate of Todd*, 104 App 284, 4 OO(2d) 421, 145 NE(2d) 261.

§ 2101.09 Liability of sheriffs, coroners, and constables for failure to serve and return process. (GC § 10501-26)

When required by the probate judge, sheriffs, coroners, and constables shall attend his court and serve and return process directed and delivered to them by such judge. No such officer shall neglect or refuse to serve and return such process. If such officer does neglect or refuse to serve and return such process, the judge shall issue a summons specifying the cause for amercement, directed to the officer, therein named, commanding him to summon the officer guilty of such misconduct to appear within two days after the service of summons and show cause why he should not be amerced. In addition to a fine, as provided by section 2101.99 of the Revised Code, to be paid into the county treasury, such officer and his sureties shall be liable upon his official bond for damages sustained by any person by reason of such officer's misconduct.

HISTORY: GC § 10501-26; 114 v 320 (327). **EFF** 10-1-53. For an analogous section, see former GC § 1596.

Cross-References to Related Sections

Penalty, RC § 2101.99(A).

See RC § 2101.10 which refers to this section.

Forms

1 A&H Probate FORM 2101.09a et seq.

Research Aids

Constables:

O-Jur2d: Sheriffs, Marshals and Constables §§ 27, 37, 70; Crim. Prac. § 42; Process §§ 31, 77

Coroners:

O-Jur2d: Coroners §§ 11, 22; Crim. Prac. § 42; Process §§ 31, 77.

Sheriffs:

O-Jur2d: Sheriffs, Marshals and Constables §§ 21, 37, 70; Crim. Prac. § 42; Process §§ 31, 77.

§ 2101.10 Liability of sheriffs, coroners, and constables for failure to pay over moneys. (GC § 10501-27)

No sheriff, coroner, or constable shall refuse to pay moneys, collected by him, to the probate judge or other person, when so directed by the judge. For refusal to pay over moneys collected, such officer shall be summoned as provided in section 2101.09 of the Revised Code and amerced for the use of the parties interested, in the amount required to be collected by such process, with ten per cent thereon. The judge may enforce the collection of such amercement by execution or other process, by imprisonment as for contempt of court, or both. The delinquent officer and his

sureties shall also be liable on his official bond for the amount of the amercement at the suit of the person interested.

HISTORY: GC § 10501-27; 114 v 320 (327). **EFF** 10-1-53.

Cross-References to Related Sections

Causes for which sheriff or other officer may be amerced, RC § 2707.01 et seq.

Forms

1 A&H Probate FORM 2101.10a et seq.

Outline of Procedure

Amercement. Leyshon No. 34; A&H No. 5

Research Aids

Amercement and extent of liability:

O-Jur2d: Sheriffs, Marshals and Constables §§ 38, 70

Am-Jur2d: Sheriffs, Police, and Constables § 203

§ 2101.11 Custody of files; clerks and appointees. (GC §§ 10501-5, 10501-7)

Each probate judge shall have the care and custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint deputy clerks, stenographers, bailiff, and any other necessary employees, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each appointee may administer oaths in all cases when necessary, in the discharge of his duties.

Such appointees shall receive such compensation and expenses as the judge determines, and shall serve during the pleasure of the judge. The compensation of such appointee shall be paid in semimonthly installments by the county treasurer from the county treasury, upon the warrants of the county auditor, certified to by the judge. The board of county commissioners shall appropriate such sum of money each year as will meet all the administrative expense of the court which the judge deems necessary for the operation of the court, including the salaries of such appointees as the judge determines. The total compensation paid to the appointees in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year, unless approved by the board.

The judge may require any of his appointees to give bond in the sum of not less than one thousand dollars conditioned for the honest and faithful performance of his duties. The sureties on said bonds shall be approved in the manner provided in section 2101.03 of the Revised Code.

The judge shall be personally liable for the default, malfeasance, or nonfeasance of such appointee, but if a bond is required of such appointee, the liability of the judge shall be limited

to the amount by which the loss resulting from such default, malfeasance, or nonfeasance exceeds the amount of the bond.

All bonds required to be given in the probate court, on being accepted and approved by the probate judge, shall be filed in his office.

HISTORY: GC §§ 10501-5, 10501-7; 114 v 320 (321, 322); 119 v 394, § 1; 125 v 903 (958). **EFF** 10-1-53. For analogous sections, see former GC §§ 1584, 11200.

Cross-References to Related Sections

See RC § 2101.02.1 which refers to this section.

Forms

1 A&H Probate FORM 2101.11a et seq.

Research Aids

Appointee may administer oaths:

O-Jur2d: Oath and Affirmation § 4

Am-Jur2d: Oath and Affirmation § 7

Appointment of clerks and appointees:

O-Jur2d: Courts § 29; Judges § 38

Am-Jur2d: Clerks of courts §§ 2-6; §§ 38-40

Bond:

O-Jur2d: Courts § 42

Am-Jur2d: Clerks of Courts § 35

Clerical duties and responsibilities of probate judge:

O-Jur2d: Courts § 35; Judges § 38

Compensation of deputies and appointees:

O-Jur2d: Courts §§ 19, 54; Judges § 38

Am-Jur2d: Clerks of Courts §§ 11-13

Liability of judge on default of appointee:

O-Jur2d: Judges § 74

CASE NOTES AND OAG INDEX

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1. The provisions of GC § 10501-5 (RC § 2101.11), requiring the county commissioners to appropriate such sums of money each year as will meet all of the administrative expense of the probate court which the judge thereof deems necessary, including such salaries of the appointees of the court as the judge shall fix and determine, provided, however, that the total compensation of such appointees in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year, are mandatory: *State ex rel Motter v. Atkinson*, 146 OS 11, 31 OO 472, 63 NE(2d) 440.

2. The words "fees earned," as used in this section in imposing a limitation upon annual compensation for appointees of the probate court, mean fees collected by the probate court: *State ex rel Ray v. South*, 176 OS 241, 27 OO(2d) 133, 198 NE(2d) 919.

3. In the absence of an abuse of discretion on the part of the judge of the probate court in making up the annual budget under this section, the board of county commissioners is obligated to appropriate annually such sum of money as will meet all the

administrative expenses of such court which the judge thereof deems necessary, including such salaries of court appointees as the judge shall fix and determine; provided, however, that the total compensation of such appointees in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year: State ex rel Ray v. South, 176 OS 241, 27 OO(2d) 133, 198 NE (2d) 919.

4. As used in RC §§ 2101.11 and 2151.10, "administrative expenses" of the juvenile and probate courts, respectively, include expenses of office equipment, stationery and supplies: State ex rel Ray v. South, 176 OS 241, 27 OO(2d) 133, 198 NE(2d) 919.

5. The mandatory duty of county commissioners under RC § 2101.11, to appropriate annually such sum of money as will meet all the administrative expense of the court, including the salaries of such appointees as the judge determines, provided that the total compensation paid to appointees in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year unless approved by the board, is not enforceable by an action for contempt of court: In re Contempt of Court, 30 OS(2d) 182, 59 OO(2d) 188, 283 NE(2d) 126.

6. Term of deputy clerk in probate court expires with term of appointing judge: State ex rel Selzer v. May, 15 OLA 74.

7. The term "total fees earned by the probate court," as used in GC § 10501-5 (RC § 2101.11), refers to total fees charged by the probate court for services rendered during the calendar year, whether collected or not: 1948 OAG No.2648.

8. A clerk of court may not deposit money held or controlled by him in his official capacity in a building and loan association: 1961 OAG No. 2119. [RC § 2335.25, amended, 136 v H 49, eff. 9-1-75, now permits the clerk to make such deposits.]

9. A board of county commissioners acting pursuant to RC § 325.17 to fix the compensation of deputies, assistants and other employees of a probate court must, by reason of this section, appropriate the amount deemed necessary by the judge of such court, subject to the limitation set by such section, in the absence of an abuse of discretion by such judge: 1965 OAG No.65-32.

10. Revised Code § 2101.11 permits but does not require the board of county commissioners to approve a budget for the probate court which exceeds the amount collected in the preceding year by that court: 1968 OAG No.68-094.

11. The amendments contained in Am. Sub. H. Joint Resolution No. 42 do not affect RC § 2101.11, and the judge of the probate division of the common pleas court is still the clerk of his own court as prescribed in said section: 1968 OAG No.68-126.

12. No provision of any amendment proposed in Am. Sub. H. Joint Resolution No. 42 requires the assumption, by the clerk of the court of common pleas, of any duties, functions or responsibilities over the operations of the probate division of the court of common pleas: 1968 OAG No.68-126.

13. The words "clerks" and "deputies," as used in subsection (C), section 4, Am. Sub. H. Joint Resolution No. 42, refer to persons employed in such capacities in the probate division of the court of common pleas: 1968 OAG No.68-126.

14. The amendments contained in Am. Sub. H. Joint Resolution No. 42 repeal RC Title XXI (21) only to the extent that any provision thereof is inconsistent with the constitutional amendments proposed in said resolution: 1968 OAG No.68-126.

§ 2101.12 Maintenance of books and records.

The following books or records shall be kept by the probate court:

(A) A criminal record, in which shall be made an entry of proceedings had in criminal actions instituted in the court prior to January 1, 1932;

(B) An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, a minute of the time of filing each paper, and a brief note of each order or proceeding relating to the estate with reference to the journal or record in which the order or proceeding is found;

(C) A guardian's docket, showing the name of each ward, and, if an infant, his age, the name of his parents, the amount of bond and names of sureties therein, and a minute of papers, orders, and proceedings as in division (B) of this section;

(D) A civil docket, in which shall be noted the names of parties to actions and proceedings, a minute of the time of the commencement of such actions and proceedings and of the filing of the papers relating thereto, a brief note of the orders made therein, and the time of entering them;

(E) A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings;

(F) A record of wills, in which the wills proved in the court shall be recorded with a certificate of the probate of the will, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court;

(G) A final record, which shall contain a complete record in each cause or matter of the petitions, complaints, answers, motions, returns, reports, verdicts, awards, orders, and judgments, which shall be completed within ninety days after the final order or judgment has been made in such cause or matter;

(H) A record by the probate judge, within thirty days after their return, of inventories, sale bills, and allowances to surviving spouses, in a book or record provided for that purpose;

(I) A record of accounts, which shall contain an entry of the appointment of executors, administrators, and guardians, partial and final accounts thereof, and the orders and proceedings of the courts thereon, which record shall be made within sixty days after the filing and approval of such account;

(J) An execution docket, in which shall be entered a memorandum of executions issued by the probate judge stating the names of the parties, the name of the person to whom delivered, his return thereon, the date of issuing the execution, the amount ordered to be collected, stating the

costs separately from the fine or damages, the payments thereon, and the satisfaction thereof when it is satisfied;

(K) A marriage record, in which shall be entered licenses, the names of the parties to whom issued, the names of the persons applying therefor, a brief statement of the facts sworn to by such persons, and the returns of the person solemnizing the marriage;

(L) A record of bonds, in which shall be recorded bonds of executors, administrators, guardians, trustees, and assignees that have been taken and approved by the probate judge;

(M) A naturalization record, in which shall be entered the declaration of intention of the person seeking to be naturalized, the oath of the person naturalized, and the affidavit or oath of witnesses who testify in his behalf, in which affidavit shall be stated the place of residence of such witnesses;

(N) A permanent record of all births and deaths occurring within the county, reported as provided by law, which shall be kept in such form and manner as may be designated by the director of health;

(O) A separate record and index of adoptions, in accordance with section 3107.17 of the Revised Code.

For each record required by this section, an index shall be maintained. Each index shall be kept current with the entries therein and shall refer to such entries alphabetically by the names of the persons as they were originally entered, indexing the page of the book or record where the entry is made. On the order of the judge, blank-books or other record forms approved by the probate judge for such records and indexes shall be furnished by the board of county commissioners at the expense of the county.

HISTORY: GC §§ 10501-15, 10501-16; 114 v 320; 125 v 903 (958); 129 v 1484 (E# 10-2-61); 129 v 1448 (E# 10-25-61); 136 v S 145 (E# 1-1-76); 136 v H 156. E# 1-1-77.

For analogous sections, see former GC §§ 1594, 1595, 1595-1.

The effective date of H 156 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2101.12 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein

Cross-References to Related Sections

Restoration of lost or destroyed records, RC § 2729.01 et seq.

Comparative Legislation

Books and records of court:

Ind.—Burns' Stat, § 29-1-1-23

Ky.—KRS, § 25.040

Mich.—MCLA, § 701.26

N.Y.—SCPA, § 2501

Pa.—Purdon's Stat, Tit. 20, § 742

Fla.—FSA, § 28.223

Text Discussion

1 Anderson Fam. L. § 11.1.

Research Aids

Birth and death records:

O-Jur2d: Health § 38; Judgments § 97

Dockets:

O-Jur2d: Courts § 59

Execution docket:

O-Jur2d: Executors § 478

Indexes:

O-Jur2d: Courts § 60; Judgments § 117

Am-Jur2d: Records and recording laws § 89

Marriage records:

O-Jur2d: Marriage § 21

Am-Jur2d: Marriage § 41

Records generally:

O-Jur2d: Courts § 57; Records and recording § 10; Judges § 38

Records of adoption:

O-Jur2d: Adoption of children § 17

Record of bond:

O-Jur2d: Fiduciaries § 175

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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1. Under USRS § 2165, before the amendment of June 29, 1906, 34 Stats at L 596 et seq (Session I, c 3592), any state court which had a common law jurisdiction and a seal and a clerk had jurisdiction to grant naturalization to aliens; and accordingly a probate court had such jurisdiction, although it did not have a general common law jurisdiction. Accordingly a plea in abatement which sets forth that one of the grand jurors who returned an indictment was an unnaturalized citizen, is not supported by sufficient evidence if the record shows that such juror was duly naturalized by the probate court of Ohio before the amendment of June 29, 1906: Bell v. State, 7 App 185, 27 OCA 353, 29 CD 48.

2. General Code § 1594 (now GC § 10501-15 [RC § 2101.12]), which provides in part for a bond record to be kept by the probate court, contemplates that only such bonds as have been taken and approved by the probate judge will be carried into the record of bonds, and a bond found in such record is presumed to have been approved by the probate court: Rowe v. Aetna Casualty &c. Co., 69 App 291, 24 OO 74, 42 NE(2d) 706.

3. This section does not require the probate judge to keep a court calendar: Commissioners v. Millard, 4 NP 53, 4 OD 419 [affirmed, Millard v. Commissioners, 13 CC 518, 7 CD 115]; Stark v. Clark, 17 CC(NS) 398, 24 CD 135 [affirmed, without opinion, 88 OS 586].

4. A probate judge, having recorded a birth or death certificate, is without authority to change his records, but may, by amendment, correct his records to conform to the facts contained in the original instrument when an instrument was erroneously recorded. He has no authority to supply a missing birth or death certificate or to supply supplemental infor-

mation to an incomplete certificate: 1940 OAG No. 1744.

5. By virtue of GC § 10501-5 (RC § 2101.12), the probate court is required to keep books to incorporate the records and data mentioned in subsections 1 to 13. Therefore said probate court, by order duly entered, may include in one book, provided the same is as required by GC § 10501-16 (RC § 2101.12), the records and data mentioned in subsections 5, 6, 7, 8 and 11 of GC § 10501-15 [RC § 2101.12, subsections (E), (F), (G), (I) and (L)]. However, inheritance tax proceedings should be kept in a separate book in view of GC § 5348-7 (RC § 5731.48): 1948 OAG No.3489.

6. The probate court, by order duly entered, may include in one book, provided the same is properly indexed, the dockets mentioned in subsections 2, 3, 4 and 9 of GC § 10501-15 [RC § 2101.12, subsections (B), (C), (D) and (J)]: 1948 OAG No.3489.

7. A probate court may make up a record in so far as same is required by RC §§ 2101.12, 3107.14, 5123.37, 5123.38 and 5731.48, by microfilming or other duplication process as authorized by RC § 901, provided the original documents are maintained on file and until their eventual destruction is accomplished only in accordance with the provisions of RC § 149.38. 1955 OAG No.5667. (1950 OAG p.39 overruled.)

8. Proceedings in adoption cases should be separately recorded in a book kept for that purpose and separately indexed, in accordance with RC § 3107.14, and should not be journalized or generally recorded as provided by RC § 2101.12(E), (G): 1959 OAG No.652.

9. The probate court is required to keep books wherein shall be incorporated the records and data mentioned in subsections (A) to (O) both inclusive of RC § 2101.12: 1967 OAG No. 67-060.

10. The probate judge may properly include in one book, provided the same is properly indexed, the dockets mentioned in subsections (B), (C), (D), (E), (F), (G), (H), (I), (J) and (L) of RC § 2101.12: 1967 OAG No. 67-060.

§ 2101.13 Probate judge shall make entries omitted by his predecessor. (GC § 10501-8)

When a probate judge, whether elected or appointed, enters upon the discharge of his duties, he shall make, in the respective books of his office, the proper records, entries, and indexes omitted by his predecessors in office. When made, such entries shall have the same validity and effect as though they had been made at the proper time and by the officer whose duty it was to make them, and such judge shall sign all entries and records made by him as though such entries, proceedings, and records had been commenced, prosecuted, determined, and made by or before him.

HISTORY: GC § 10501-8; 114 v 320 (322); 125 v 903 (960). Eff 10-1-53. For an analogous section, see former GC § 1586.

Research Aids

Duty to make entries omitted by predecessor:

O-Jur2d: Judges §§ 27, 38

Am-Jur2d: Judges § 32

CASE NOTES AND OAG

1. This section, providing that when a judge of a probate court "enters upon the discharge of his duties, he shall make . . . the proper records, entries, and

indexes omitted by his predecessor," places upon such successor judge the duty to perform nondiscretionary acts omitted by his predecessor, but does not place upon him the duty to make a journal entry allowing attorney fees, which involves the exercise of discretion: *State ex rel Egbert v. Leiser*, 67 App 350, 21 OO 303, 36 NE(2d) 874.

2. In addition to the probate court's inherent common law power to enter judgments nunc pro tunc, this section, specifically empowers the probate judge to make entries omitted by his predecessor and in a combined probate-juvenile court this statute also applies to the juvenile court: *In re Howell*, 74 OLA 217, 140 NE(2d) 347 (JC).

§ 2101.14 Care and preservation of papers; time stamp. (GC §§ 10501-6, 10501-38)

All pleadings, accounts, vouchers, and other papers in each estate, trust, assignment, guardianship, or other proceeding, ex parte or adversary, which are filed in the probate court shall be kept together, and upon the final termination or settlement of such case, cause, or proceeding shall be preserved for future reference and examination. Such papers shall be properly jacketed, and otherwise tied, fastened, or held together, numbered, lettered, or otherwise marked in such manner that they may be readily found by reference to proper memoranda upon the docket, record, or index entries thereof, which memoranda shall be made by the probate judge. Certificates of marriage, reports of births and deaths, and similar papers not part of a case or proceeding, shall be arranged and preserved separately in the order of their dates or in which they were filed. As used in this section "case" or "cause" includes all proceedings in the settlement of any estate, guardianship, or assignment, except as provided in section 2101.141 [2101.14.1] of the Revised Code.

The probate court shall provide a time stamp and shall stamp on all papers filed in said court the day, month, and year of the filing thereof.

HISTORY: GC §§ 10501-6, 10501-38; 114 v 320 (321, 329); 125 v 245. Eff 10-2-53. For an analogous section to GC § 10501-6 see former GC § 1585.

This section, prior to the 1953 amendment, was identical to the above except that in line 21 of the first paragraph after the word "assignment" the words "except as provided in section 2101.141 [2101.14.1] of the Revised Code" were not included therein. It was in effect only during the one day of October 1, 1953.

Research Aids

Care and preservation of papers:

O-Jur2d: Judges § 38; Records and recording § 10

[§ 2101.14.1] § 2101.141 Disposition of obsolete papers.

The vouchers, proof, or other evidence filed in support of the expenditures or distribution stated in an account, which has been filed in the

probate court, may be ordered destroyed or otherwise disposed of after a period of twenty-one years has elapsed from the date of its filing, as provided in this section.

Said vouchers, proof, or other evidence of expenditures or distribution may be ordered destroyed or otherwise disposed of after such period of time has elapsed and the account with which they were filed has been approved and settled and recorded, as provided by law at the time of its filing, and the estate has been closed or terminated and there has been a compliance with section 149.38 of the Revised Code. If at the time of the filing of an account it was not required by law to be approved and settled, said requirement shall not be a condition of the precedent to an order for the destruction or other disposition of the vouchers, proof, or other evidence of expenditures or distribution filed with said account.

When the vouchers, proof, or other evidence filed in support of expenditures or distribution stated in an account are microfilmed, they may be ordered destroyed immediately after such record is made and, if required by law, after the approval and settlement of said account.

The inventories, schedules of debts, accounts, pleadings, vouchers, wills, trusts, bonds, and other papers filed in the probate courts by fiduciaries, appointed by said courts and all pleadings filed and court entries for the determination of inheritance tax under former sections 5731.01 to 5731.56 of the Revised Code, and estate tax under sections 5731.01 to 5731.51 of the Revised Code, and all documents filed or received and entries made by the court in conjunction with the instruments referred to in this section, after having been recorded, if required by law to be recorded, may be ordered microfilmed and destroyed at any time after closing or termination of the administration of the estate, trust, or other fiduciary relationship, and may be ordered destroyed or otherwise disposed of without microfilming after a period of twenty-one years has elapsed from the closing or termination of the administration of the estate, trust, or other fiduciary relationship and after there has been a compliance with section 149.38 of the Revised Code.

Nothing herein shall apply to records pertaining to estates on which inheritance tax temporary orders are pending.

Prior to the order of the court directing the destruction or disposition of said vouchers, proof, or other evidence of expenditures or distribution, any party in interest, upon application filed therefor, may have said vouchers, proof, or other evidence of expenditures or distribution recorded, upon payment of the costs incident thereto.

An estate, trust, or other fiduciary relationship shall be deemed to be closed or terminated when a final accounting has been filed, and if required by law at the time of filing said account it has been approved and settled.

HISTORY: 125 v 245; 131 v 615 (Eff 5-11-65); 133 v H 363 (Eff 9-12-69); 135 v H 75. Eff 10-31-73.

See Comment in Addams & Hosford's Ohio Probate Practice and Procedure, Vol. 2.

Cross-References to Related Sections

See RC § 2101.14 which refers to this section.

Forms

1 A&H Probate FORM 2101.14.1a et seq.

Research Aids

Destruction of old papers:

O-Jur2d: Judges § 38; Records and recording § 10
Estate deemed to be closed:

O-Jur2d: Executors and administrators § 378

§ 2101.15 Probate judge to file itemized account of fees with county auditor.

In each case, examination, or proceeding, the probate judge shall file an itemized account of fees received or charged by him. On the first day of January, in each year, he shall file with the county auditor an account, certified by such judge, of all fees received by him during the preceding year. No judge shall fail to perform the duties imposed in this section. At the instance of any person, an action shall be instituted and prosecuted by the prosecuting attorney against any such defaulting judge.

HISTORY: GC § 10501.41; 114 v 320 (330); 125 v 903 (960). Eff 10-1-53. For an analogous section, see former GC § 1600.

Cross-References to Related Sections

Penalty, RC § 2101.99(B).

Forms

1 A&H Probate FORM 2101.15a et seq.

Research Aids

Filing itemized account of fees:

O-Jur2d: Judges § 64

CASE NOTES AND OAG

1. The county must furnish proper books for recording these cost bills (see GC § 10501-4 [RC § 2101.01]), but the probate judge cannot charge for and collect fees for keeping such record or for indexing the same: Commissioners v. Millard, 4 NP 53, 4 OD 419 [affirmed, Millard v. Commissioners, 13 CC 518, 7 CD 115].

§ 2101.16 Fees.

(A) The fees enumerated in this section shall be charged and collected, if possible, by the probate judge and shall be in full for all services rendered in the respective proceedings:

(1) Account, in addition to advertising charges \$ 7.00

Waivers and proof of notice of hearing on account, per page, minimum seventy-five cents		\$.75
(2)	Account of distribution, in addition to advertising charges	\$ 4.00
(3)	Adoption of child, petition for	\$10.00
(4)	Alter or cancel contract for sale or purchase of real estate, petition to	\$12.00
(5)	Application and order not otherwise provided for in this section	\$ 3.00
(6)	Appropriation suit, per day, hearing in	\$15.00
(7)	Birth, application for registration of	\$ 5.00
(8)	Birth record, application to correct	\$ 3.00
(9)	Bond, application for new or additional	\$ 3.00
(10)	Bond, application for release of surety or reduction of	\$ 3.00
(11)	Bond, receipt for securities deposited in lieu of	\$ 2.00
(12)	Certified copy of journal entry, record, or proceeding, per page, minimum fee seventy-five cents	\$.75
(13)	Citation and issuing citation, application for	\$ 4.00
(14)	Change of name, petition for	\$10.00
(15)	Claim, application of administrator or executor for allowance of his own	\$ 5.00
(16)	Claim, application to compromise or settle	\$ 5.00
(17)	Claim, petition for authority to present	\$ 5.00
(18)	Commissioner, appointment of	\$ 4.00
(19)	Compensation for extraordinary services and attorney fees for fiduciary, application for	\$ 3.00
(20)	Competency, application to procure adjudication of	\$ 7.50
(21)	Complete contract, application to	\$ 5.00
(22)	Concealment of assets, citation for	\$ 7.00
(23)	Construction of will, petition for	\$15.00
(24)	Continue decedent's business, application to	\$ 5.00
	Monthly reports of operation	\$ 2.50
(25)	Declaratory judgment, petition for	\$15.00
(26)	Deposit of will	\$ 2.00
(27)	Designation of heir	\$10.00
(28)	Distribution in kind, application, assent, and order for	\$ 4.00
(29)	Distribution under section 2109.36 of the Revised Code, application for an order of	\$ 6.00
(30)	Exceptions to any proceeding named in this section, contest of appointment or	\$ 5.00
(31)	Election of surviving partner to purchase assets of partnership, proceedings relating to	\$ 7.50
(32)	Election of surviving spouse under will	\$ 3.00
(33)	Fiduciary, including assignee or trustee of an insolvent debtor or any guardian accountable to probate court, appointment of	\$10.00
	All proceedings where guardian of person is appointed for the purpose of giving consent	\$ 5.00
(34)	Foreign will, application to record	\$ 5.00
	Record of such will, additional, per page	\$.75
(35)	Forms used for the complete administration, when supplied by probate court, not to exceed	\$ 5.00
(36)	Heirship, petition to determine	\$15.00
(37)	Injunction proceedings	\$15.00
(38)	Improve real estate, petition to	\$15.00
(39)	Inventory with appraisement	\$ 7.00
(40)	Inventory without appraisement	\$ 5.00
(41)	Investment or expenditure of funds, application for	\$ 5.00
(42)	Invest in real estate, application to	\$ 7.50
(43)	Lease for oil, gas, coal, or other mineral, petition to	\$15.00
(44)	Lease or lease and improve real estate, petition to	\$15.00
(45)	Marriage license	\$ 8.00
	Certified abstract of each marriage	\$ 1.00
(46)	Minor or mentally ill person, etc., disposal of estate under three thousand dollars of	\$ 5.00
(47)	Mortgage or mortgage and repair or improve real estate, petition to	\$15.00
(48)	Newly discovered assets, report of	\$ 5.00
(49)	Nonresident executor or administrator to bar creditors' claims, proceedings by	\$15.00
(50)	Physician's certificate, recording	\$ 5.00
(51)	Power of attorney or revocation of power, bonding company	\$ 5.00
(52)	Presumption of death, petition to establish	\$15.00
(53)	Probating will	\$10.00
	Proof of notice to beneficiaries	\$ 2.00
(54)	Purchase personal property, application of surviving spouse to	\$ 6.00
(55)	Purchase real estate at appraised value, petition of surviving spouse to	\$15.00
(56)	Receipts in addition to advertising charges, application and order to record	\$ 3.00
	Record of such receipts, additional, per page	\$.75
(57)	Record in excess of fifteen hundred words in any proceeding in the probate court, per page	\$.75
(58)	Release of estate by mortgagee or other lien holder	\$ 3.00
(59)	Relieving estate from administration	\$10.00
(60)	Removal of fiduciary, application for	\$ 6.00
(61)	Requalification of executor or admin-	

istrator	\$ 5.00
(62) Resignation of fiduciary	\$ 3.00
(63) Sale bill, public sale of personal property	\$ 7.50
(64) Sale of personal property and report, application for	\$ 5.00
(65) Sale of real estate, petition for	\$20.00
(66) Schedule of debts	\$ 5.00
(67) Schedule of debts, motion by fiduciary for hearing on	\$ 5.00
(68) Terminate guardianship, petition to ..	\$ 6.00
(69) Transfer of real estate, application, entry, and certificate for	\$ 5.00
(70) Unclaimed money, application to invest	\$ 5.00
(71) Vacate approval of account or order of distribution, motion to	\$ 5.00
(72) Writ of execution	\$ 2.50
(73) Writ of possession	\$ 4.00
(74) Wrongful death, application and settlement of claim for	\$10.00
(75) Year's allowance petition to review ...	\$ 5.00
(76) In estates of deceased persons, that are relieved from administration, the total fees of the probate judge chargeable against such estate, including the admission of the will to probate, shall not exceed	\$15.00

(B) The fees of witnesses, jurors, sheriffs, coroners, and constables, for services rendered in the probate court, or by order of the probate judge, shall be the same as provided for like services in the court of common pleas.

(C) The probate court may by rule require an advance deposit for cost, not to exceed seventy-five dollars, at the time application is made for appointment as executor or administrator or at the time the will is presented for probate.

HISTORY: GC §§ 10501-20, 10501-42; 114 v 320; 115 v 393; 119 v 287; 126 v 607 (EF 8-5-55); 136 v H 1 (EF 6-13-75); 136 v S 145 (EF 1-1-76); 136 v H 740 (EF 6-4-76); 136 v S 466. EF 5-26-76.

For former analogous sections, see former GC §§ 11204, 1601.

Comment by Director, Legislative Service Commission:

Section 2101.16 of the Revised Code is amended by this act (Am.H.B. 740) and also by Am.Sub.S.B. 466 of the 111th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable, so that they are required by that section to be harmonized to give effect to each amendment.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2101.16 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2101.16 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Cross-References to Related Sections

Fees of probate judge in proceedings to change name of person, RC § 2717.01.

Receipt for fees, RC § 325.28.

Salary of probate judge, RC § 141.04 et seq.

See RC §§ 2109.16, 2113.63 which refer to this section.

Comparative Legislation

Fees:

Ind.—Burns' Stat., § 29-1-1-23

Ky.—KRS, § 64.230

Mich.—MCLA, § 701.17

N.Y.—SCPA, § 2402

Tenn.—Code Ann., Tit. 20, § 743

Fla.—FSA, § 28.2401

Text Discussion

1 Anderson Fam. L. § 10.10.

Research Aids

Coroners fees:

O-Jur2d: Coroners § 9

Fees:

O-Jur2d: Courts § 52; Judges § 64; Guardian and Ward § 222

Sheriffs and constables fees:

O-Jur2d: Sheriffs, Marshals, etc. §§ 16, 18

Jury fees:

O-Jur2d: Jury § 143

Witness fees:

O-Jur2d: Witnesses § 6

CASE NOTES AND OAG [DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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Excluded and nonstatutory fees, 2, 3, 14

Limitations on chargeable fees, 5-8, 10, 12

1. A probate court has power to requalify a discharged fiduciary and reopen an estate for proper cause, as indicated by the provision of a fee therefor by item (A)(63) of RC § 2101.16: In re McDonald, 44 OO(2d) 262, 15 OMisc 74, 239 NE(2d) 277 (PC).

2. This and the following sections show that no provision is made for fees for recording cost bills or keeping an index of such record and that no provision is made for fees for appointing examiners of the county treasury: Commissioners v. Millard, 4 NP 53, 4 OD 419 [affirmed, Millard v. Commissioners, 13 CC 518, 7 CD 115].

3. The probate judge is not entitled to fees for making out a report of social statistics to the secretary of state: Swartz v. Commissioners, 1 OSU 428, 35 Bull 275.

4. Fees set forth in this section should be taxed in all proceedings instituted on and after Jan. 1, 1932, even though appointment of fiduciary was made prior to that date: In re Murphy, 29 NP(NS) 183.

5. The limitation of a maximum of ten dollar fees for an estate of less than five hundred dollars only applies to proceedings in an estate listed in this section where the costs are taxed against the fiduciary in his fiduciary capacity, and not to proceedings where the costs are taxed to other persons, or to proceedings not listed therein: In re Crum, 31 NP(NS) 105.

6. The limitation of a maximum of ten dollars in probate court fees chargeable in an estate, the assets of which do not exceed five hundred dollars, does not apply to a proceeding for settling a claim for wrongful injury: In re Crum, 31 NP(NS) 105.

7. When acting as judge of a juvenile court, a pro-

bate judge may not tax any costs against delinquent, dependent or neglected children, except the costs which may be taxed against delinquent minors under eighteen years of age by virtue of GC § 1654 (see now RC §§ 2151.41, 2151.99): In re Costs, 3 OLA 625.

8. The ten dollar limitation contained in item 48 [(vv)] of this section, applies to the total amount of fees chargeable by a probate judge against an estate, the assets of which do not exceed five hundred dollars in value, regardless of the nature or number of independent proceedings which may be involved in the administration of such estate: 1932 OAG No. 4784.

9. When the new 1933 fees become effective, an entry made by the probate judge providing for a discount of fees, under GC § 10501-45 (RC § 2101.20), is terminated and the probate judge shall charge the new schedule of fees for the remainder of the year 1933: 1933 OAG No.1633.

10. The word "estates" as used in item 48 [(vv)] of this section refers to the estates of deceased persons as well as to estates of living persons in guardianship or trusteeship proceedings under proper jurisdiction of the probate court, where the assets of such estates do not exceed five hundred dollars in value. As a consequence, the ten dollar limitation applies to the total amount of fees chargeable by a probate judge against such estates, the assets of which do not exceed five hundred dollars in value, regardless of the nature or number of independent proceedings which may be involved in the administration of such estates: 1933 OAG No.1782.

11. The term "assets" as used in par. 48 [(vv)] of this section, in connection with the word "estates," includes real estate which is available for or may be appropriated to the payment of the debts of an estate: 1935 OAG No.3977.

12. Costs of legal advertising or printer's fees for the publication of notice of appointment and other notices necessary to be made or published in the probate court, are not such costs as are referred to in subsection 48 [(vv)] of this section, and are properly chargeable by the probate judge in addition to the ten dollars minimum fee in estates not exceeding five hundred dollars in total value: 1937 OAG No.441.

13. When a person requests a certified copy of a journal entry or proceeding to the probate judge, judge shall base his charge upon this section. If such person presents a copy of the original journal entry or proceeding to the probate judge, with a request that he certify the same to be a correct copy, he should be governed by GC § 2901 (RC § 2303.20): 1939 OAG No.1454.

14. If the copy of the journal entry, record or proceeding is made by a deputy of the probate court, working after office hours, typing charges made by such deputy are matters of personal concern between the deputy and the person requesting the copy and are not made the subject of statutory regulation: 1939 OAG No.1454.

§ 2101.17 Fees from county treasury.

The fees enumerated in this section shall be paid to the probate court from the county treasury upon the warrant of the county auditor which shall issue upon the certificate of the probate judge and shall be in full for all services rendered in the respective proceedings as follows:

- (A) For each hearing to determine if a person is a mentally ill individual subject to hospitalization when the person is committed to a

- state hospital or to relatives \$12.00
 (B) When the person is discharged7.00
 (C) For order of return of a mentally ill person to a state hospital or removal therefrom2.00
 (D) For proceedings for committing a person to an institution for the mentally retarded 10.00
 (E) For habeas corpus proceedings when a person is confined under color of proceedings in a criminal case and is discharged10.00
 (F) When acting as a juvenile judge, for each case filed against a delinquent, dependent, unruly, or neglected child, or a juvenile traffic offender5.00
 (G) For proceedings to take a child from parents or other persons having control thereof5.00

HISTORY: GC § 10501-43; 114 v 320; 136 v S 145. EF 1-1-76.

For an analogous section, see former GC § 1602.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2101.17 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Research Aids

Fees:

O-Jur2d: Judges § 64; Insane, etc. § 17

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Delinquency proceedings, jurisdiction and fees: 1918 OAG vol.1, p.558.

2. The probate court has general power to issue executions on its judgments, subject to special and exclusive methods of enforcing its judgments that may be provided by statute: 1920 OAG vol.1, p.700.

3. Where an affidavit has been filed in the probate court upon which a lunacy inquest is based, and the person is discharged under former GC § 1602 (repealed, 114 v 320, § 1), the five dollar fee therein provided for is taxable against the person who is thus tried and discharged: 1920 OAG vol.1, p.723.

4. A probate judge is not entitled to compensation in addition to his salary: 1921 OAG vol.2, p.966.

5. When acting as judge of a juvenile court, a probate judge may not tax the cost against delinquent, dependent or neglected children, except the costs which may be taxed against delinquent minors under the age of eighteen years, under the provisions of former GC § 1654 (see now RC §§ 2151.41, 2151.99): 1925 OAG p.12.

6. The provisions of this section, which is a specific statute, with respect to the payment of the fees to the probate court, are mandatory, and such fees must be received by the probate court notwithstanding the provisions of GC § 2983 (RC § 325.31), which is a general statute: 1944 OAG No.7057.

§ 2101.18 Fees for other services. (GC §§ 10501-44, 10501-46)

For services for which compensation is not provided, the probate judge shall be allowed the same fees as are allowed the clerk of the court of common pleas for similar services.

The probate judge shall administer oaths and

make certificates in pension and bounty cases without compensation.

HISTORY: GC §§ 10501-44, 10501-46; 114 v 320 (332, 333). **EFF** 10-1-53. For analogous sections, see former GC §§ 1603, 1604.

Cross-References to Related Sections

Receipt for fees, RC § 325.28.

Salaries in lieu of fees, RC § 325.02.

Research Aids

Fees:

O-Jur2d: Judges § 64; Courts § 52.

CASE NOTES AND OAG

1. The probate judge, exercising juvenile jurisdiction in proceedings against an adult for contributing to delinquency, is entitled to receive as clerk of his own court the same costs as are taxed and paid to the clerk of courts in criminal cases, to be accounted for to the probate judge's fee fund: 1915 OAG vol.1, p.541.

1.1 There is no authority for requiring fees for keeping a day book, because the clerk of the court of common pleas keeps no such book, it not being the same as a court calendar: *Commissioners v. Millard*, 4 NP 53, 4 OD 419 [affirmed, *Millard v. Commissioners*, 13 CC 518, 5 CD 115].

2. This section relates only to services in causes only between private parties and it does not authorize compensation to the probate judge for appointing examiners of the county treasury: *Millard v. Conrade*, 5 CC(NS) 145, 16 CD 445.

3. Probate judges are prohibited from making a charge for certificates of births, deaths or marriages in the matter of the procurement of compensation or insurance, due a soldier of the world war under the federal war risk insurance act: 1920 OAG vol.1, p.233.

4. A probate judge should charge the sums provided by GC §§ 2900 and 2901 (RC § 2303.20) for taking affidavits and acknowledgments in cases docketed in the probate court: 1936 OAG No.5092.

§ 2101.19 Limitation of charges by probate judge. (GC § 10501-64)

No probate judge or his deputy clerk shall sell or offer for sale for more than one dollar any merchandise to be used in connection with any license, order, or document issued by the probate court, nor shall he make any charge in connection with the issuance of any license, order, or document except that specifically provided by law.

HISTORY: GC § 10501-64; 120 v 330, § 2. **EFF** 10-1-53.

Research Aids

Fees:

O-Jur2d: Judges §§ 64, 76

§ 2101.20 Reduction of fees. (GC § 10501-45)

When the aggregate amount of fees and allowances collected by the probate judge in any calendar year exceeds by more than ten per cent the amount necessary to pay the salaries of said judge and the employees of the probate court,

including court constables, for the same calendar year, such judge may, by an order entered on his journal, provide for a discount of all the fees and allowances he is required to charge and collect for the use of the county by fixing a per cent of discount which shall be applied to all the earnings of said office for the ensuing year and shall constitute the legal fees of said office for said year.

HISTORY: GC § 10501-45; 114 v 320 (332). **EFF** 10-1-53. For an analogous section, see former GC § 1603-1.

Forms

1 A&H Probate FORM 2101.20a et seq.

Research Aids

Fees:

O-Jur2d: Judges § 64

CASE NOTES AND OAG

1. In considering reduction of fees to be charged in probate court, probation officers appointed under former GC § 1662 (now GC § 1639-18 [RC § 2151.13]) are not to be considered employees of office of probate judge, in determining whether fees collected during any calendar year exceed by more than ten per centum amount necessary to pay salaries and other employees of office of probate year: *Funk v. Lamneck*, 30 NP(NS) 174.

§ 2101.21 Fiduciary; payment of costs in advance. (GC § 10501-39)

Before appointing any person as a fiduciary, the probate court may require payment of the costs incident to such appointment.

HISTORY: GC § 10501-39; 114 v 320 (329). **EFF** 10-1-53.

Research Aids

Costs:

O-Jur2d: Fiduciaries § 6

§ 2101.22 Process. (GC § 10501-23)

The probate judge shall issue any process, notices, commissions, rules, and orders that are necessary to carry into effect the powers granted to him.

HISTORY: GC § 10501-23; 114 v 320 (326). **EFF** 10-1-53. For an analogous section, see former GC § 10501.

Research Aids

Form of process:

O-Jur2d: Process §§ 4-13

Am-Jur2d: Process §§ 7-20

§ 2101.23 Contempt. (GC § 10501-28)

The probate judge may keep order in his court and has authority throughout the state to compel performance of any duty incumbent upon any fiduciary appointed by or accounting to him. The probate judge may punish any contempt of his authority as such contempt might be punished in the court of common pleas.

If a person neglects or refuses to perform an order or judgment of a probate court, other than

for the payment of money, he shall be guilty of a contempt of court and the judge shall issue a summons directing such person to appear before the court, within two days from the service thereof, and show cause why he should not be punished for contempt. If it appears to the judge that such person is secreting himself to avoid the process of the court, or is about to leave the county for that purpose, the judge may issue an attachment instead of the summons, commanding the officer, to whom it is directed, to bring such person before such judge to answer for contempt. If no sufficient excuse is shown, such person shall be punished for contempt.

HISTORY: GC § 10501-28; 114 v 320 (327). **EFF** 10-1-53. For analogous sections, see former GC §§ 1598, 10500.

Cross-References to Related Sections

Common pleas contempt actions, RC § 2705.01 et seq.

Forms

1 A&H Probate FORM 2101.23a et seq.

Outline of Procedure

Contempt. Leyshon No. 61; A&H No. 30

Research Aids

Contempt:

O-Jur2d: Contempt §§ 2, 3, 8-13, 38-40, 45-49

Am-Jur2d: Contempt §§ 62, 63, 71

Order for payment of money:

O-Jur2d: Assign for Cred. § 76

CASE NOTES AND OAG

1. The probate judge has no power to imprison for contempt for disobedience of an order to deliver to a receiver appointed by the probate judge, money received in order to defraud creditors. Such order of the probate court is a summary order given without opportunity for a hearing, which is necessary to constitute due process of law: *White v. Gates*, 42 OS 109.

2. Under RC § 2101.23, which limits the jurisdiction of the probate court to enforce its orders or judgments by contempt of court proceedings to instances of neglect or refusal to perform an order or judgment "other than for the payment of money," an order of the probate judge, seeking to compel the payment of money in the form of increased salaries by the members of the board of county commissioners to probate court employees, is not enforceable by contempt of court proceedings: *In re Contempt of Court*, 30 OS(2d) 182, 59 OO(2d) 188, 283 NE(2d) 126.

3. The probate court has general power to issue executions on its judgments, subject to special and exclusive methods of enforcing its judgments that may be provided by statute: 1920 OAG vol.1, p.700.

state, territory, or country; in case of the unavoidable absence of the probate judge, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of such acts must be preserved in the usual records of the probate court;

(B) To grant and revoke letters testamentary and of administration;

(C) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(D) To approve and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;

(E) To grant marriage licenses and licenses to ministers of the gospel to solemnize marriages;*

(F) To make inquests respecting persons who are unable to manage their property and affairs effectively for reasons such as mental illness, mental deficiency, or physical illness or disability, subject to guardianship;

(G) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(H) To authorize the sale of lands, equitable estates, or interests therein, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(I) To authorize the completion of real contracts on petition of executors and administrators;

(J) To issue writs of habeas corpus, and determine the validity of the caption and detention of the persons brought before it on such writs; the probate court may refer the petition to the court of common pleas when the petitioner is detained on a charge, indictment, or conviction of having committed a felony or misdemeanor under the laws of the United States, this state, or under an ordinance of any political subdivision of this state;

(K) To construe wills;

(L) To render declaratory judgments;

(M) To direct and control the conduct of fiduciaries and settle their accounts;

(N) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by trustee;

(O) To terminate a testamentary trust in any case in which a court of equity may do so;

(P) To hear and determine actions to contest the validity of wills.

Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law.

The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.

The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

§ 2101.24 Jurisdiction of probate court.

Except as otherwise provided by law, the probate court has jurisdiction:

(A) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other

HISTORY: GC §§ 10501-53, 10501-55; 114 v 320; 125 v 903 (960); 127 v 27 (EF 9-9-57); 129 v 7 (EF 10-5-61); 130 v 611 (EF 10-14-63); 136 v S 145 (EF 1-1-76); 136 v S 466, EF 5-26-76.

For analogous sections, see former GC §§ 10492, 10493, 10498.

It appears that the reference to licensing of ministers to solemnize marriages should have been deleted from this section. See RC §§ 3101.10-3101.12, as amended by AmHB 740, eff 6-4-76, in which the licensing of ministers to solemnize marriages is now vested in the secretary of state.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2101.24 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2101.24 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Comment

Subdivision (K) is for the purpose of giving to the probate court concurrent jurisdiction with the common pleas court to construe wills. The General Assembly has never enacted a statute expressly giving this jurisdiction to the probate court, but the committee believes that in the settlement of accounts and the determination of other matters it is frequently necessary and desirable that the probate court shall have power to construe the will. Subdivision (L) covers declaratory judgments. The court of common pleas now has concurrent jurisdiction in the matter of declaratory judgments. Subdivision (M) provides that the probate court shall have jurisdiction to direct trusts instead of forcing such cases into equity.

Cross-References to Related Sections

Appeal from probate court, RC § 2101.42.

Injunction may be granted by probate judge, RC § 2727.03.

Jurisdiction in proceedings to register land titles, RC § 5309.02 et seq.

Procedure as to wills, RC § 2107.02 et seq.

Procedure in habeas corpus, RC § 2725.01 et seq.

Procedure in sale of land, RC §§ 2127.02, 2127.07.

Procedure to compel completion of real contracts, RC § 2113.48.

Comparative Legislation

Probate jurisdiction:

Cal.—Probate Code, § 300

Ill.—Rev Stat, ch 3, § 5-1

Ind.—Burns' Stat, § 33-4-4-3

Ky.—KRS, § 25.110

Mich.—MCLA, § 701.19

N.Y.—SCPA, § 201

Pa.—Purdon's Stat, Tit. 20, § 711

Fla.—FSA, § 26.012

Text Discussion

1 Anderson Fam.L. § 10.1

Forms

1 A&H Probate FORM 2113.01a et seq: Executors and administrators; appointment, powers, duties.

Outlines of Procedure

Construction of will. Leyshon No. 60, A&H No. 29; Declaratory judgments. Leyshon No. 63; A&H No. 33; Habeas corpus. Leyshon No. 76, A&H No. 51

Research Aids

Appointment and qualification of trustees:

O-Jur2d: Fiduciaries § 6

Am-Jur2d: Trusts § 119-121

Appointment and removal of guardians:

O-Jur2d: Guardian and Ward §§ 9-11, 37-54, 80

Am-Jur2d: Guardian and Ward §§ 24, 25, 27, 57-59

Appointment and removal of testamentary trustees:

O-Jur2d: Trusts § 50

Am-Jur2d: Trusts §§ 119, 120, 127-130

Control of testamentary trustees:

O-Jur2d: Trusts § 166

Am-Jur2d: Trusts § 282

Construction of wills:

O-Jur2d: Wills §§ 692, 694

Am-Jur2d: Wills §§ 1127, 1128

Control of executors and administrators:

O-Jur2d: Executors and administrators § 87

Control of fiduciaries:

O-Jur2d: Fiduciaries § 162

Control of guardians:

O-Jur2d: Guardian and Ward § 88

Declaratory judgments:

O-Jur2d: Declaratory judgments §§ 1, 22, 33

Distribution of estates:

O-Jur2d: Executors and Administrators § 370

Equity jurisdiction:

O-Jur2d: Courts § 178

Exclusiveness of jurisdiction:

O-Jur2d: Courts § 170; Executors and Administrators § 38

Am-Jur2d: Executors and Administrators § 23

General text discussion:

Page on Wills: §§ 26.14-26.17

Grant of letters:

O-Jur2d: Executors and Administrators §§ 36-78

Am-Jur2d: Executors and Administrators §§ 82-92

Habeas corpus:

O-Jur2d: Habeas corpus § 37

Inquests respecting mental illness:

O-Jur2d: Insane, etc. §§ 7-13

Am-Jur2d: Incompetent persons §§ 8, 9

Jurisdiction generally:

O-Jur2d: Courts §§ 172-179

Am-Jur2d: Courts § 104, Wills §§ 850-859

License to solemnize marriages:

O-Jur2d: Marriage § 19

Am-Jur2d: Marriage § 40

Marriage license:

O-Jur2d: Marriage §§ 11, 16

Am-Jur2d: Marriage §§ 37-39

Petition for completion of real contracts:

O-Jur2d: Executors and Administrators § 198

Proof of wills:

O-Jur2d: Wills §§ 219-259

Am-Jur2d: Wills §§ 822-859

Sale of estate held in testamentary trust:

O-Jur2d: Trusts §§ 180-183

Sale of lands:

O-Jur2d: Executors and Administrators §§ 198, 428

Am-Jur2d: Executors and Administrators §§ 344-361

Settlement of accounts:

O-Jur2d: Executors and Administrators §§ 378, 379

Am-Jur2d: Executors and Administrators § 506

Termination of testamentary trust:

O-Jur2d: Trusts §§ 75-83

ALR

Death of beneficiary as terminating or revoking trust of savings bank account over which settlor retains right of withdrawal or revocation. 64 ALR3d 221.

Termination of trust where beneficiary has power to dispose of property or is given entire beneficial interest. 169 ALR 459.

Exclusive jurisdiction to determine dwelling place and living conditions of one adjudged incompetent. 131 ALR 289.

Power of attorney to apply for or receive license for another. 135 ALR 800.

Mental condition which will justify appointment of guardian, committee, or conservator of estate for incompetent or spendthrift. 9 ALR3d 774.

Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee, devisee, or distributee. 123 ALR 1293.

Failure of trustee to disclose self-dealing as ground for vacating order or decree settling account. 132 ALR 1522.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance. 15 ALR2d 610.

Right of administrator with the will annexed or trustee other than person named in will as such, to execute power of sale conferred by will. 9 ALR2d 1324.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed. 7 ALR2d 544.

Diverse adjudications by courts of different states as to domicile of decedent as regards taxation, administration, or distribution of estate. 121 ALR 1200.

Law Reviews

See explanatory article in 4 OBar 127.

The constructive trust: a neglected remedy in Ohio. Article by Prof. Harry W. Vanneman, OSU, 10 CinLRev 366; 3 OSLJ 1.

Decedents' estates—writ of prohibition no substitute for appeal in case of double probate. (Case note.) 11 OSLJ 284.

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifield of the Steubenville bar. 8 CinLRev 174.

Final accounts by probate fiduciaries. Address by Rodney M. Love of Dayton. 16 OBar (No. 49) 647.

Jurisdiction—probate court—power to determine questions of title to property. (Case note.) 23 CinLRev 118.

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

Sale of real estate, construction of wills, and inheritance taxes discussed. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 8) 121.

Ohio Rules

See Staff note to Civil Rule 73(B) commenting on the effect of Civil Rule 73 on this section, in Civil Rules Volume to Page's Ohio Revised Code Annotated.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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1. General Code § 11215 (RC § 2305.01) is an old and general statute, while this section is recent and special; therefore, under the canons of statutory construction, the latter must take precedence over the former: *Unger v. Wolfe*, 134 OS 69, 11 OO 483, 15 NE(2d) 955.

2. While the authority of the court under a proceeding is very broad for the purpose of discovering

concealed or embezzled assets, it is not broad enough to litigate all the issues in a case where there has been no concealment of assets. To that extent there is a limitation upon the "plenary power" granted to probate court in the [next to] the last paragraph of this section: *Goodrich v. Anderson*, 136 OS 509, 17 OO 152, 26 NE(2d) 1016.

3. Under this section the probate court has "plenary power at law and in equity fully to dispose of any matter properly before the court," unless otherwise provided by statute. There is no statutory provision which limits or denies to that court power to hear and determine fully and completely all questions raised by exceptions to an inventory of the assets of a decedent's estate: *Bolles v. Toledo Trust Co.*, 136 OS 517, 17 OO 156, 27 NE(2d) 145.

3.1 The probate court has jurisdiction to hear exceptions to the account of the superintendent of banks in charge of liquidation of an Ohio bank as to a trust for which such bank, before its liquidation, was trustee through appointment by that court; to settle such account; to surcharge the bank as such trustee; and to direct the superintendent of banks to such trustee; and to direct the superintendent of banks to issue a certificate of claim against the assets of such bank to and in favor of a successor trustee; but such court does not have jurisdiction to render a money judgment against the bank or superintendent of banks, or to determine the character of the claim as to preferences, or to impress a lien upon property held by the bank as trustee, in favor of the successor trustee: *In re Binder*, 137 OS 26, 17 OO 364, 27 NE(2d) 939.

3.2 It is the duty of the probate court to require of the guardian of the estate of a minor a full account of the guardian's care or lack of care of the assets belonging to the ward. It is the duty of the probate court to fix the liability, if any, of a guardian for his failure on final settlement to account fully for the estate of the ward: *In re Zimmerman*, 141 OS 207, 25 OO 326, 47 NE(2d) 782.

3.3 By the constitution and statutory enactments, the probate court is invested with the power and jurisdiction to adjudicate a matter relating to the title to and status of personal property, where, during the administration of a decedent's estate in such court, decedent's widow files her petition asking for a declaration that certain personal property is an asset of the estate and must be administered as such, as against the claim that such property was effectually disposed of by the decedent during his lifetime through a written declaration of trust: *In re Morrison*, 159 OS 285, 50 OO 291, 112 NE(2d) 13.

3.4 No relief for a probate court estate, upon a complaint to the probate court pursuant to GC § 10506-67 (RC § 2109.50), can be given except with respect to property of such estate: *In re Sexton*, 163 OS 124, 56 OO 178, 125 NE(2d) 880.

3.5 By virtue of GC § 10501-53 (RC § 2101.24), and GC § 12102-4 (RC § 2721.05), one who as trustee under a will and as an individual is interested in a provision of the will authorizing the removal of certain of testator's real estate from the trust and the substitution of a sum of money to take its place may bring and maintain an action for a declaratory judgment in the probate court to secure a determination and declaration as to his obligations as trustee and as an individual with respect to such matter and as to the rights of the trust beneficiaries, where there is a present bona fide dispute between or among those concerned as to the interpretation of the will and doubt exists as to the proper interpretation: *Sessions v. Skelton*, 163 OS 409, 56 OO 370, 127 NE(2d) 378.

3.6 Where the assets of an estate have (in accordance with the terms of a will) been distributed to life tenants,

the estate has been closed and the final account has been settled and determined, and the life tenants die, in the absence of a motion, filed in accordance with RC § 2109.35 to vacate the order of the probate court, such court lacks jurisdiction to entertain an application by the remaindermen to commit securities formerly in the estate to a trustee: *State ex rel Beedle v. Kiracofe*, 176 OS 149, 27 OO(2d) 25, 198 NE(2d) 61.

3.7 The probate court has plenary power at law and in equity fully to dispose of any matter properly before the court unless the power is expressly otherwise limited or denied by statute: *Wolfrum v. Wolfrum*, 2 OS(2d) 237, 31 OO(2d) 501, 208 NE(2d) 537.

3.8 The determination by the probate court in the summary proceeding provided for by RC § 2115.16 that assets should be included in an estate makes the question of title *res judicata* as between all parties to the proceeding, but the judgment of the probate court may be attacked in a subsequent action by other interested persons who were not parties to the proceeding in probate court: *Cole v. Ottawa Home and Savings Assn.*, 18 OS(2d) 1, 47 OO(2d) 1, 246 NE(2d) 542.

4. The last paragraph of this section is an added provision definitely granting equity power to the probate court on all matters properly before the court: *Abicht v. O'Donnell*, 52 App 513, 6 OO 462, 3 NE(2d) 993.

5. The probate court has jurisdiction to give full relief in assignment proceedings, including the sale of mortgaged premises, free from the inchoate dower interest of the husband who did not sign the assignment agreement by his wife; and such jurisdiction cannot be defeated by the mortgagee instituting foreclosure proceedings in the common pleas court under a mortgage signed by both the husband and wife: *Madigan v. Dollar Bldg. &c. Co.*, 52 App 553, 6 OO 478, 4 NE(2d) 68.

5.1 Where the probate court has acquired jurisdiction of the subject matter of a proceeding brought by an administrator to sell the real estate of a decedent to pay the debts of the estate, the common pleas court is without jurisdiction in an action subsequently brought by a mortgagee to foreclose a mortgage on the same property: *Home Building and Savings Co. v. Sanford*, 59 App 302, 13 OO 90, 18 NE(2d) 127 [see also 59 App 294, 13 OO 86, 18 NE(2d) 126].

5.2 The probate court does not have jurisdiction, in a proceeding upon exceptions to the inventory filed in a decedent's estate, to determine the title to real or personal property that had been duly transferred, and possession thereof delivered, by the decedent before her death: *In re Brunskill*, 63 App 529, 17 OO 265, 27 NE(2d) 492.

6. The grant of a limited equity jurisdiction to the probate court, under the provisions of GC § 10501-17 (RC § 2101.33) and this section, does not oust the court of common pleas from its original equity jurisdiction to declare void the judgments and orders of the probate court for lack of jurisdiction: *Young v. Guella*, 67 App 11, 21 OO 66, 35 NE(2d) 997.

7. The specific grant of power to the probate court as contained in GC § 10501-17 (RC § 2101.33) and this section does not confer upon such court general equity jurisdiction: *Hooffstetter v. Adams*, 67 App 21, 21 OO 70, 35 NE(2d) 896.

8. Every legal intentment must be indulged in to support the validity and regularity of an administrator's assignment to two defendants of his cause of action against them and a third defendant to set aside fraudulent transfers of accounts by the decedent making him insolvent unless defendants elect to pay the value of the accounts to the administrator, in view of the broad powers now vested in the probate court by

virtue of this section: *Kause v. Gemin*, 69 App 494, 24 OO 210, 38 NE(2d) 96.

9. Under this section the probate court has jurisdiction to order an administrator to pay a debt incurred by him in the administration of the estate, even where there is an issue of fact. The administrator has no right to a trial by jury under such circumstances: *In re Kaffenberger*, 71 App 201, 26 OO 17, 48 NE(2d) 885.

10. Jurisdiction of the probate court to redetermine its order or modify its order or instruct its fiduciary is not limited by the power conferred by GC § 5339 (RC § 5731.20), but includes broad powers conferred by GC § 10501-53 (RC § 2101.24): *In re Shafer*, 74 App 33, 29 OO 233, 56 NE(2d) 926.

10.1 GC § 11925 et seq conferred jurisdiction on the court of common pleas to authorize sale of realty held in testamentary trust: *State ex rel Ehmann v. Schneider*, 78 App 27, 33 OO 391, 67 NE(2d) 117.

10.2 The power of a court to render a declaratory judgment by virtue of provisions of the Uniform Declaratory Judgments Act does not empower the court to expand its jurisdiction over subject matter: *Sherrets v. Tuscarawas Savings and Loan Co.*, 78 App 307, 34 OO 21, 70 NE(2d) 127.

11. Where the administratrix of an estate files an action in the probate court of a county against a savings and loan company, a resident of such county, and the receiver of a park association, a nonresident of such county, the petition in the action charging fraud in the decedent's oral transaction with the park association and seeking a declaration of rights to a certain stock certificate of the company alleged to have been given by the deceased to the association as consideration in such transaction, an order of dismissal of the petition is justifiable, the court having no jurisdiction of the subject matter of the action and there being an improper joinder of parties defendant: *Sherrets v. Tuscarawas Sav. &c. Co.*, 78 App 307, 34 OO 21, 70 NE(2d) 127.

12. In controlling the administration of a testamentary trust, the probate court, under the jurisdiction vested in it by this section, has the power to determine the validity of a deed obtained from the beneficiary of the trust, where the validity of such conveyance is challenged on the ground of undue influence, mental incapacity or fraud: *In re Stuckey*, 80 App 421, 36 OO 117, 73 NE(2d) 208.

13. The probate court, under this section, has authority to authorize a trustee for a missing person to bring an action for equitable partition of lands in which the missing person owned a fractional interest: *In re Parrett*, 86 App 162, 41 OO 20, 90 NE(2d) 425.

14. General equity powers are not conferred on the probate court under this section: *In re Dickey*, 87 App 255, 42 OO 474, 94 NE(2d) 223.

15. This section gives the probate court, in matters within its jurisdiction, the authority to exercise equity powers in disposing of matters where there is no legal remedy or where the legal remedy is inadequate: *In re Dickey*, 87 App 255, 42 OO 474, 94 NE(2d) 223.

16. Under Const. Art. IV, § 8, and GC §§ 5340 and 10501-53 (RC §§ 5731.21 and 2101.24) the probate court is vested with plenary equity jurisdiction to hear and determine an application, filed after term, to modify an order determining inheritance taxes paid through a mistake of fact: *In re Beckman*, 91 App 42, 48 OO 236, 107 NE(2d) 538.

16.1. Where probate court, in proceedings by village against township for a division of property, made an order of division of funds and assets, such order terminated the jurisdiction of the court, which jurisdiction did not continue over the divided property so

as to enable the court to entertain a proceeding by the village attorney to impress such property with a lien: *Eastlake v. Davis*, 94 App 71, 51 OO 279, 114 NE(2d) 627.

16.2 This section modifies or limits the jurisdiction conferred on the common pleas court, with reference to the specific provisions incorporated therein, including jurisdiction to construe wills, in which respect GC § 11215 (RC § 2305.01), is repealed by implication: *Van Stone v. Van Stone*, 95 App 406, 53 OO 438, 120 NE(2d) 154.

16.3 The probate court has the power to appoint a trustee for personal property bequeathed to a spendthrift life tenant (remainder to her children) in order to protect the property, even though the will expressly provides otherwise: *In re Miller*, 95 App 457, 54 OO 98, 121 NE(2d) 26.

16.4 General Code § 10509-185 (RC § 2113.58), the purpose of which is to protect the interests of remaindermen under wills, contains two distinct remedies, either of which the court, in a proper case, may apply; the provisions of that section do not operate as a limitation on the plenary jurisdiction conferred on the probate court by Const., Art. IV, § 8, and this section: *In re Miller*, 95 App 457, 54 OO 98, 121 NE(2d) 26.

16.5 In an action for a declaratory judgment brought by a person in possession of personal property claimed by the executor of decedent's estate and which the party in possession claims by virtue of a gift inter vivos, a probate court has jurisdiction to determine the title to such personal property: *Renee v. Sanders*, 102 App 21, 2 OO(2d) 7, 131 NE(2d) 846.

16.6 Where services are rendered by an attorney for a widow in effecting a settlement of all her rights and claims in and to the estate of her deceased husband the probate court has jurisdiction to hear and determine an application by the attorney for the allowance of compensation out of the estate; but, although it may have been fortuitous for the estate that a settlement of many problems may have been effected, such circumstances do not justify payment of attorney fees by the estate: *In re Estate of Colosimo*, 104 App 342, 5 OO(2d) 24, 149 NE(2d) 31.

16.7 The language of this section and RC § 5303.-03 does not subtract from or limit the full jurisdiction of the common pleas court in an action of ejectment to determine the legal title to land, be it by will, deed or otherwise, upon which to award possession of land: *Avery v. Avery*, 107 App 199, 8 OO(2d) 91, 157 NE(2d) 917.

16.8 A probate court has inherent power to vacate, after term, a judgment procured by fraud: *In re Adoption of Sladkey*, 109 App 120, 10 OO(2d) 304, 161 NE(2d) 554.

16.9 The probate court was without jurisdiction to declare the validity of a purported contract, in a declaratory judgment action, where such contract had no bearing on the assets of the estate, duties of the executor, or the court's supervision of the administration of the estate: *In re Martin*, 115 App 515, 21 OO(2d) 166, 185 NE(2d) 785.

17. The issue whether a release of a negligence claim executed in the probate court is void may be determined by a common pleas court in an action therein to recover for personal injury damages caused by such negligence: *Carpenter v. Pontius*, 119 App 383, 28 OO(2d) 12, 200 NE(2d) 682.

17.1 By virtue of the provisions of Art. IV, § 8, Ohio Constitution, and Title 21 of the Revised Code, a probate court has jurisdiction to pass upon a claim against an estate filed individually by one of the co-administrators of such estate; but such court has no jurisdiction in such

proceeding to examine into a claim of such estate against such co-administrator and her husband for moneys allegedly owing the estate on promissory notes: In re Stutz, 1 OApp(2d) 188, 30 OO(2d) 212, 204 NE(2d) 248.

17.2. A probate court does not have jurisdiction of an action in which plaintiff seeks an order that a trustee (not appointed by such court) of an *inter vivos* trust turn over to plaintiff, the surviving spouse of the deceased settlor, property delivered by the settlor, prior to her death, to, and held by, such trustee: Purcell v. Cleveland Trust Co., 6 OApp(2d) 235, 35 OO(2d) 427, 217 NE(2d) 817.

17.3. As an incident to a hearing upon exceptions to an inventory pursuant to RC § 2109.58, the probate court has jurisdiction to determine the issue of a common law marriage: In re Soeder, 7 OApp(2d) 271, 36 OO(2d) 404, 220 NE(2d) 547.

17.4. A probate court is without jurisdiction to entertain an original action wherein plaintiff seeks to obtain a declaratory judgment by that court that an ordinance of a municipality is unconstitutional as it relates to plaintiff's property, together with injunctive and equitable relief; a declaratory judgment rendered by such court, without jurisdiction, is void and of no effect: State ex rel Mayfield Heights v. Bartunek, 12 OApp(2d) 141, 41 OO(2d) 222, 231 NE(2d) 326.

18. It was not the purpose of the General Assembly, by the enactment of the uniform declaratory judgments act, to alter or broaden the jurisdiction of the probate court over parties and subject matter, but only to provide a new procedural device or vehicle of relief in the disposition of the matters properly coming before it: State ex rel Mayfield Heights v. Bartunek, 12 OApp(2d) 141, 41 OO(2d) 222, 231 NE(2d) 236.

18.1 Where there is no repugnancy in a will creating a trust and it is not against public policy, such trust cannot be judicially terminated before the objects of the trust have been fully accomplished: Collins v. First National Bank, 20 OApp(2d) 1, 49 OO(2d) 1, 251 NE(2d) 610.

18.2 Generally, a change in circumstances and the needs of beneficiaries do not justify a court termination of a trust created in a will to meet the change in circumstances and conditions: Collins v. First National Bank, 20 OApp(2d) 1, 49 OO(2d) 1, 251 NE(2d) 610.

18.3 The probate court and the court of common pleas have concurrent jurisdiction of an action to foreclose a mortgage on the real estate of a deceased mortgagor of whose estate an administratrix has been appointed and qualified, when it is necessary to sell the real estate to pay decedent's debts, and the court which first acquires jurisdiction thereof retains it to the exclusion of the other: Government Nat. Mtg. Assn. v. Smith, 28 OApp(2d) 300, 57 OO(2d) 453, 277 NE(2d) 233.

18.4 The probate court has jurisdiction of an application of an heir to the administratrix of an estate for an allowance for attorney fees incurred when he resisted a claim against the estate previously allowed as valid, which claim was substantially reduced through the applicant's efforts, such jurisdiction being granted by Art. IV, § 8 of the constitution and by this section: In re Helfrich, 3 OO 162 (CP).

18.5. Under this section the probate court has no authority to terminate a testamentary trust: In re Rich, 3 OO 315 (PC).

19. A trust provision that payments from the principal might be directed by the probate court of a county in Ohio, if necessary for the education or maintenance of minor children or if the best interests of the children required such payments, was construed as a rule to govern the probate court in deciding whether to direct payments from principal, and

not as a condition precedent to the exercise of jurisdiction and therefore open to inquiry in other tribunals: Harvey v. Fiduciary Trust Co. (Mass.), 11 OO 77, 13 NE(2d) 299.

20. The judgment of a probate court in Ohio making an award out of trust funds to attorneys who secured the creation of the trust, the situs of which was in Massachusetts, was not res judicata on the issue of jurisdiction by virtue of the trust deed which purported to give Ohio courts jurisdiction, where it did not appear that the Ohio courts rested their supposed jurisdiction upon the trust deed rather than upon the statutes of Ohio, and where the defendant trustee had ceased to be a party to the proceeding before judgment on appeal was rendered: Harvey v. Fiduciary Trust Co. (Mass.), 11 OO 77, 13 NE(2d) 299.

21. The power of the probate court to hear and determine the question whether or not conservancy district assessments levied after the death of the testator should be charged against [income of the life tenant or against] the interest of the remaindermen, comes within the general jurisdiction of the probate court as provided by this section: Reibold v. Evans, 13 OO 409 (PC) [affirmed, 65 App 123].

22. Since January 1, 1932, the probate court, under the provisions of this section, has jurisdiction to construe a post-nuptial contract upon exceptions filed in an inventory, to determine whether such contract bars an allowance of a year's support, and an allowance of property not deemed assets in favor of the surviving widow of a decedent: In re Crabtree, 15 OO 487 (PC).

23. Jurisdiction of probate court to determine title to allegedly concealed assets under this section and GC §§ 10506-67, 10506-77 (RC §§ 2109.50, 2109.56). (Case note.) 18 OO 535.

24. The probate court can determine title on exceptions to an inventory, but it is a matter of discretion whether a summary proceeding should be employed or the exceptors ordered to pursue other remedies: In re Brady, 21 OO 374, 6 OSupp 284 (PC).

25. Under this section the probate court has specific authority to render declaratory judgments, and also additional authority conferred by GC § 12102-1 (RC § 2721.02): Smith v. Smith, 26 OO 541 (PC).

26. Under the provisions of GC § 10501-17 (RC § 2101.33) and this section probate court has same power as common pleas court to vacate or modify its orders or judgments after term, on equitable grounds, unless the power is expressly otherwise limited or denied by statute: In re Vanderlip, 27 OO 123, 12 OSupp 123 (PC).

27. Jurisdiction of the probate court in Ohio to render declaratory judgments is conferred by Const., Art. IV, § 8, by this section, and by the present uniform declaratory judgments act, GC §§ 12102-1 to 12102-16 (RC § 2721.01 to 2721.15): Meyers v. Johnston, 28 OO 334 (CP).

28. Outside of the thirteen subjects named in this section, of which the probate court has jurisdiction, none of the jurisdiction actually conferred upon the probate court is exclusive unless specifically so provided by statute: Williams v. Jones, 42 OO 323 (CP).

29. There is no statute conferring upon the probate court exclusive jurisdiction over a suit against an administrator and the decedent's son to declare them trustees of certain property: Williams v. Jones, 42 OO 323 (CP).

30. The probate court has the power to correct a mistake in papers filed therein, and it is the duty of that court to correct an injustice: In re Schick, 44 OO 42 (PC).

30.1 A probate court has jurisdiction to render a

declaratory judgment deciding whether or not the beneficiary of an inter vivos trust has capacity to take where that question is interwoven with the administration of the estate: *National City Bank v. Baldwin*, 21 OO(2d) 145 (PC).

30.2 The court of common pleas does not have jurisdiction to appoint a general guardian for an incompetent person: *In re Stephens*, 30 OO(2d) 325, 202 NE(2d) 458 (PC).

30.3 The appointment by the probate court of a guardian of an incompetent's person and estate will not interfere with the jurisdiction of the court of common pleas in a pending divorce action over the "assets of the marriage": *In re Stephens*, 30 OO(2d) 325, 2 OMisc 47, 202 NE(2d) 458.

30.4 In ruling on petition, asking for the construction of the terms of a will, probate court has jurisdiction to pass on the question of the validity of an inter vivos trust which petitioner's decedent believed he had created: *Knowles v. Knowles*, 33 OO(2d) 218, 4 OMisc 153, 212 NE(2d) 88 (PC).

30.5 The power of the probate court in relation to a decedent's estate is strictly limited to matters involving the enhancement or depletion of such estate and the distribution of its assets to the lawful heirs: *In re Porter*, 46 OO(2d) 180, 17 OMisc 136, 243 NE(2d) 794.

30.6 A probate court has no jurisdiction to consider the validity or effect of a contract between the distributee of a decedent's estate and one who contracted to collect their share of the estate for a percentage thereof, where the purported contract has no bearing on the assets of the estate, the duties of the administrator or the court's supervision of his administration: *In re Porter*, 46 OO(2d) 180, 17 OMisc 136, 243 NE(2d) 794.

30.7 Revised Code § 2101.24 which grants the probate court authority to make inquests respecting insane persons subject to guardianship, also provides that such jurisdiction is exclusive unless otherwise provided by law: *In re Appropriation for Highway Purposes*, 47 OO(2d) 420, 19 OMisc 81, 246 NE(2d) 626 (CP).

30.8 Where the court of common pleas, pursuant to the provisions of RC §§ 2945.37, 2945.38, and 2945.40, has found the accused "insane" and has committed him to Lima state hospital until restored to reason, the probate court lacks exclusive jurisdiction to make an order binding upon the common pleas court relating to the competence or sanity of the accused: *In re Appropriation for Highway Purposes (Lands of Moser)*, 47 OO(2d) 420, 19 OMisc 81, 246 NE(2d) 626 (CP).

31. An action for money damages is not within the jurisdiction of the probate division of the common pleas court, although filed as a counterclaim to an action within the jurisdiction of that division by a trust adviser named in a will being administered under its authority: *Kindt v. Cleveland Trust Co.*, 55 OO (2d) 53, 26 OMisc 1, 266 NE(2d) 84 (CP).

31.1 Though the jurisdiction of the probate court in Ohio is limited to testamentary trustees, it does not preclude the court from following the assets of a testamentary trust into an inter vivos trust, in furtherance of its jurisdiction of the testamentary trust, in order to fully dispose of the issues properly before it: *Dollar Savings and Trust Co. v. First Nat. Bank*, 61 OO(2d) 134, 32 OMisc 81, 285 NE(2d) 768.

31.2 The common pleas court acquires jurisdiction of a mortgage foreclosure proceeding, although the mortgagor is dead, where a petition is duly filed and process issued and served, and such jurisdiction is not lost by the executor of the mortgagor filing in probate court, the following day, a petition to sell realty to pay debts of the estate: *Home Owners Loan Corp. v. Roth*, 24 OLA 693.

32. A judgment of the court of common pleas, in an action for declaratory judgment, ordering the distribution of assets of an estate in the hands of the executor thereof is invalid by virtue of this section, giving the exclusive right to order the distribution of estates to the probate court: *Mally v. Kekich*, 47 OLA 120, 71 NE(2d) 305 (App).

33. Even though the probate court has the power to control the conduct of trustees under this section, ex parte orders without notice are not binding upon the life tenant: *Holmes v. Hrobon*, 61 OLA 113, 103 NE(2d) 845 (App).

33.1 The probate court is a court authorized to determine the validity of claims of all claimants to decedent's property. Since the petition (in common pleas court) states an ordinary action in replevin and fails to assert reasons why the probate court cannot grant the relief requested under the statutes vesting responsibility and authority in the administrator, an action does not lie in the court of common pleas: *Service Transport Co. v. Matyas*, 63 OLA 236, 244.

33.2 A probate court does not have general equitable powers, but only such equity powers as are necessary in disposing of matters properly before it where there is no legal remedy or where the legal remedy is inadequate, and where the only question properly before the probate court was one of law, there could be no appeal on questions of law and fact: *MacLean v. J. S. MacLean Co.*, 71 OLA 590, 133 NE(2d) 198 (App).

33.3 Where probate court, on petition to sell real estate, found that deed from decedent to his grandson conveyed title to the real estate and that it was not an asset of the estate, such ruling terminated the court's jurisdiction precluding further determination of the issue of whether the state of Ohio had waived priority under trust mortgage executed by decedent upon receiving aid for aged: *Piatt v. Piatt*, 65 OLA 284, 114 NE(2d) 441 (App).

33.4 The words "such jurisdiction" used in this section apply to jurisdiction of the probate court over the matters expressly enumerated in that section of the statute, and the term "plenary power at law and in equity" does not contemplate a grant of general equity jurisdiction to the probate court, but rather a limited grant of equitable jurisdiction in order that the probate court may fully dispose of matters properly before it: *Fellers v. Belau*, 87 OLA 54, 178 NE(2d) 530 (CP).

33.5 The probate court has jurisdiction under this section to render declaratory judgments: *Ireland v. Cleveland Trust Co.*, 80 OLA 94 (PC).

33.6 Under authority of this section, the probate court has full power to hear and determine any matter properly before it, unless the power is expressly otherwise limited or denied by statute: *In re Smith*, 67 OLA 409, 120 NE(2d) 632 (PC).

33.7 The question of whether or not plaintiff is entitled to the return of his property, title to which he put in the name of the deceased under mistake of fact or because of the fraudulent conduct or representation of (his supposed wife) made by her during her lifetime states a cause of action coming within the equity power of the court of common pleas and the fact that defendant is an administrator does not oust it of such jurisdiction: *Carter v. Birnbaum*, 68 OLA 97, 113 NE(2d) 102.

33.8 Since the amendment to the General Code of Ohio giving courts of probate "plenary power at law and in equity fully to dispose of any matter properly before the court, . . ." the principles which originally guided courts of chancery in the exercise of their equitable jurisdiction over guardians and wards are now equally applicable to probate courts

of Ohio: *Dorfmeier v. Dorfmeier*, 69 OLA 15, 123 NE(2d) 681 (PC).

33.9. General Code § 10501-53 (RC § 2101.24), providing that "The probate court shall have plenary power at law and in equity to fully dispose of any matter properly before the court . . ." adds nothing to the jurisdiction conferred upon such court by const. art. IV, § 8: *Foerster v. Foerster*, 71 OLA 129 (PC).

34. The action of an Ohio probate court in removing for neglect and incompetency an executor under a will during the pendency of an action to contest such will in the common pleas court of the same county, is not subject to review by a federal court: *Pettiford v. George*, 125 F(2d) 144, 22 OO 460.

35. General Code § 10510-10 (RC § 2127.08) and this section were held not unconstitutional as violative of Art. IV, § 8, Constitution of Ohio: *Hatch v. Buckeye State Bldg. &c. Co.*, 32 NP(NS) 297.

36. Where divorce actions are pending in probate courts by reason of the jurisdiction conferred on such courts under former GC § 10494 (repealed, 114 v 320 [475]), prior to January 1, 1932, the date upon which the repeal of said section becomes effective, such jurisdiction continues by reason of GC § 26 (RC § 1.20): 1931 OAG No.3856.

37. Under the provisions of this section a probate court does not have jurisdiction in action on rejected claims, and cannot assert jurisdiction over such claims through a petition for declaratory judgment: *Mainline Const. Co. v. Warren*, 11 OMisc 233, 40 OO(2d) 509, 227 NE(2d) 432 (PC).

45. This statute establishes the law to the effect that the jurisdiction of a probate court once acquired over an estate is exclusive of every other probate court: *State ex rel Black v. White*, 132 OS 58, 7 OO 165, 5 NE(2d) 163; *In re Crist*, 89 OS 33, 105 NE 71; *Children's Home v. Fetter*, 90 OS 110, 106 NE 761; *Addams v. State ex rel Hubbell*, 104 OS 475, 135 NE 667.

46. The probate court of county of decedent's residence, first appointing administrator, acquired jurisdiction exclusive of any other court (former GC § 10498 [see now RC § 2101.24]), and prohibition lies against the second court appointing administrator: *State ex rel Taylor v. Gregory*, 122 OS 512, 172 NE 365.

47. The exclusive jurisdiction of a probate court referred to in this section does not apply when otherwise provided by law: *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

48. By reason of GC § 10501-53 (RC § 2101.24), the probate court has exclusive jurisdiction, unless otherwise provided by law, as to all matters specifically set forth therein and as to all matters pertaining directly to the administration and settlement of estates: *Jacobsen v. Jacobsen*, 164 OS 413, 58 OO 239, 131 NE(2d) 833; *Wolfrum v. Wolfrum*, 2 OS(2d) 237, 31 OO(2d) 501, 208 NE(2d) 537.

50. The probate court has exclusive jurisdiction of an action to rescind a renunciation of intestate succession properly filed with it: *Wolfrum v. Wolfrum*, 2 OS(2d) 237, 31 OO(2d) 501, 208 NE(2d) 537.

51. Under the provisions of this section, the probate court has exclusive jurisdiction as to the allowance of fees to an attorney for his services in the unsuccessful prosecution of an application for the removal of the guardian of an incompetent: *Unger v. Wolfe*, 134 OS 69, 11 OO 483, 15 NE(2d) 955.

52. Where once the probate court acquires jurisdiction over testamentary trustees by virtue of this section, it has exclusive jurisdiction, both on general principles of comity and by virtue of such section: *Morehead v. Central Trust Co.*, 54 App 9, 7 OO 372,

5 NE(2d) 932.

53. In view of the "exclusive" jurisdiction and "plenary" power, both legal and equitable, given the probate court by this section, fraud on the part of a fiduciary must be challenged in that court: *Neidecker v. Neidecker*, 63 App 416, 17 OO 135, 26 NE(2d) 929.

54. By this section the probate court is given, *inter alia*, exclusive jurisdiction over the administration of decedents' estates: *Saluppo v. Santangelo*, 71 App 185, 26 OO 10, 48 NE(2d) 903.

55. Under this section, conferring plenary power upon a probate court to dispose of any matter properly before it, which power is exclusive "unless otherwise provided by law," such court has exclusive jurisdiction to make such an adjudication, irrespective of such a captioned pleading, when the prayer therein asks for a determination not only of the names of the heirs but also of the interest each inherits: *Speidel v. Schaller*, 73 App 141, 28 OO 252, 55 NE(2d) 346.

56. The grant of exclusive jurisdiction to the probate court by this section, is subject to the general limitation found therein, to wit, "such jurisdiction shall be exclusive in the probate court unless otherwise provided by law": *Haag v. Meffley*, 89 App 471, 46 OO 274, 103 NE(2d) 37.

56.1 This section confers on the probate court exclusive jurisdiction in a distinct and separate action limited to and characterized as an action having its sole end and purpose the construction of a will: *Avery v. Avery*, 107 App 199, 8 OO(2d) 91, 157 NE (2d) 917.

56.2 Under this section, the probate court has jurisdiction to entertain an application by the beneficiary of a testamentary trust to direct and control the conduct of testamentary trustees in the payment, or the withholding of payment, of trust income which is payable to such beneficiary under the will of the decedent: *In re Gallagher*, 118 App 477, 25 OO(2d) 394, 195 NE(2d) 601.

56.3 This section, spelling out the jurisdiction of the probate court provides that the court may direct and control the conduct that executors, administrators and other fiduciaries: *In re Ferris*, 19 OO(2d) 428, 182 NE(2d) 78 (PC).

56.4 The probate court has exclusive jurisdiction to direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates: *Border v. Ohio Sav. & Trust Co.*, 55 OO(2d) 410, 26 OMisc 273, 267 NE(2d) 120 (CP).

56.5 The probate court in which a decedent's estate is being administered has jurisdiction to determine what rights, if any, the administratrix of the deceased's estate has in a purported oral lease of land occupied by the deceased at the time of his death: *In re Logan*, 71 OLA 391, 131 NE(2d) 454 (PC).

57. Exclusive jurisdiction to direct and control the conduct of fiduciaries and settle their accounts is conferred upon the probate court by the provisions of this section: *In re Binder*, 25 OLA 472 (CP).

58. This section vests in the probate court exclusive jurisdiction to control the conduct of testamentary trustees and to settle their accounts: *Gregg v. Kent*, 27 OLA 628.

58.1 Where the probate court of one county has lawfully and properly assumed jurisdiction over the estate of a minor and appointed a guardian of such estate, the jurisdiction of such probate court is exclusive and the attempted appointment of another as guardian by the probate court of another county, even at the request of the ward, is null and void: *In re Kollmeyer*, 64 OLA 578.

59. Under the provisions of GC §§ 10508-7 (repealed, 119 v 394 [425], § 11), 10509-112 (RC § 2113.-

14) and this section, the probate court has exclusive jurisdiction to appoint an administrator of the debtor's estate and to hear and determine all questions arising in the case: *United States v. First Nat. Bank*, 54 FSupp 351, 28 OO 445.

60. General Code § 10501-52 (RC § 2101.46) vests in the probate court exclusive jurisdiction of suits, the subject matter of which relates to the conduct of defendant as an executor or administrator in the settlement of his accounts: *Truss v. Clouse*, 23 OLA 610.

61. The fact that the guardian has removed from the state, taking the trust funds with him, does not oust the probate court of its jurisdiction over such guardianship which has already attached: *Netting v. Strickland*, 18 CC 136, 9 CD 841.

62. An application to a probate court in one county for administration, though it be refused, excludes any other probate court from acting: *In re Worthington*, 4 OD(NP) 381.

63. Jurisdiction of an action involving an alleged breach of fiduciary duties is lodged in the probate court, and the federal court was without jurisdiction over the subject matter: *Starr v. Rupp*, 421 F(2d) 999, 53 OO(2d) 169, 25 OMisc 224.

65. Where a widow is administratrix of her husband's estate and daughters have presented claims of varying amounts for loans to their deceased father, an order of an Ohio probate court approving such claims, made after formal request for ruling, notice and public hearing at which oral evidence was introduced, is a decision on the merits within treasury regulations which provide for acceptance in such cases of determinations of local courts as to the amounts of claims, even though the order is by consent: *Goodwin's Estate v. Commissioner*, 51 OO 73, 201 F(2d) 576.

66. A probate judge who ordered sterilization of plaintiff acted wholly without jurisdiction in the matter and hence was not protected by the doctrine of judicial immunity, where there was no set of conditions or circumstances under Ohio law which would permit the probate judge to order plaintiff to submit to sterilization, and where the proceeding which resulted in plaintiff's sterilization commenced on an affidavit filed by the county child welfare board alleging that plaintiff was a feeble minded person: *Wade v. Bethesda Hospital*, 61 OO(2d) 147, 337 FSupp 671.

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Scope and construction

1. This section is to be construed with GC § 10617 (see now RC §§ 2109.26, 2113.06, 2113.07): *Schumacher v. McCallip*, 69 OS 500, 69 NE 986.

2. By virtue of the jurisdiction conferred by RSUS § 2165, upon state courts of record having common law jurisdiction and a seal and a clerk, the probate courts of Ohio were authorized to grant naturalization to aliens, prior to the amendment of said statute in 1906: *Bell v. State*, 7 App 185, 27 OCA 353, 29 CD 48.

3. This section does not confer upon the probate court jurisdiction to supervise or control the administration of a testamentary trust: *Pike v. White*, 22 CC(NS) 61, 33 CD 453 [affirmed, without opinion, May 4, 1915].

4. The court of common pleas is not excluded from determining the ownership of stock standing in the name of an insane person: *Durrett v. Bellevue Brew. Co.*, 21 NP(NS) 161.

5. Former GC §§ 10494, 10495 and 10497 (repealed, 114 v 320 [475]) are valid enactments, and not so inseparably united with the appeal provision of former GC § 10496 (repealed, 114 v 320 [475]), that they are unconstitutional and void: *Geiger v. Geiger*, 117 OS 451, 160 NE 28.

6. Under the provisions of Chap. V, Title IX, Div. VI, of the General Code (GC §§ 10062 to 10084 [RC §§ 1717.01 to 1717.14]), providing for the organization and powers of humane societies, a probate judge, when called upon to approve the appointment of an agent for such society, has discretion to determine not only whether the person named is a proper person for the discharge of such duties, but also whether there is such necessity for the appointment as would justify the payment of the expense out of the public treasury: *State ex rel Coshocton Humane Society v. Ashman*, 90 OS 200, 107 NE 337.

7. For the construction of former statutes conferring jurisdiction upon the probate court in cases of proceedings by a guardian to sell realty of the ward, see *Foresman v. Haag*, 36 OS 102.

Jurisdiction in general

12. The decree of a probate court in Ohio, involving the exercise of the general jurisdiction of a court of equity, must be considered as coram non judge and void. A decree by such court, on a petition addressed solely to its probate jurisdiction, for the cancellation of a creditor's mortgage, was an attempt to exercise chancery jurisdiction, and utterly void. In so far, therefore, as the decree below went beyond the jurisdiction of a probate court, it is to be treated as void, and in so far as it is within its jurisdiction, it is exclusively so, under § 5, Art. III of the constitution of 1802, and not subject to revision, under such constitution, by the supreme court: *Gilliland v. Sellers*, 2 OS 223.

13. The probate court is a court of record in the fullest sense. It is competent to decide its own jurisdiction and to render a final judgment without setting forth on the record the facts and the evidence on which such judgment is rendered. Its records import absolute verity, and its judgments cannot be attacked collaterally: *Shroyer v. Richmond*, 16 OS 455; *McAfee v. Phillips*, 25 OS 374; *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 OS 273, 27 NE 464; *Hoffman v. Fleming*, 66 OS 143, 64 NE 63; *Fisher v. Lanning*, 76 OS 189, 81 NE 182; *Union Sav. Bank &c. Co. v. Western Union Tel. Co.*, 79 OS 89, 86 NE 478, 128 AmSt 675 [vacating on rehearing 78 OS 398, which affirmed, without opinion, *Western Union Tel. Co. v. Union Sav. Bank &c. Co.*, 20 CD 380, which reversed

Smith v. Western Union Tel. Co., 7 NP(NS) 609, 19 OD 537]; Crawford v. Zeigler, 84 OS 224, 95 NE 743; Wilberding v. Miller, 90 OS 28, 106 NE 665 [affirming on rehearing 88 OS 609, which modified and affirmed Miller v. Miller, 15 CC(NS) 481, 25 CD 43, 58 Bull 125 (Ed), which was on appeal from 13 NP(NS) 1]; Children's Home v. Fetter, 90 OS 110, 106 NE 761; Bell v. State, 7 App 185, 27 OCA 353, 29 CD 48; Wolfe v. Fidelity &c. Co., 11 App 58, 30 OCA 593 [affirmed, Fidelity &c. Co. v. Wolfe, 100 OS 332]; Woodward v. Curtis, 19 CC 15, 10 CD 400 [affirmed, without opinion, 63 OS 575]; Robinson v. Dunn, 17 CC(NS) 292, 32 CD 149 [affirmed, without opinion, 87 OS 472]; Reno v. Love, 25 CC(NS) 129, 28 CD 296, 60 Bull 497 (Ed) [affirmed, without opinion, 88 OS 623]; Hunter v. Yocum, 18 NP(NS) 14, 27 OD 31.

14. Where the record shows that the court, after hearing the evidence, found that the defendants therein were duly notified according to law of the time, place and purpose of the application, a defendant on whom no service was had otherwise than by publication will not be permitted, in a collateral proceeding, to draw in question the jurisdiction of the court, by proving that at the commencement, and during the pendency of the proceeding, he was a resident of the state: *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 OS 273, 27 NE 464.

15. The court of common pleas has jurisdiction of an action to set aside or vacate a deed of assignment for benefit of creditors, for fraud or other good cause, and the probate court has no jurisdiction of such action: *Standard Home & Sav. Assn. v. Jones*, 64 OS 147, 59 NE 885; *Collins v. Williamson*, 229 Fed 59, 143 CCA 653 [see also 243 Fed 835, 156 CCA 347].

16. The probate court is one of special and limited jurisdiction: *Estate of Ferguson*, 81 OS 58, 89 NE 1070. For opinion below, see *In re Ferguson*, 6 NP (NS) 417, 18 OD 376; *First Nat. Bank v. Beebe*, 62 OS 41, 56 NE 485; *McLaughlin v. McLaughlin*, 4 OS 508; *Mansfield v. Cole*, 16 NP(NS) 209, 25 OD 231.

16.1. Under Art. IV, § 8, Ohio Constitution, and GC § 10492 the claim for attorney's fees expended by an heir in contesting with partial success a claim against the estate by filing requisition for rejection in the probate court should be presented to the probate court for allowance and cannot be allowed by the common pleas court: *Koelble v. Runyan*, 25 App 426, 158 NE 279.

16.2. Where an assignee for the benefit of creditors obtained from the probate court an order of sale of personal property, and in pursuance of such order has offered the same at public sale, the court of common pleas is without jurisdiction to entertain a suit brought by a purchaser at such sale for the purpose of restraining the assignee from again offering such property for sale when the original order has not been returned to, or the sale confirmed by, the probate court in conformance with GC § 11121: *Kerr Hardware Co. v. Cherrington*, 37 App 395, 174 NE 787.

17. A memorandum made by a probate judge in his court calendar does not constitute a public record, but is in the nature of a private memorandum and is not competent as evidence for the purpose of establishing a judicial finding in a hearing before the successor in office of the judge who made it: *Stark v. Stark*, 17 CC(NS) 398, 24 CD 135 [affirmed, without opinion, 88 OS 586].

18. Jurisdiction is the power to hear and determine a cause: *Sprankle v. Odell*, 22 CC(NS) 480, 33 CD 685 [affirmed, without opinion, *Sprankle v. Sprankle*, 78 OS 404].

19. As to the power of the probate court in a proceeding by an administrator to sell realty of his decedent to pay debts, and that such proceeding is a civil

action, see *Doan v. Biteley*, 49 OS 588, 32 NE 600 [affirming *Biteley v. Doan*, 4 CC 7, 2 CD 388].

20. Whether or not a court whose jurisdiction has first attached may waive jurisdiction in favor of another court, such waiver cannot operate as a bar to the parties: *Addams v. State ex rel Hubbell*, 104 OS 475, 135 NE 667.

21. The fact that an administrator has brought suit in the court of common pleas to foreclose the decedent's equity of redemption in certain realty, does not oust the probate court of its jurisdiction of a proceeding by the administrator of such decedent to sell such realty to pay his debts, especially if such administrator was not made a party in such proceedings in foreclosure: *Bateman v. Morris*, 4 NP 397, 7 OD 287.

Special jurisdiction—wills

26. The probate court has exclusive jurisdiction to take the proof of wills, admit them to probate and record them, together with the testimony. A record thus made in pursuance of these provisions is the only one authorized or required by law, and without such probating and recording, wills are wholly inoperative in Ohio for any purpose whatever: *Brown v. Burdick*, 25 OS 260.

27. A copy of the probate and record of a will duly certified by the probate judge is conclusive of the validity of the will, on the trial of a collateral issue, between a stranger and the devisee respecting the property devised, and is admissible as evidence on the trial of such issue, notwithstanding proceedings to contest it may be pending at the time it is offered and admitted as evidence: *Brown v. Burdick*, 25 OS 260.

28. The probate court has exclusive jurisdiction to take the proof of wills: *Mosier v. Harmon*, 29 OS 222.

29. When the probate court assumes to act under the provisions of a will conferring upon it supervisory powers over the administration of a testamentary trust, its action is that of a mere arbitrator from which error will not lie: *Pike v. White*, 22 CC(NS) 61, 33 CD 453.

Administration

34. The appointment of an administrator de bonis non cannot be attacked collaterally on the ground that his bond was defective in having but one surety thereto: *Slagle v. Entekin*, 44 OS 637, 10 NE 675.

35. An order of the probate court removing an executor is not the subject of review on petition in error in the court of common pleas: *Monger v. Jeffries*, 62 OS 149, 56 NE 654. For opinion below, see *Munger v. Jeffries*, 7 NP 55, 10 OD(NP) 12; see, to the same effect, *Estate of Still*, 15 OS 484; *Brigel v. Starbuck*, 34 OS 380; *Ebersole v. Schiller*, 50 OS 701, 35 NE 793.

36. The court of common pleas has jurisdiction to review an order of the probate court denying the right to administer the estate of a deceased person which GC § 10617 (see now RC §§ 2109.21, 2113.06, 2113.07) confers upon the next of kin, if a suitable person: *Schumacher v. McCallip*, 69 OS 500, 69 NE 986. For opinion below, see *In re Schumacher*, 5 NP 387, 6 OD 125.

37. By the provisions of Art. IV, § 8 of the constitution and this section, plenary jurisdiction is conferred on the probate court to grant and revoke letters testamentary and of administration, to direct and control the conduct and settle the accounts of executors and administrators, and order the distribution of estates: *Trumpler v. Royer*, 95 OS 194, 115 NE 1018 [affirming *Royer v. Trumpler*, 7 App 312, 27 OCA

117, 28 CD 186; for a later report, overruling motion to certify record, see *Trumpler v. Royer*, 16 OLR 108, 63 Bull 223].

38. While exclusive jurisdiction cuts off concurrent jurisdiction, it is not inconsistent with appellate jurisdiction over the same subject matter by another court, and it follows, therefore, that the right, conferred by GC § 11206 (see now RC § 2101.42), of appeal to the common pleas from an order of the probate court removing an executor, is not in conflict with the provision of this section, giving to the probate court exclusive jurisdiction to grant and revoke letters testamentary: *Estate of Sells*, 7 NP(NS) 175, 19 OD 567.

39. When an order is made by the probate court removing an executor, it is directed against him and he is affected by it, and he has the right of appeal therefrom, notwithstanding he is not an heir, devisee or other interested person under the will: *Estate of Sells*, 7 NP(NS) 175, 19 OD 567.

40. There is no authority in the probate court to set aside the final account of an administrator and reopen the estate, where no exception was filed by a party in interest within eight months of the settlement of said account, which is conclusive unless attacked for fraud or corrected by the court upon the filing of a subsequent and correct account. But when a mistake has been made in the former and final account as to the existence of debts against the estate and credits due the administrator, said former and final account may be opened up by the probate court upon the filing of a subsequent account showing the existence of such debts and credits: *Hunter v. Yocum*, 18 NP(NS) 14, 27 OD 31.

41. Under this section no provision is made for prosecuting error to the action of the probate court in granting letters of administration. The only authority for such proceeding in error is to be found under GC § 12241 (see now RC § 2505.24): *Gartner v. Meyer*, 19 NP(NS) 353, 27 OD 198.

42. Since the executor of a deceased administrator has no right to continue the administration of the estate of which such deceased was administrator, no substantial right of such executor is affected by an order of the probate court appointing an administrator *de bonis non*; and accordingly such executor cannot bring error proceedings to reverse such order of the probate court: *Gartner v. Meyer*, 19 NP(NS) 353, 27 OD 198.

43. The appointment of an administratrix cannot be attacked collaterally for failure to give bond: *Mitchell v. Albright*, 10 DecRep 301, 20 Bull 101.

—Estates of decedents

48. Whether the adjudication of the probate court that decedent was domiciled within its jurisdiction was conclusive was avoided in *Hoffman v. Fleming*, 66 OS 143, 64 NE 63 [for holding below that such adjudication was void, see *Fleming v. Hoffman*, 8 NP 86, 10 OD 560], the court holding that the sureties on the executor's bond were estopped to deny jurisdiction.

49. It is final where the domicile of decedent is claimed to be without the state: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming, on rehearing, 88 OS 609, which modified, in memorandum opinion, *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43, 58 Bull 125 (Ed), on appeal from 13 NP(NS) 1]; *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

50. It is final where his domicile is claimed to be in another county in the same state: *State ex rel Barbee v. Allen*, 96 OS 10, 106 NE 665.

51. Such judgment is final in case of an application by the executor to the probate court for instructions

as to his duties: *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

52. A court of another state is not bound by an adjudication of a court of Ohio as to the domicile of intestate: *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

53. It is said that a probate court has, by the provisions of Art. IV, § 8 of the constitution of Ohio, such jurisdiction in probate and testamentary matters that it is competent to decide upon its own jurisdiction: *State ex rel Emery-Thompson Mach. &c. Co. v. Jones*, 96 OS 506, 118 NE 115.

54. Power to sell lands, given by will to an executor, cannot be executed by administrator with the will annexed: *Wills v. Cowper*, 2 O 124.

55. Under the second section of the act of March 14, 1853 (51 v 167), the probate court had power, on final settlement with an administrator, to order distribution of moneys in his hands to the persons entitled thereto, and, for this purpose, to determine every disputed question necessary to ascertain the amount due, and enforce payment by execution, but that the court by such order exhausted its power, and it could not entertain a petition to enforce the collection as a debt against the estate: *McLaughlin v. McLaughlin*, 4 OS 508.

56. "It has been settled, in *Swearingen v. Morris*, 14 OS 432, and *Cox v. John*, 32 OS 532, that the only order of distribution here authorized to be made is a general order to the executor or administrator to distribute the funds remaining in his hands according to law. It thus appears that an order designating or naming the distributees is not authorized by law, and, therefore, would not debar anyone interested in the distribution from asserting his or her interest therein": *Armstrong v. Grandin*, 39 OS 368; *Estate of Ullman*, 12 CC(NS) 340, 21 CD 376; *Skardon v. Robinson*, 8 OLR 412, 55 Bull 373.

57. The proceeding of an executor or administrator to sell the real estate of the deceased, to pay the debts and cost of administering his estate, whether prosecuted in the court of common pleas or the probate court, is a civil action, to which any person may be made a defendant, who has or claims an interest in the land, or who is a necessary party to a complete determination of any question involved in the action. The probate court has jurisdiction to try any question of fact arising in such action therein prosecuted, or afford the parties a trial by jury when the nature of the issues entitle them to a jury trial, or render it appropriate: *Doan v. Biteley*, 49 OS 588, 32 NE 600.

58. If the brothers and a sister of a trustee whose shares had been set off in severalty, should permit the latter to manage the portion set off to them, make contracts from time to time for the sale of parcels thereof and collect the purchase money, and suffer this course of business to continue for more than twenty years without calling for an accounting in the probate court, his authority, in favor of the sureties on his executor's bond, should be regarded as derived, not from the will of the testator, but from his brothers and sister, and they can require him to account only in a court of general jurisdiction as their agent, and not in the probate court as executor or trustee under the will: *Culver v. Culver*, 58 OS 172, 50 NE 505.

59. While the probate court has power to control the conduct of fiduciaries in the administration of estates, the thing complained of must be the result of an act committed or omitted by the fiduciary, and not of an act done by the complaining party or in which she participated of her own free will: In re *Schubert*, 32 NP(NS) 169.

60. Where the administrator of an estate is re-

quired by the probate court to file an account of the expenses of his administration, preparatory to his stating a final account, and does so, which expense account includes an amount due his attorney for services rendered in the settlement of the estate, and for necessary expenses paid by him in discharge of his duties as such attorney, and said account, on hearing by that court, is approved and allowed, and the administrator is ordered by the court to pay to said attorney the sum so found due him out of the assets of the estate in his hands for distribution, a failure to comply with such order is a breach of the administration bond for which the surety thereon is liable: *Smith v. Rhodes*, 68 OS 500, 68 NE 7 [distinguishing *Thomas v. Moore*, 52 OS 200].

61. It is no defense to the action on the administration bond for the surety to plead and prove that exceptions to the account of the administrator, filed by a creditor of the estate, had been withdrawn by him in consideration of the part payment of his claim by the administrator: *Smith v. Rhodes*, 68 OS 500, 68 NE 7.

62. The common pleas court is without jurisdiction over an action brought by an executor against his coexecutor for an accounting. Such an issue must be presented to and finally determined by the probate court: *Loney v. Walkey*, 8 App 256, 27 OCA 543, 29 CD 418.

62.1. By the mere probating of a will and the appointment of an executor, jurisdiction of the probate court over the sale of the real estate of the decedent is not acquired. Such jurisdiction is not acquired until the executor has filed a petition in that court to sell real estate to pay debts, and the interested parties have entered their appearance therein, or process has been issued upon said petition which is later served according to law: *Home Owners' Loan Corp. v. Roth*, 24 OLA 693.

62.2. Both the probate court and the court of common pleas have subject matter jurisdiction of an action for specific performance of a contract to sell land belonging to a decedent's estate: *Fellers v. Belau*, 87 OLA 54, 178 NE(2d) 530.

63. Whether an executor would be charged a second time with funds distributed without an order of the court, depends on whether or not the probate court at the time the distribution was made, on a proper application, would have ordered such distribution, or would have approved of such distribution in an account filed by the executor: *In re Thompson*, 23 NP(NS) 544.

64. The jurisdiction of the probate court over the administration of the estates of decedents is exclusive; and the federal courts cannot take jurisdiction of such proceedings: *Puder v. Agler*, 242 Fed 95, 15 OLR 433, 62 Bull 410.

65. Since Art. IV, § 8 of the constitution of Ohio confers exclusive jurisdiction upon the probate court over all questions of administering the estates of decedents, former decisions as to the power of a court of equity in the administration of estates of decedents are of no weight: *Puder v. Agler*, 242 Fed 95, 15 OLR 433, 62 Bull 410.

66. An action to sell realty has all the essentials of a civil action, and may be brought in either the court of common pleas or the probate court, and in either court in which the suit may be brought, or on appeal, the rights of the several parties in the subject matter may be determined. But the probate court having exclusive jurisdiction to settle the accounts of executors and administrators, it is incompetent, where such a suit is brought in the common pleas court, for that court to attempt to fix the costs and expenses of administration: *Tidd v. Bloch*, 4 CC(NS) 216, 16 CD 113.

67. The probate court has jurisdiction under this

section to apportion the statutory commissions between two or more executors in accordance with the services performed by each, where the accounts between the estate, on the one hand, and the executors on the other, have not been settled and determined: *Meyers v. Hopkins*, 7 CC(NS) 240, 18 CD 208.

68. A probate court has jurisdiction of an action to compel an executor to pay legacies before the expiration of the time within which creditors may present their claims: *Estate of Isherwood*, 7 NP 332, 5 OD 143 [affirmed in *Isherwood v. Isherwood*, 16 CC 279, 8 CD 409, which was affirmed, without opinion, in 57 OS 660].

69. The probate court has jurisdiction to determine ownership of stock inventoried as assets of intestate's estate: *Brown v. Southern Ohio Sav. Bank & Co.*, 22 App 324, 153 NE 864.

70. Where the evidence shows clearly that a deed executed by decedent was intended as security for a loan, the probate court has jurisdiction to determine the rights of parties, and have the conveyed property sold to pay debts of deceased: *Helmhold v. Helmhold*, 25 App 32, 158 NE 499.

—Lack of jurisdiction

75. The probate court has no authority to cancel an election, previously made and entered upon his journal, for an alleged mistake of the party so electing, as to the provisions and effect of the will. Such election, when made and recorded, can be vacated only on petition of the court of common pleas, or other court having general equity jurisdiction: *Davis v. Davis*, 11 OS 386.

76. The probate court has no jurisdiction, in making an order of distribution under this section, to determine the persons to whom distribution is to be made, and the amount going to each, but its power is exhausted in that particular when, upon final settlement of the account of the executor or administrator, it enters a general order of distribution: *First Nat. Bank v. Beebe*, 62 OS 41, 56 NE 485. See *Brown v. Routzahn*, 58 F(2d) 329.

77. General Code § 10832 (see now RC § 2113.37) is intended as a guide to the court and to administrators in dealing with that subject, and such court is without jurisdiction, in advance of the settlement of the estate, to entertain an application by the administrator to fix a sum as a maximum to be expended by such administrator for that purpose, and order the administrator, in the event that such monument is not procured by the widow or next of kin, to erect such monument and charge the expense to the estate: *Estate of Ferguson*, 81 OS 58, 89 NE 1070. For opinion below, see *In re Ferguson*, 6 NP(NS) 417, 18 OD 376.

78. After the expiration of the eight months allowed by GC § 10834 (see now RC § 2109.35) for filing exceptions when the account is settled in the absence of a person interested and without actual notice to him, the judgment of a probate court settling the final account of an executor or an administrator becomes absolute and conclusive and cannot be attacked except for fraud of the prevailing party: *Crawford v. Zeigler*, 84 OS 224, 95 NE 743.

78.1. The rule that the judgments of the probate court cannot be set aside, collaterally, except for fraud, applies to judgments approving accounts of executors: *Truss v. Clouse*, 23 OLA 610.

79. Jurisdiction cannot be conferred upon the probate court by will or any other private appointment, or by consent, empowering it to act as a court in supervising the administration of a testamentary trust: *Pike v. White*, 22 CC(NS) 61, 33 CD 453.

—Guardianships

84. The probate courts of this state have power to

appoint guardians for deaf and dumb persons of full age, whom they find to be incapable of managing their affairs, without submitting the question of incapacity to a jury of any kind: *Shroyer v. Richmond*, 16 OS 455.

85. A suit in equity, on a guardian's bond, to compel an account cannot be maintained without a showing that the powers and jurisdiction of the probate court are ineffectual to secure such accounting: *Newton v. Hammond*, 38 OS 430, approved; *Gorman v. Taylor*, 43 OS 86, 1 NE 227.

86. The jurisdiction of the probate court over the settlement of the accounts of guardians is exclusive: *Newton v. Hammond*, 38 OS 430; *Gorman v. Taylor*, 43 OS 86, 1 NE 227.

87. Exclusive original jurisdiction to remove a guardian being, by this section, vested in the probate court, the court of common pleas is without original jurisdiction to entertain an application to remove a guardian: *Guardianship of Oliver*, 77 OS 474, 83 NE 795.

88. Inasmuch as the probate court has exclusive jurisdiction to settle accounts of guardians, the common pleas court can acquire no jurisdiction on appeal so long as any item of such an account remains undetermined: *Gregg v. Klein*, 12 CC(NS) 264, 22 CD 698.

89. A testamentary guardian of a minor, named by will, pursuant to the provisions of GC § 10930 (see now RC § 2111.12), is without authority to act as such guardian until he has been appointed guardian by the probate court having jurisdiction to make such appointment: *Henicle v. Flack*, 3 App 444, 23 CC (NS) 447.

90. The probate court has jurisdiction to entertain the application of a guardian to enter into a trust agreement with minor children and to exercise that jurisdiction to the full extent authorized or referable to the authority granted in this section, notwithstanding the irregularity in failing to appoint a guardian ad litem for the minors and to have an answer filed in their behalf: *Pence v. Pence*, 36 OLA 369, 43 NE(2d) 924 (App).

91. No cause of action accrues in favor of a ward on the bond of his guardian until final settlement and adjudication of the account of the guardian in the probate court: *Wegner v. Wiltsie*, 3 CC(NS) 410, 13 CD 308.

92. The death of the guardian without filing an account, and leaving no books of account or memorandum from which his indebtedness to the estate can be ascertained, does not give the common pleas court jurisdiction on the bond of the guardian to compel an accounting and payment to the ward of the amount found due him. An allegation that under such circumstances the jurisdiction of the probate court is ineffectual for the purpose of obtaining an accounting, states a conclusion of law and not of fact to be taken as admitted on demurrer: *Wegner v. Wiltsie*, 3 CC (NS) 410, 13 CD 308.

93. The probate court has no jurisdiction to find one an intertemperate and appoint a guardian for him, under GC § 11011 (see now RC §§ 2109.04, 2111.01, 2111.02, 2111.13, 2111.14), where the application for the appointment of a guardian alleges imbecility and is made under GC § 10989 (see now RC §§ 2111.01, 2111.02, 2111.04): *Urban v. Urban*, 21 CC(NS) 458, 33 CD 387.

94. An order of the probate court appointing a stranger guardian of a minor child is a final order affecting a substantial right of its father and is reviewable on error: *Hare v. Sears*, 4 NP(NS) 566, 17 OD 591.

95. The power of the probate court to appoint and to remove guardians is exclusive and is not subject to

collateral attack: *State ex rel Fisher v. Madden*, 12 OD(NP) 83.

—Marriage licenses

101. A common law marriage is valid in Ohio: *Umbehauer v. Labus*, 85 OS 238, 97 NE 832.

—Appropriation of property

105. The statute regulating proceedings instituted in the probate court by municipal corporations to appropriate real property for an authorized public use, confers on that court power to decide when the service on the defendant is complete, and the parties are in court, and its decision on these questions cannot be collaterally inquired into: *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 OS 273, 27 NE 464.

—Insolvency

110. The superior court has no jurisdiction to hear the question of attorney fees for services rendered the assignee of an insolvent estate. The exclusive jurisdiction is in the probate court: *Kittredge v. Miller*, 12 CC 128, 5 CD 391 [affirmed, without opinion, *Miller v. Kittredge*, 56 OS 779; for earlier opinion in same case, see *Kittredge v. Miller*, 10 DecRep 166, 19 Bull 119].

111. An assignment will not transfer the jurisdiction to the court of insolvency where a suit to foreclose is pending in the court of common pleas: *Omwake v. Jackson*, 15 CC 615, 8 CD 235 [on appeal from 5 NP 119, 7 OD 238].

§ 2101.25 Optional jurisdiction of probate judge.

When any action for the appropriation of property or any appeal in a road case, in a sewer district case, or in any county water supply system case is filed in the probate court, the judge may certify such cause to the court of common pleas of the county, together with all the papers filed therein, whereupon the clerk of the court of common pleas shall file said papers and enter said cause on the docket. Thereupon the court of common pleas shall have jurisdiction to hear, determine, and make a record of said cause, as if commenced in such court. The court of common pleas, upon said case being docketed in that court, shall advance the same for trial at the earliest date permitted, on application by any party to said case.

HISTORY: GC § 10501-54; 114 v 320 (335); 127 v 36, § 1. Eff 9-4-57.

Appeal in county road cases, RC § 5563.03 et seq.

Comment

Appropriation suits and road cases are not removed from the probate court prior to this section as originally enacted on Jan. 1, 1932, but the present concurrent jurisdiction is retained, coupled with the right of the probate judge to certify the case to the common pleas court.

Forms

1 A&H Probate FORM 2101.25a et seq.

1 A&H Probate FORM 5563.05a et seq: Road appeals.

Outline of Procedure

Appropriation of property. Leyshon No. 47, A&H No. 18

Research Aids

Appropriation of property:

O-Jur2d: Highways and streets §§ 142, 144, 146

Jurisdiction:

O-Jur2d: Eminent Domain § 206

Law Reviews

Recent amendments affecting probate practice.
Richard F. Sater. 18 OSLJ 464.

CASE NOTES AND OAG

1. Where the probate court in which decedent's estate is being administered first obtains jurisdiction of all the necessary parties and the subject of the action it may, having plenary power at law and in equity to dispose of any matter properly before it, dispose of an action for specific performance to convey real property based upon a contract between plaintiff and decedent; or, if in its opinion a proper case of doctrine forum non conveniens is made, return the cause of the court of common pleas of the county wherein the land in question is situated in a manner similar to that provided for certain causes in this section: *Fellers v. Belau*, 87 OLA 54, 178 NE(2d) 530 (CP).

§§ 2101.26 to 2101.29 Repealed,
136 v S 145, § 2 [GC §§ 10501-21, -24, -25; 114 v 320; 116 v 385; 119 v 394; 120 v 649; 121 v 270; 122 v 21; 125 v 903]. Eff 1-1-76.

See provisions § 3 of SB 145 (136 v___) following RC § 2101.01.

For text of RC §§ 2101.26 to 2101.29 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

§ 2101.30 Jury; drawing.

Whenever a jury is required in the probate court, the probate judge shall forthwith notify the commissioners of jurors, who shall cause to be drawn from the jury wheel, or to be drawn by use of the automation data processing equipment and procedures described in section 2313.07 of the Revised Code, the names of sixteen persons as jurors. Additional names may be drawn if required. The clerk of the court of common pleas or one of his deputies shall make a list of such names in the order drawn and certify it to the probate court, and such court shall issue a venire commanding the persons whose names were drawn to appear on the day and at the hour set for trial. The probate court shall deliver the venire to the sheriff, who shall serve it within five days thereafter and make prompt return of such service.

HISTORY: GC § 10501-30; 114 v 320; 115 v 389; 131 v 616 (Eff 11-1-65); 133 v H 424. Eff 11-25-69.

Comment

Even though a number of matters not of a probate character have been removed from the probate court, a jury will sometimes be required in the probate court. The above section sets up a uniform procedure for obtaining a jury and is based on former GC § 1201-1. See also RC § 2313.37 with reference to alternate juror, Ohio jury code, RC § 2313.01 et seq.

Comparative Legislation

Jury:

Cal.—Probate Code, § 1230

Ill.—Rev Stat, ch 78, § 8

Ky.—KRS, § 29.135

Mich.—MCLA, § 701.45d

N.Y.—SCPA, § 502

Pa.—Purdon's Stat, Tit. 20, § 778

Forms

1 A&H Probate FORM 2101.30a et seq.

Outline of Procedure

Jury. Leyshon No. 81; A&H No. 56

Research Aids

Jury selection:

O-Jur2d: Jury §§ 45-67

Am-Jur2d: Jury §§ 136-188

§ 2101.31 Determination of questions of fact. (GC § 10501-32)

All questions of fact shall be determined by the probate judge, unless he orders them tried by a jury, or referred, as provided in sections 2101.06 and 2101.07, and sections 2315.26 to 2315.37, inclusive, of the Revised Code.

HISTORY: GC § 10501-32; 114 v 320 (328); 125 v 903 (962). Eff 10-1-53.

Comment

At the beginning of the section the words "Unless otherwise provided by law," which appeared in GC § 10501-32, have been omitted.

Research Aids

Findings:

O-Jur2d: Judgments § 62; Trial §§ 398-404.

CASE NOTES AND OAG

1. Where an action for declaratory judgment is properly instituted in the probate court, this section is applicable, and the questions of fact arising in the trial of the issues shall be determined by the probate judge unless upon his own initiative or upon request of either party the probate judge shall, in the exercise of his discretion, order such questions of fact to be tried by a jury or referred as otherwise authorized in the statutes: *Renee v. Sanders*, 160 OS 279, 52 OO 175, 116 NE(2d) 420.

§ 2101.32 Rules and procedure of court of common pleas to govern; power to award and tax costs. (GC § 10501-22)

The probate judge shall have the powers, perform the duties, and be governed by the rules and regulations provided for the courts of common pleas and the judges thereof in vacation. The sections of the Revised Code governing civil proceedings in the court of common pleas shall govern like proceedings in the probate court when there is no provision on the subject in Chapters 2101. to 2131., inclusive, of the Revised Code.

In all actions or proceedings had in the probate court, whether ex parte or adversary, the court

may award, tax, and apportion costs between the parties, on the same or adverse sides.

HISTORY: GC § 10501-22; 114 v 320 (326); 119 v 394 (395), § 1. Eff 10-1-53. For an analogous section, see former GC § 11212.

Comment

The revision made the following changes in this section: in the sixth line after the word "pleas" the words "so far as applicable" have been omitted, and at the beginning of the second paragraph the words "Unless it is expressly otherwise provided by law" have been omitted.

Outline of Procedure

Action, in general. Leyshon No. 32; A&H No. 3

Research Aids

Costs:

O-Jur2d: Costs §§ 17, 33

Findings of fact and law:

O-Jur2d: Trial § 398

Powers and duties of probate judge:

O-Jur2d: § 38

Three-fourths jury verdict:

O-Jur2d: Trial § 325

Vacation and modification of judgment:

O-Jur2d: Judgments § 532

Law Reviews

Sale of real estate, construction of wills, and inheritance taxes discussed. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 8) 121.

CASE NOTES AND OAG

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1. Exceptions to the accounts of a testamentary trustee having been sustained, and money judgment having been rendered against him by the probate court, the judgment remaining unpaid and not collectible, the surety on his official bond may be made a party and judgment may be rendered against it by the probate court in the same action; GC § 11652 (RC § 2325.22) and this section authorize such procedure and judgment: In re Johnson, 66 App 433, 20 OO 392, 34 NE(2d) 1017.

2. For history of this section, see In re Harmon, 87 App 451, 43 OO 223, 96 NE(2d) 34.

3. This section provides for application of the code of civil procedure to proceedings in the probate court only when there is no provision in the probate code: Smith v. Smith, 8 OO 29 (App).

4. Former GC § 11212 (see now RC § 2101.32), providing that the law governing civil proceedings in the common pleas court, so far as applicable, shall govern in like proceedings in the probate court, does not furnish an additional remedy, since the probate code contains an adequate remedy and procedure: Reitz v. Smith, 56 App 72, 9 OO 233, 10 NE(2d) 150.

4.1 This section is a procedural provision and places the probate court by reference in the same position as the common pleas court for the purposes of appeal. In re Davis, 107 App 52, 55, 7 OO(2d) 377, 156 NE(2d) 321.

5. The perfecting of an appeal from the common

pleas court to the court of appeals merely suspends the judgment of the common pleas court, and the same rules of law are applicable to the perfecting of appeals from the probate court to the common pleas court: Jones v. Whaley, 10 OO 87 (CP).

6. This section secures the right of trial by jury in the probate court: Lawrence R. Co. v. O'Harra, 48 OS 343, 28 NE 175 [see also Bogard v. Railway Co., 64 OS 564, 61 NE 1140]; Doan v. Biteley, 49 OS 588, 32 NE 600, affirming Biteley v. Doan, 4 CC 7, 2 CD 388 [see also Levy v. Ginn, 61 OS 644, 57 NE 1133]; Woodward v. Curtis, 19 CC 15, 10 CD 400 [affirmed, without opinion, 63 OS 575, 60 NE 1135]; Toledo, A., A. & C. R. Co. v. Toledo & C. R. Co., 6 CC 521, 3 CD 566; Rote v. Stratton, 2 NP 27, 3 OD 156; Israel v. Zanesville R. Co., 10 DecRep 225, 19 Bull 258.

7. The probate court has authority under this section and GC § 11486 (RC § 2315.36) to allow referees' fees and charge them as costs against the successful party only in an action against an executor on a claim against an estate, notwithstanding the provisions in GC § 10509-117 (RC § 2117.09), relating to taxing of costs in references the same as in arbitration under a rule of the common pleas court, are inoperative due to the repeal of all statutes giving the common pleas court authority to tax costs in such cases: Williard v. Kilbourne, 34 OLA 491.

8. The purpose of the amendment to this section was to confer upon the probate court the same general power to award and tax costs and apportion them between the parties as is conferred upon courts of common pleas by GC § 11628 (RC § 2323.44): Holmes v. Hrobon, 93 App 1, 50 OO 178, 61 OLA 113, 103 NE(2d) 845 [Mod. 158 OS 508; for apportionment in a later related proceeding see 116 App 366, 22 OO(2d) 200].

9. If the parties are entitled to a jury in a proceeding in the probate court, the court has full power to impanel a jury: Wiler v. Logan Natural Gas & C. Co., 6 CC(NS) 206, 17 CD 261.

10. This section makes the provisions of GC § 11455 (see now RC § 2315.09), to the effect that a verdict may be rendered by the concurrence of three-fourths of the jury, applicable to proceedings in the probate court: Smith v. Craig, 9 App 316, 29 OCA 236, 30 CD 544, 63 Bull 399 (Ed); Baird v. Dietrick, 20 NP (NS) 209, 28 OD 110 [affirmed, 8 App 198, 28 OCA 257; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

11. So far as applicable, the provisions of law governing civil proceedings in the court of common pleas govern proceedings in the probate court in the absence of any particular procedural provisions in the probate code: In re Smith, 67 OLA 409, 120 NE(2d) 632 (PC).

12. An action in the probate court under GC § 10509-105 (RC § 2117.01), for the allowance of a claim of an administrator and his wife against his decedent's estate for services rendered under a written contract, involves an ordinary contractual action for services rendered and as such, except for the fact that the claimant is an administrator, would normally be brought in the court of common pleas and thus is a "like proceeding" within the contemplation of this section: In re Smith, 67 OLA 409, 120 NE(2d) 632 (PC).

13. By virtue of RC §§ 2101.32 and 2323.25 the revised code provisions on rules of practice for the court of common pleas govern the probate court where there are no specific statutes in the code in the chapters directly applying to the probate court: In re Howell, 74 OLA 217, 140 NE(2d) 347 (JC).

§ 2101.33 Vacation and modification of judgments.

The probate court has the same power as the court of common pleas to vacate or modify its orders or judgments.

HISTORY: GC §§ 10501-17, 10501-18; 114 v 320; 125 v 903 (962) (EF 10-1-53); 136 v H 390. EF 8-6-76.

See also former GC §§ 11631, 11643.

Cross-References to Related Sections

See RC § 2153.15 which refers to this section.

Outline of Procedure

Vacation of a judgment. Leyshon No. 108; A&H No. 88

Research Aids

Terms:

O-Jur2d: Courts § 86

Vacation or modification:

O-Jur2d: Judgments § 532; Fiduciaries § 208; Infants § 68; Insane § 49; Wills §§ 270, 271

Am-Jur2d: Wills §§ 1063, 1064; Judgments § 770 et seq.

Law Review

See explanatory article in 4 OBar 127.

ALR

Power and duty of probate court to set aside admission of forged instrument to probate as a will. 115 ALR 473.

Failure of trustee to disclose self-dealing as ground for vacating order or decree settling account. 132 ALR 1522.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance. 15 ALR2d 610.

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1. General Code § 10501-17 (RC § 2101.33) deals merely with the vacation or modification of judgments. It does not purport to give the probate court any broad equity powers beyond that: *Pengelly v. Thomas*, 151 OS 51, 38 OO 519, 84 NE(2d) 265.

1.1 Under GC § 10501-17 (RC § 2101.33) the probate court has the same power at law and in equity to vacate or modify its orders and judgments after term as the court of common pleas, and such power is not limited to the statutory grounds enumerated in GC § 11631 (RC § 2325.01), but includes equitable grounds as well: *In re Gray*, 162 OS 384, 55 OO 224, 123 NE(2d) 408.

1.2. Where, in the administration of an estate, a motion to vacate and set aside an order previously entered approving and confirming an inventory filed

therein is timely filed by the surviving spouse, although not within one month after such order approving such inventory, and is subsequently found to be well taken, and an order is thereupon entered that such previously approved inventory be modified by the deletion therefrom of certain personal property and by increasing the amount of the widow's year's allowance, such order of modification does not constitute a vacation of the previous order of approval so as to reinstate in such surviving spouse the right of election to purchase the mansion house for the one-month period, provided in RC § 2113.38, from the date of such order of modification: *In re Hrabnicky*, 167 OS 507, 5 OO(2d) 181, 149 NE(2d) 909.

1.3. Error in the application of the law to the facts in the rendition of a judgment is judicial error and is a matter which must be raised by appeal and is not an irregularity in obtaining the judgment within the meaning of RC § 2325.01, relating to the vacation of judgments after term: *Bartlett v. Bartlett*, 176 OS 299, 27 OO(2d) 206, 199 NE(2d) 586.

2. A probate court can, by virtue of GC § 10501-17 (RC § 2101.33), vacate or modify its orders and judgments the same as a common pleas court, and as its jurisdiction in that respect is not limited either by the constitution or legislative enactment to statutory grounds only, such jurisdiction includes equitable grounds as well: *Abicht v. O'Donnell*, 52 App 513, 6 OO 462, 3 NE(2d) 993.

3. The grant of a limited equity jurisdiction to the probate court, under the provisions of GC §§ 10501-53 and 10501-17, does not oust the common pleas court from its original equity jurisdiction to declare void the judgments and orders of the probate court for lack of jurisdiction: *Young v. Guella*, 67 App 11, 21 OO 66, 35 NE(2d) 997; *Armstrong v. Brufach*, 74 OLA 370, 136 NE(2d) 463.

4. The probate court has the same jurisdiction, at law and in equity, to vacate or modify its own orders and judgments as has the court of common pleas: *Hooffstetter v. Adams*, 67 App 21, 21 OO 70, 35 NE(2d) 896.

4.1. Power of probate court to vacate previously allowed claim against estate: *In re Blue*, 67 App 37, 32 NE(2d) 499 [reported subnom *Amrine v. Gabriel*, at 14 OO 447].

5. By GC § 10501-17 (RC § 2101.33) the jurisdiction of the probate court to modify or vacate its orders or judgments is limited by the same rules that govern the common pleas courts, and by GC § 10501-18 (RC § 2101.33) the year is divided into three terms of four months each, for the purpose of modifying or vacating its orders or judgments: *In re Shafer*, 74 App 33, 29 OO 233, 56 NE(2d) 926.

5.1. The probate court, in determining the amount of inheritance tax, acts in a judicial as well as an administrative capacity, has the same power in respect thereto that it has in respect to other matters rightfully lodged with it, and may, in accordance with such power, set aside its determination based upon a mistaken appraisal and make a second determination based upon the true appraisal: *In re Seidensticker*, 75 App 73, 30 OO 381, 60 NE(2d) 74.

6. The probate court has the same powers as the common pleas court to vacate or modify its judgments during the same term of court in which the judgment is rendered: *In re Kleinhenn*, 76 App 122, 31 OO 429, 63 NE(2d) 315.

7. This section confers on the probate court jurisdiction to vacate a confirmation of a final account in a decedent's estate: *Pengelly v. Thomas*, 79 App 53, 34 OO 449, 65 NE(2d) 897.

8. This section is not violative of any provision of the constitution, and applies to a proceeding to vacate

a confirmation of a final account in a decedent's estate, even though such confirmation was made prior to the effective date of such section: *Pengelly v. Thomas*, 79 App 53, 34 OO 449, 65 NE(2d) 897.

8.1. An executor does not lose his right to have a final order determining inheritance taxes modified for a mistake of fact in erroneously listing assets for taxation by a failure to file exceptions to the interlocutory order determining inheritance taxes: *In re Beckman*, 91 App 42, 48 OO 236, 107 NE(2d) 538.

8.2. Probate court's power to vacate decree of adoption: *In re Sladky*, 109 App 120, 10 OO(2d) 304, 161 NE(2d) 554.

8.3. The probate court is without jurisdiction to entertain an application to vacate the probate of a will, filed subsequent to the certification of such will to the court of common pleas for adjudication as to its validity: *State ex rel Cleveland Trust Co. v. Probate court*, 113 App 1, 12 OO(2d) 307. [affirmed 172 OS 1, 15 OO(2d) 43, 173 NE(2d) 100.]

8.4 The probate court has the power to modify a previously-rendered order, after term, on equitable grounds as well as those grounds enumerated by statute: *In re Craig*, 5 OApp(2d) 137, 34 OO(2d) 245, 214 NE(2d) 122.

9. An order of a probate court making an election for an incompetent surviving spouse under RC § 2107.45, is subject to the control of the court and may be vacated under RC § 2101.33 within term time: *In re Strauch*, 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95.

10. The common pleas court may, in the exercise of a sound discretion, vacate or modify its orders during term, and under GC § 10501-17 (RC § 2101.33), the probate court is given the same power as a common pleas court to vacate or modify its orders. The probate court has the power to vacate and modify its order during term in the exercise of a sound discretion: *In re Wampler*, 60 OLA 593, 103 NE(2d) 303 (App).

11. The court has no power to "correct the record" (by vacating, four years later, the appointment of a guardian) where the record shows on its face that it exemplifies exactly what the court intended by its judgment to do: *In re Gerstenek*, 76 OLA 280, 139 NE(2d) 64.

§ 2101.34 Judgments by confession. (GC § 10501-31)

If the judges of the court of common pleas are absent from the county or are under a disability, the probate judge of the county may enter judgments by confession in cases pending in the court of common pleas of his county.

HISTORY: GC § 10501-31; 114 v 320 (328). **EFF** 10-1-53.

Comment

The need for this section arises primarily in counties where the common pleas judge is assigned for weeks at a time to another county. In his absence litigants are compelled to go for cognovit judgments to an adjoining county where court is in session. In emergency cases a lien of real value may be lost and the client's rights jeopardized.

This section merely permits the probate judge to enter judgments by confession in the place of a common pleas judge who is absent or under disability. All clerical duties would remain in the common pleas court and the probate court would not be burdened with added detail.

Comparative Legislation

Judgment by confession:

Ill.—Rev Stat, ch. 110, § 50

Ind.—Burns' Stat, § 34-1-28-1

Ky.—KRS, § 454.090

Forms

1 A&H Probate FORM 2101.34a et seq.

Research Aids

Judgments by confession:

O-Jur2d: Judgments § 789

Jurisdiction of probate court:

O-Jur2d: Courts § 192

Law Review

See explanatory article in 4 OBar 127.

CASE NOTES AND OAG

1. There is a precedent for this procedure in GC § 11878 (RC § 2727.03) which has been held constitutional: *Phelon v. Pittsburgh, A. & W. R. Co.*, 5 CC 545, 3 CD 267.

§ 2101.35 Execution. (GC § 10501-29)

Orders for the payment of money may be enforced as judgments in the court of common pleas. Such execution shall be directed to the sheriff, or, in the sheriff's absence or disability, to the coroner.

HISTORY: GC § 10501-29; 114 v 320 (328). **EFF** 10-1-53. For an analogous section, see former GC § 1599.

Outline of Procedure

Execution. *Leyshon No. 73; A&H No. 47*

Research Aids

Creditor's suits:

O-Jur2d: Creditor's suits § 10

Enforcement by execution:

O-Jur2d: Executions §§ 40, 56, 76; Executors and Administrators § 640

Am-Jur2d: Executions §§ 1, 5, 9, 35, 50 and 59

Sales on execution by deputy sheriff or coroner:

O-Jur2d: Coroners § 11

Am-Jur2d: Executions §§ 303 et seq.

CASE NOTES AND OAG

1. When an execution issued against a party is not warranted by a judgment of the probate court, ample remedy is supplied the aggrieved party by application to the court to set aside the writ, or by proceedings in injunction. Prohibition will not issue: *State ex rel Voight v. Lueders*, 101 OS 211, 128 NE 70.

2. Mandamus will lie to compel a probate court to enter on the journal its judgment rendered on the application of a party to set aside a writ of execution which was wrongfully issued upon a valid judgment: *State ex rel Voight v. Lueders*, 101 OS 256, 128 NE 72.

3. An order made by the probate court, upon the settlement of the accounts of an administrator, is an order which may be enforced by a suit in the nature of a creditor's bill: *Warner v. York*, 1 CC(NS) 73, 15 CD 310 [for another opinion in a suit between the same parties growing out of same transaction, see 16 CC(NS) 369, 31 CD 543].

4. The probate court has general power to issue executions on its judgments, subject to special and exclusive methods of enforcing its judgments that may be provided by statute: 1920 OAG vol.1, p.700.

§ 2101.36 “Probate judge” includes court of common pleas in lunacy proceedings. (GC § 10501-14)

“Probate judge” in the statutes relating to lunacy matters includes the court of common pleas of such county, when it is made to appear to the judge thereof that the probate judge is incapacitated from sitting in such case.

HISTORY: GC § 10501-14; 114 v 320 (324). **Eff** 10-1-53. For an analogous section, see former GC § 1593.

Research Aids

Probate judge:

O-Jur2d: Insane etc. § 8; Judges § 93

§ 2101.37 Judge of court of common pleas to act as probate judge; compensation. (GC § 10501-12)

When the probate judge of any county is absent, or is unable to attend court, or the volume of work in his office necessitates it, he may call upon a judge of the court of common pleas having jurisdiction in said county to act in his place, or in conjunction with him, or he may call upon the chief justice of the supreme court, who shall designate a judge of the court of common pleas or a probate judge to act in the place of such absent or incapacitated probate judge, or in conjunction with him. If the probate judge of any county dies or resigns during his term of office, a judge of the court of common pleas of said county shall act in the place of said probate judge until his successor is appointed and qualified. When a judge of the court of common pleas or a probate judge so designated resides outside the county in which he is called upon to act, he shall receive such compensation as is provided for judges of the court of common pleas designated by the chief justice to hold court outside their respective counties. The record of such cases shall be made and preserved in the proper records of the probate court by the deputy clerk thereof.

HISTORY: GC § 10501-12; 114 v 320 (323); 116 v 558, § 1; 123 v 504, § 1. **Eff** 10-1-53. For an analogous section, see former GC § 1592.

Comment

For a discussion of the history and effect of this section and its constitutionality, see author's text in Davies' Revision of Addams & Hosford's Ohio Probate Practice and Procedure, this section.

Cross-References to Related Sections

Additional compensation and expenses provided while holding court in another county, RC § 141.07.

Research Aids

Assignment of judge by chief justice:

O-Jur2d: Judges § 34

Common pleas judge as probate judge:

O-Jur2d: Courts § 170; Judges § 42

Compensation of replacement judge:

O-Jur2d: Judges § 54

Filling of vacancy:

O-Jur2d: Judges § 102

CASE NOTES AND OAG

1. A probate judge may transfer a case for hearing to the court of common pleas only if he is absent, unable to attend court, the volume of work necessitates such transfer or if he is interested in the estate, and where no reason appears in the record which would preclude the judge from sitting, the court of common pleas acquires no jurisdiction by an attempted transfer thereto: *In re Byerly*, 74 OLA 586, 141 NE(2d) 771 (App).

2. General Code § 1592 (former analogous section) held not to be in contravention of the constitution: 1915 OAG vol.2, p.1725.

§ 2101.38 Administration when the probate judge is interested. (GC §§ 10501-9, 10501-10)

Letters testamentary, of administration, or of guardianship shall not be issued to a person after his election to the office of probate judge and before the expiration of his term. If a probate judge is interested, as heir, legatee, devisee, or other manner in an estate which would otherwise be settled in the probate court of the county where he resides, such estate, and all of the accounts of guardians in which the judge is interested, shall be settled by the court of common pleas of the county. In such matters and cases in which the judge is interested, the original papers shall be by him forthwith certified to the court of common pleas. In other matters and proceedings in a probate court in which the judge thereof is interested or in which he is required to be a witness to a will, such judge shall, upon the motion of a party interested in the proceedings, or upon his own motion, certify the matters and proceedings to the court of common pleas and forthwith file with the clerk of the court of common pleas all original papers connected therewith.

When a matter or proceeding is so certified, the court of common pleas, at chambers, by a judge thereof, or in open court shall hear and determine it as though such court had original jurisdiction of the subject matter. Upon final decision of the questions involved in such proceedings, the final settlement of the estate in which the judge is interested as executor, administrator, or guardian, or when his interest therein ceases, the clerk shall deliver to the probate court from which they came the original papers and make and file therein an authenticated transcript of the orders, judgments, and proceedings of the court of common pleas. Thereupon the probate judge shall record such orders, judgments, and proceedings in the proper records.

HISTORY: GC §§ 10501-9, 10501-10; 114 v 320 (322). **Eff** 10-1-53. For analogous sections, see former GC §§ 1589, 1590.

Cross-References to Related Sections

See RC § 2101.39 which refers to this section.

Forms

1 A&H Probate FORM 2101.38a et seq.

Research Aids

Certification to common pleas:

O-Jur2d: Judges § 93

Disabilities:

O-Jur2d: Judges §§ 49, 80

Am-Jur2d: Judges §§ 51-61

Interest:

O-Jur2d: Courts § 171, Judges §§ 80, 93

Am-Jur2d: Judges § 97 et seq.

ALR

Adverse interest or position as disqualification for appointment as personal representative. 18 ALR 2d 633.

Constitutionality of statute which disqualifies judge upon peremptory challenge. 115 ALR 855.

Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding. 110 ALR 472.

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

Dissolution of marriage as affecting disqualifying relationship by affinity in case of judge. 117 ALR 800.

Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification. 10 ALR2d 1307.

Reviewability of action of judge in disqualifying himself. 162 ALR 654.

State's right to file affidavit disqualifying judge for bias or prejudice. 115 ALR 866.

What is civil action or civil proceeding within statute relating to disqualification of judge. 102 ALR 397.

CASE NOTES AND OAG

1. Cited as showing that the general assembly does not construe Art. IV, § 8 of the constitution of Ohio, conferring exclusive jurisdiction as to matters therein enumerated: *State ex rel Fay v. Archibald*, 52 OS 1, 38 NE 314.

2. The probate court may determine whether a will is entitled to probate and whether letters testamentary thereon shall issue: *State ex rel Barbee v. Allen*, 96 OS 10, 117 NE 13 [followed, *State ex rel Hartford Life Ins. Co. v. Douds*, 96 OS 604].

3. An appeal on questions of law and fact does not lie from an order of the common pleas court in a proceeding on exceptions to an inventory and appraisal certified to that court by the probate court for hearing, in accordance with GC §§ 10501-9 and 10501-10 (RC § 2101.38). Under such circumstances the attempted appeal on questions of law and fact will be dismissed and the cause retained as an appeal on questions of law: *In re Barnes*, 92 App 293, 49 OO 364, 109 NE(2d) 876.

3.1 The papers filed with the court of common pleas are to be regarded as a part of the files of such court: *Barr v. Closterman*, 7 CC 363, 4 CD 637.

4. Where the probate judge has any interest whatever in a controversy, whether financial or otherwise, he is authorized under this section to certify the case to the court of common pleas, either on motion of a party interested or sua sponte: *In re Ullman*, 12 CC (NS) 340, 21 CD 370 [modifying and affirming 9 NP (NS) 12, 19 OD 803].

5. The federal court holds under this section that

the court of common pleas has only a limited and special jurisdiction to act and to certify its action back to the probate court, and that when the papers are transmitted to the probate court such jurisdiction terminates, and the common pleas court has no authority to revoke an order admitting a will to record by subsequent proceedings therein: *McClaskey v. Barr*, 7 OFD 556, 54 Fed 781.

6. Under GC § 10501-10 (RC § 2101.38), providing that upon certification of a matter by the probate court to the court of common pleas the court of common pleas "shall hear and determine it as though it had original jurisdiction of the subject matter," the court of common pleas has such power to hear and determine the matter as the probate court would have had if the matter had not been certified: *In re Barnes*, 64 OLA 6 (CP).

§ 2101.39 Disqualification of probate judge for prejudice; replacement.

When a probate judge has a prejudice, either for or against a party or his counsel in a matter or cause pending before him, or is otherwise interested in such cause or matter, or disqualified to sit therein, but the prejudice, interest, or disqualification is not such as to permit or require certification of the proceedings to the court of common pleas as provided by section 2101.38 of the Revised Code, any party to such cause or matter, or the counsel of any such party, may file an affidavit setting forth such prejudice, interest, or disqualification. The fact of the filing of such affidavit shall be entered upon the record of the court. The judge may upon his own motion make an entry setting forth such prejudice, interest, or disqualification.

Forthwith upon the filing of such affidavit or the making of such entry the judge shall notify the chief justice of the supreme court who, if satisfied that such prejudice, interest, or disqualification exists, shall assign some probate judge or some judge of the court of common pleas to hear the cause or matter in place of such probate judge. The judge assigned shall proceed and try such cause or matter. The affidavit referred to in this section shall be filed not less than three days prior to the time set for the hearing of such cause or matter.

HISTORY: GC § 10501-11; 114 v 320 (323); 126 v 36, § 1. Eff 10-4-55.

See former GC §§ 1589, 1590, 1592, 1687.

Comment

General Code § 10501-11 was based upon former GC § 1687, which was applicable to the common pleas court. That section, however, did not expressly provide that the chief justice of the supreme court must be satisfied that bias, prejudice, interest, or disqualification exists before assigning some other common pleas judge to hear the cause. However, it was decided by the supreme court that GC § 2253-1 (RC § 141.08), passed by the legislature in 1917, was in pari materia with former GC § 1687, and must be read and construed therewith. General Code § 2253-1 provided: "The chief justice of the supreme court

shall receive his actual and necessary expenses incurred while performing his duties under the law and the constitution in determining the disqualification or disability of any judge of the court of common pleas or of the court of appeals, to be paid from the state treasury upon the warrant of the auditor of state, issued to such chief justice." Therefore, an affidavit setting forth such bias, prejudice, interest, or disqualification is not conclusive and there must be a determination of that issue by the chief justice: *State ex rel Chute v. Marshall*, 105 OS 320, 137 NE 870. Consequently, the effect of the above Revised Code section is substantially the same as former GC § 1687 with reference to the common pleas court.

Cross-References to Related Sections

Additional compensation and expenses provided while holding court in another county, RC § 141.07.

Forms

1 A&H Probate FORM 2101.39a et seq.

Research Aids

Disqualification to act:

O-Jur2d: Judges §§ 77 et seq.

Am-Jur2d: Judges §§ 86 et seq.

ALR

State's right to file affidavit disqualifying judge for bias or prejudice. 115 ALR 866.

Disqualification of judge in pending case as subject to revocation or removal. 162 ALR 641.

Reviewability of action of judge in disqualifying himself. 102 ALR 654.

What is civil action or civil proceeding within statute relating to disqualification of judge. 102 ALR 397.

Constitutionality of statute which disqualifies judge upon peremptory challenge. 115 ALR 855.

Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification. 10 ALR2d 1307.

Dissolution of marriage as affecting disqualifying relationship by affinity in case of judge. 117 ALR 800.

Disqualification of judge by relative's ownership of stock in corporation which is party to action or proceeding. 110 ALR 472.

Law review

See explanatory article in 4 OBar 127.

Determination of claim of disqualification against a judge. (Editorial note.) 3 CinLRev 97.

CASE NOTES AND OAG

1. The General Assembly, in its enactment of this section, directing the chief justice of the supreme court to assign "some probate judge or some judge of the court of common pleas" to hear a cause or matter pending before another probate judge who has a prejudice or interest or is otherwise disqualified in such cause as set out in said section, exercised a legislative function well within the powers granted to the General Assembly by the constitution of Ohio: *In re Ely*, 176 OS 311, 27 OO(2d) 236, 199 NE(2d) 746.

2. This section confers no authority upon the chief justice except with regard to an affidavit filed by a party or his counsel in a matter or cause pending before the probate judge which must be tried or upon which a hearing is necessary: *In re Hill*, 29 OO(2d) 60, 196 NE(2d) 816 (PC).

§ 2101.40 Dealing in assets of estate. (GC § 10501-40)

A probate judge shall not in any way deal in property or securities involved in probate court cases. This section applies to all appointees of the probate court.

HISTORY: GC § 10501-40; 114 v 320 (329). Eff 10-1-53.

Research Aids

Restrictions:

O-Jur2d: Judges § 49

Law Review

See explanatory article in 4 OBar 127.

§ 2101.41 Prohibition.

No probate judge shall practice law, be associated with another as partner in the practice of law in a court or tribunal of this state, prepare a complaint or answer, make out an account required for the settlement of an estate committed to the care or management of another, or appear as attorney before a court or judicial tribunal. Whoever violates this section shall forfeit his office.

The deputy clerk of a probate court may engage in the practice of law if his practice is not related in any way to probate law or practice. The deputy may engage in the practice of law only with the continued consent and approval of all of the judges of the probate court.

The prosecuting attorney shall file his information against a judge or deputy clerk who practices law in violation of this section in the court of common pleas, and proceed as upon indictment.

This section does not prevent a probate judge or deputy clerk from finishing business commenced by him prior to his election or appointment, provided it is not connected with his official duty.

HISTORY: GC §§ 12854, 12855, 12856; RS § 534; S&S 627; S&C 1214; 59 v 19, § 7; 77 v 183; 129 v 582 (733) (Eff 1-10-61); 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2101.41 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Penalty, RC § 2101.99(C).

Research Aids

Practice of law prohibited by judge:

O-Jur2d: Judges § 54

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO
SB 145 AMENDMENT]

1. A probate judge may finish business commenced by him prior to his election provided it is not connected with his official duty: 1967 OAG No. 67-034.

§ 2101.42 Cases appealable from probate court.

From any final order, judgment, or decree of the probate court, an appeal on a question of law may be prosecuted to the court of appeals in the manner and within the time provided for the prosecution of such appeals from the court of common pleas to the court of appeals. For the purpose of prosecuting appeals on questions of law from the probate court, the probate court shall exercise judicial functions inferior only to the court of appeals and the supreme court.

HISTORY: GC § 10501-56; 114 v 320; 118 v 78; 119 v 394; 136 v S 145. Eff 1-1-76.

For an analogous section, see former GC § 11206.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2101.42 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

This section is also derived from GC § 11064.

This section was amended in 1941 to provide that appeals from the probate court "shall be taken within the time" provided by law for the taking of appeals from the common pleas court. The same result was reached by the supreme court in the case of *In re Knechtges*, 138 OS 24, 19 OO 481, 32 NE(2d) 410, which was decided after the amendment had been submitted to the general assembly.

Comparative Legislation

Appeals:

Cal.—Probate Code, § 1240

Ill.—Rev Stat, ch 3, § 26-1

Ind.—Burns' Stat, § 29-1-1-22

Ky.—KRS, § 394.240

Mich.—MCLA, § 701.45a

N.Y.—SCPA, § 2701

Pa.—Purdon's Stat, Tit. 20, § 792

• Fla.—FSA § 733.103

Research Aids

Jurisdiction of court of appeals:

O-Jur2d: Appellate Review §§ 14, 21, 23

Review:

Actions involving personal representative of decedent:

O-Jur2d: Executors and Administrators § 647

In accounting and settlement:

O-Jur2d: Fiduciaries § 306

In general:

O-Jur2d: Appellate Review § 299; Wills §§ 716, 717, 312-319.

In guardianship matters:

O-Jur2d: §§ 66, 67

In trusts:

O-Jur2d: Trusts § 201

Removal of fiduciary:

O-Jur2d: Fiduciaries § 344

Removal of trustee:

O-Jur2d: Trusts § 61

ALR

Changes in corporate organization as affecting status of corporation as trustee. 131 ALR 753.

Necessity and sufficiency of service on removal of nonresident trustee. 15 ALR2d 610.

Right of executor to appeal from decree or order of removal. 37 ALR2d 751.

Who entitled to contest, or appeal from, allowance of claim against decedent's estate. 118 ALR 743.

Law Reviews

Observations on the appellate-procedure act. Address by Richard F. Stevens of the Elyria bar. 12 OBar (No. 34) 491.

Ohio Appellate Rule

This section is affected by Appellate Rule 2. See Koykka: Ohio Appellate Process.

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Scope and construction

1. Statute permitting appeal from judgment of probate court in settling accounts of executor or trustee is remedial and must be liberally construed: *United States Fidelity &c. Co. v. Wood*, 35 App 224, 172 NE 383.
2. Appeal from the probate court to the common pleas court, like error, is purely a statutory remedy, and the procedure outlined by statute must be strictly followed to effectuate the appeal: *In re Wilson*, 14 OLA 417.
3. An action in mandamus is not appealable and the court of appeals may dismiss the appeal sua sponte: *State ex rel Hall v. Fenner*, 18 OLA 701.
4. This section to GC § 10501-61 (repealed, 118 v 78 [80]) provide otherwise than in the appellate code for review by statutory appeal, but not on questions of law only: *Linton v. Williams*, 23 OLA 340.
6. This section, providing for appeals to the common pleas court by one against whom the probate court has made an order in proceedings to appoint guardians or trustees for idiots, lunatics, imbeciles or drunkards, should be liberally construed: *Jacobs v. Porter*, 36 OLA 282, 43 NE(2d) 879 (App).
7. The word "record" as used in this section includes all of the testimony and evidence which was before the probate court at the hearing of the matter contemplated by the statute: *In re Campbell*, 39 OLA 513 (App).
8. An appeal from an order of the probate court must be within the provisions of this section: *In re Helfrich*, 3 OO 162 (CP).
9. There is a right of appeal in an action brought in the probate court by a guardian against the sureties on the bond of a former guardian: *Shroyer v. Richmond*, 16 OS 455.
11. Jurisdiction of probate court to determine priorities as between creditors of a partnership firm and of the individual members. Whatever jurisdiction exists, in such a case, in the probate court, exists in the common pleas on appeal: *Clapp v. Huron County Banking Co.*, 50 OS 528, 35 NE 308.
12. The right of appeal is construed strictly: *Ebersole v. Schiller*, 50 OS 701, 35 NE 793; *Browne v. Wallace*, 66 OS 57, 63 NE 588 [affirming 21 CC 417;

sub nomine, *Brown v. Wallace*, 12 CD 1]; *Luburg v. Luburg*, 13 App 220, 31 OCA 549 [motion to certify record overruled, *Luberg v. Luberg*, 18 OLR 112, 65 Bull 278].

13. The provision of GC § 10214 (RC § 1.11), to the effect that remedial provisions relating to procedure must not be construed strictly, applies to the provisions of GC § 11206 (see now RC § 2101.42), relating to cases which may be appealed from the probate court to the court of common pleas: *Trumpler v. Royer*, 95 OS 194, 115 NE 1018 [affirming *Royer v. Trumpler*, 7 App 312, 27 OCA 117, 28 CD 186].

14. An order of the probate court admitting an instrument to probate as a last will is not reviewable on appeal: *Frey v. Bland*, 139 OS 354, 22 OO 411, 40 NE(2d) 145.

15. The provisions of this section (119 v 396) are not violative of either Const., Art. II, § 26 or Art. IV, § 6: *In re Bates*, 142 OS 622, 27 OO 536, 53 NE(2d) 787.

16. Where the record of the probate court discloses that such court sustained plaintiff's demurrer to the defendant's answer and cross-petition, and, the defendant not desiring to plead further, such court thereupon rendered judgment for the plaintiff, there is no occasion for a bill of exceptions, and this section does not authorize any appeal by such defendant to the common pleas court: *Steward v. Belt*, 152 OS 399, 40 OO 401, 89 NE(2d) 572.

17. Appeal does not lie from order granting or revoking letters of administration: *Stafford v. American Missionary Assn.*, 22 CC 399, 12 CD 442.

18. The probate court has jurisdiction to determine ownership of stock inventoried as assets of estate; the common pleas court has jurisdiction on appeal: *Brown v. Southern Ohio Sav. Bank &c. Co.*, 22 App 324, 153 NE 864.

19. This section limits appeals to final orders or judgments, and the whole cause is appealed, since the section makes no provision for a partial appeal and a remand to the probate court upon a determination of a specific question or issue: *Hawke v. Noyes*, 62 App 186, 15 OO 458, 23 NE(2d) 508.

20. Under this section and GC § 12223-3 (RC § 2505.03), only final orders, judgments or decrees of the probate court, in proceedings to sell real estate to pay debts, are appealable to the common pleas court: *Hawke v. Noyes*, 62 App 186, 15 OO 458, 23 NE(2d) 508.

21. An order setting aside a former order permitting an answer to be withdrawn is not a final order: *Hawke v. Noyes*, 62 App 186, 15 OO 458, 23 NE(2d) 508.

22. Where a litigant, against whom a judgment is rendered in the probate court, perfects an appeal on questions of law and fact in the common pleas court, before bringing any proceedings in the court of appeals, and it appears that, under the circumstances existing, the appeal was properly taken on questions of law and fact to the court of common pleas, such litigant thereby accomplishes a suspension of the judgment of the probate court and selects his forum and his remedy. He cannot thereafter, while said proceedings in the common pleas court are pending, invoke the jurisdiction of the court of appeals to determine the correctness of the judgment of the probate court, which, by his act, has been suspended, and which, by judgment of the common pleas court, may be superseded: *In re Habant*, 62 App 522, 16 OO 193, 24 NE(2d) 833.

23. The finding of the probate court, in a proceeding under GC § 10509-95 (RC § 2123.01) et seq, to determine heirship is not appealable to the court of common pleas on questions of law and fact under the

provisions of this section: In re Meier, 65 App 425, 19 OO 38, 30 NE(2d) 365.

24. This section, relating specifically to appeals from the probate court, is operative as to appeals from that court, and the general provisions relating to appeal in GC § 12223-3 (RC § 2505.03) affect only such cases within those general provisions as are not within the provisions of this section: In re Hamilton, 67 App 242, 21 OO 228, 36 NE(2d) 439.

25. An appeal on questions of law and fact from the probate court to the common pleas court under the provisions of this section cannot be taken from interlocutory orders or orders not involving the determination of a question of fact: In re Hamilton, 67 App 242, 21 OO 228, 36 NE(2d) 439.

26. The last part of the second paragraph of this section, authorizing appeal on questions of law and fact from judgments of the probate court to the common pleas court, where no record of the proceedings in the probate court was made, is unconstitutional: Kline v. Kline, 71 App 182, 25 OO 588, 48 NE(2d) 558.

27. A judgment of the probate court, based upon a finding by arbitrators appointed by such court, is not appealable to the common pleas court on questions of law and fact where no record of the arbitration proceedings was made, that portion of this section, authorizing appeal to the common pleas court from judgments of the probate court, in which no record was made, being unconstitutional: In re Magdzicki, 71 App 282, 26 OO 127, 49 NE(2d) 205.

28. When a record has been taken on a hearing in probate court, under this section, an appeal on questions of law and fact to the common pleas court does not give that court jurisdiction of the cause, and the appeal must be dismissed: In re Long, 76 App 321, 32 OO 34, 64 NE(2d) 261.

29. This section, providing for appeal on questions of law and fact from the probate court to the common pleas court, where no record has been taken in the probate court, is constitutional: In re Schneider, 81 App 233, 37 OO 69, 72 NE(2d) 904.

30. This section grants the right to a party aggrieved to invoke the jurisdiction of the common pleas court where a record may be taken, after which an appeal may be taken to the court of appeals by any party on the basis of such record and the judgment of the common pleas court: In re Schneider, 81 App 233, 37 OO 69, 72 NE(2d) 904.

31. An order of the probate court admitting a lost will to probate is not a final order and an appeal may not be taken therefrom: In re Brown, 97 App 499, 56 OO 454, 127 NE(2d) 226.

32. The determination by the probate court of the township or municipality wherein an inheritance tax originates is a final order from which an appeal may be taken pursuant to GC § 10501-56 (RC § 2101.42): In re Hutson, 100 App 473, 60 OO 377, 137 NE(2d) 407.

33. The word "record," as used in this section is not used in its technical sense or as defined in RC § 2323.24: In re Todd, 104 App 284, 4 OO(2d) 421, 148 NE(2d) 261.

34. Under the specific provisions of this section an appeal may be taken from any order, decision or judgment of the probate court by a person against whom it is made or whom it affects: In re Reynolds, 106 App 488, 491, 7 OO(2d) 222, 155 NE(2d) 686.

35. This section is permissive and does not outline the procedure to be followed in appeal: In re Davis, 107 App 52, 54, 7 OO(2d) 377, 156 NE(2d) 321.

36. The provision of this section pertaining to appeals from the probate court to the court of appeals on questions of law and fact, does not broaden

the jurisdiction of the court of appeals beyond the ten classes of cases designated in RC § 2501.02, as being appealable on questions of law and fact: In re Verbeck, 114 App 155, 18 OO(2d) 465, 180 NE(2d) 615.

37. By virtue of the provisions of § 4, art. IV, § 4 of the Ohio constitution, a court of common pleas has no jurisdiction to hear an appeal from a probate court: In re Derr, 24 OApp(2d) 91, 53 OO(2d) 229, 263 NE(2d) 911.

38. Ordinarily when the judgment construing a will affects only the rights of beneficiaries, an executor has no right to appeal: Fineman v. Central Nat. Bank, 18 OO(2d) 33, 175 NE(2d) 837 (App).

39. The juvenile court is a separate and distinct court, and provisions of statutes for appeal from probate court are not applicable to juvenile court: In re Morningstar, 24 OO 123 (CP).

40. The common pleas court does not have jurisdiction of an appeal on questions of law and fact from the probate court in an action for a declaratory judgment requiring the court to say whether the action of a beneficiary of a will, by withholding it from probate, made him amenable to the penalties provided by GC §§ 10504-14 and 10542 (RC § 2107.42), since the subject thereof does not fall within the provisions of this section: In re Varley, 27 OO 159, 46 NE(2d) 878 (App) [affirming 27 OO 162 (PC)].

41. That portion of this section, which provides for an appeal from the probate court to common pleas court when no record was taken at the hearing below is invalid as a result of the 1968 amendment of Const. art. IV, § 4: In re Derr, 49 OO(2d) 497, 20 OMisc 293, 254 NE(2d) 392 (CP).

42. An order of the probate court determining which of several claimants are entitled to receive rents accruing during the administration of an estate is in the nature of instructions to the executrix in her administrative capacity and is not an order adverse to her from which she may prosecute an appeal: In re Anderson, 71 OLA 127.

43. Revised Code § 2101.42 specifically governs appeals from the probate court to the court of common pleas and the general provisions relating to appeal in RC § 2505.03 affect only such cases within those general provisions as are not within the provisions of RC § 2101.42: Thompson v. Allen, 72 OLA 215, 133 NE(2d) 812 (CP).

44. This section does not nor was it intended to permit appeals on law and fact from the probate court to the court of common pleas where the judgment appealed from was rendered upon averments contained in the pleadings and no evidence of any nature was presented or attempted to be presented to the probate court: In re Bicknell, 73 OLA 359, 137 NE(2d) 619 (App).

45. Where the property which the probate court orders an executor to include in his inventory cannot be located, thus making it impossible for him to comply therewith, the executor is an aggrieved party who may appeal therefrom since under such order he would be charged with certain assets for which he would be unable to account: In re Byerly, 74 OLA 586, 141 NE(2d) 771 (App).

45.1. The probate court, under the constitution and by statute, has plenary jurisdiction in the settlement of estates, particularly in the settlement of the accounts of executors and administrators; any person affected by any order, decision, or judgment of that court in the settling of such accounts has, under RC § 2101.42, the right of appeal to the court of appeals and the court of common pleas has no jurisdiction of an action seeking to recover from defendants money

paid to them out of the assets of an estate, under an order of the probate court, as attorney fees for services rendered to the administrator on the grounds that the administration has fraudulently intermingled funds of plaintiff with the assets of decedent's estate: *Stone v. Woods*, 75 OLA 577, 144 NE(2d) 913 (CP).

Appeal—admission of will to probate

See also case notes 14, 31 under this section.

46. An order of the probate court admitting an instrument to probate as a last will is not reviewable on appeal: *In re Frey*, 139 OS 354, 22 OO 411, 40 NE(2d) 145.

47. In a proceeding to probate a will, when the evidence received and that improperly excluded by the probate court presented a prima facie case on the facts necessary to the probate of the will, which was denied in the probate court, a reviewing court may order it probated: *In re Fisher*, 67 App 6, 21 OO 44, 35 NE(2d) 784.

—Accounts of executors, etc.

48. Since the probate court has jurisdiction to make an allowance for fees for services which are rendered by attorneys who are employed by an executor or administrator to settle an estate, any person who is affected by an order of the court with reference to the allowance or disallowance of such fees may appeal from such order of the probate court to the court of common pleas under GC § 11206 (see now RC § 2101.42): *Trumpler v. Royer*, 95 OS 194, 115 NE 1018 [affirming *Royer v. Trumpler*, 7 App 312, 27 OCA 117, 28 CD 186].

49. Appeals from the probate court to the common pleas court from any order or judgment sustaining exceptions to the account of an executor shall be taken in the manner now provided for in GC § 10501-56 to GC § 10501-61 (GC § 10501-56 now RC § 2101.42; GC §§ 10501-57 to 10501-61 repealed, 118 v 78 [80]): *In re Logan*, 133 OS 341, 10 OO 533, 13 NE (2d) 911.

50. Surety of trustee could appeal from finding of probate court that error had been made in previous account approved by court: *United States Fidelity & Co. v. Wood*, 35 App 224, 172 NE 383.

51. A person who is not included in any of the classes of persons to whom notice of the filing of an inventory, the hearing thereon, the filing of exceptions, or the hearing thereon, is required to be given under the provisions of RC § 2115.16, and who was never served with such notice but merely appeared as a witness at the hearing on exceptions to the inventory, claiming ownership of certain items of personal property claimed by the executor to belong to the estate cannot appeal from a judgment of the probate court ordering such property included in the inventory: *In re Apger*, 111 App 164, 14 OO(2d) 54, 161 NE(2d) 798.

52. An order of the probate court overruling a legatee's exceptions to the schedule of debts is final, the exceptor not having taken an appeal from the order as required under GC § 10509-120 (repealed, 118 v 78 [80]), and he has no right thereafter to file exceptions to the final account: *In re Beabout*, 15 OO 2 (App) [appeal dismissed, 135 OS 571].

53. Upon such appeal the common pleas court is without jurisdiction to enter a personal judgment against the guardian, but must settle the accounts, determine the amount due the ward and certify its judgment to the probate court: *In re Jaymes*, 18 OLA 613.

54. A motion in the probate court to extend the time for making an executor's final settlement, or to strike an executor's account from the files, is not ap-

pealable to the common pleas court, since this section provides only for appeals from an order, decision or judgment settling accounts: *In re White*, 21 OLA 528.

55. Probate court's order in dismissing application and exceptions filed to account of an executor approximately one year after his account has been settled is not a final order regarding the settlement of the account from which appeal may be had: *In re French*, 23 OLA 702.

56. Exceptions to an inventory and appraisement of an estate, filed by an administratrix, may be appealed only on questions of law: *In re Turpen*, 26 OLA 587.

57. The administratrix, in such case, is not an aggrieved party or one whose rights have been affected, and has no statutory right to appeal: *In re Turpen*, 26 OLA 587.

58. An appeal to the common pleas court from an order of the probate court removing a guardian and sustaining exceptions to his account on the ground the appointment was erroneously made and was void, that he loaned ward's money on personal note without court's approval, and that he had not accounted for interest on money of ward, is not an appeal in interest of the trust, within meaning of GC § 10501-59 (repealed, 118 v 78 [80]), allowing appeal without bond: *In re Schiek*, 26 OLA 433.

59. An order of the probate court obligating the guardian of an incompetent to pay for past services rendered the ward in a sum certain and fixed constitutes the settling of an account in so far as it covers the amount for the time prior to the order of which the brother of the incompetent, appellant, had notice, within the terms of this section, authorizing an appeal to the common pleas court: *Gariety v. Doorley*, 31 OLA 182.

60. Inasmuch as the probate court has exclusive jurisdiction to settle accounts of guardians, the common pleas court can acquire no jurisdiction on appeal so long as any item of such account remains undetermined: *Gregg v. Klein*, 12 CC(NS) 264, 23 CD 698.

61. An appeal lies from the allowance or disallowance of costs for or against a guardian or his ward: *In re Gorman*, 2 NP(NS) 667, 15 OD 204.

62. An order by the probate court fixing, after an extended hearing, an attorney's fee for services in connection with the administration of an estate where there had been bitter contentions among the heirs and the work of harmonizing the conflicting interests became a serious task, will not be set aside, on the weight of evidence, where no testimony was offered as to the value of the services rendered except that of the claimant himself, and the exceptors having limited their efforts to criticism of what was done: *In re Kolb*, 22 NP(NS) 348.

63. An appeal may be made from the decision of a probate court in the matter of allowance of a claim for inheritance tax by administrator: *In re White*, 23 NP(NS) 574.

64. An order of the probate court striking exceptions to an account of a guardian from the files is a final order, and appealable: *In re Streit's Estate*, 12 OD(NP) 158.

—Removal of executor, etc.

69. Prior to 95 v 406, an appeal did not lie to the court of common pleas from an order of the probate court removing an administrator: *In re Still's Estate*, 15 OS 484.

70. Appeal lies from an order of probate court overruling motion of imbecile ward to terminate guardianship: *Hiett v. Nebergall*, 45 OS 702, 17 NE 558; *Robinson v. Wagner*, 95 OS 300, 116 NE 514

[judgment of court of appeals vacated, *In re Robinson*, 25 CC(NS) 26, 35 CD 156; reversing 18 NP(NS) 286, 30 OD 433; motion to certify record overruled, 13 OLR 499].

71. An appeal to the common pleas court from an order of the probate court removing an executor is governed by provisions of GC § 10501-56 to GC § 10501-61 (GC § 10501-56 now RC § 2101.42; GC §§ 10501-57 to 10501-61 repealed, 118 v 78 [80]); *In re Hornyak*, 133 OS 416, 11 OO 84, 14 NE(2d) 5 [reversing 9 OO 51].

72. An order of the probate court refusing to remove a guardian upon the application of the ward, being an order "affecting a substantial right made in a special proceeding" within the meaning of GC § 12223-2 (RC § 2505.02), is a "final order" from which the ward may appeal to the court of appeals on questions of law under provisions of this section: *In re Irvine*, 72 App 329, 27 OO 255, 51 NE(2d) 907.

73. This section gives a foreign guardian, adversely affected by refusal to remove resident guardian, the right to appeal to common pleas court: *Johnson v. Myers*, 5 OLA 788.

74. A proceeding filed in the probate court to remove an administrator de bonis non for the reason that his predecessor was still rightfully in office, is appealable under GC § 11206 (see now RC § 2101.42): *Johnson v. Schwenck*, 99 OS 59, 124 NE 61, 8 ALR 170.

75. Where the appointment of an administrator is revoked by the probate court, but on appeal the administrator is restored to his office and duties, the period during which he was suspended from his office is to be deducted in fixing the two years' limitation for the bringing of an action against him as such administrator: *Badger v. Orr*, 1 App 293, 17 CC(NS) 312, 24 CD 328.

76. Appeal may be taken to remove guardian for lack of jurisdiction to make appointment: *In re Murray*, 8 CC(NS) 498, 18 CD 652.

77. Right conferred by this section as to appeal from an order removing an executor is not in conflict with GC § 10492 (see now RC § 2101.24), giving exclusive jurisdiction to grant and revoke letters testamentary: *In re Sell's Estate*, 8 NP(NS) 175, 19 OD 567.

78. Appeal may be taken by the guardian of an imbecile in the interest of the trust from an order of the probate court, made upon application of the alleged imbecile himself, terminating the guardianship: *In re Kraner*, 8 NP(NS) 217, 19 OD 444.

79. Guardian of drunkard cannot appeal from decision of probate court terminating the guardianship, nor can an administrator: *Martin v. Dershem*, 65 OS 556, 63 NE 1130, 46 Bull 172.

—Sale of realty to pay debts

84. In a suit by an assignee to sell land and determine priority of liens, when one of the lienholders appeals, the costs of appeal should be adjudged against the appellant and not from the proceeds of sale: *Mutual Aid Bldg. &c. Co. v. Gashe*, 18 CC 681, 6 CD 779; see *Gashe v. Ohio Lbr. Co.*, 5 OD 130, 31 Bull 189 [modified, *Mutual Aid Bldg. &c. Co. v. Gashe*, 56 OS 273].

85. Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, cannot be attacked collaterally by exception to her account as administratrix of the said estate: *In re Hess*, 14 CC(NS) 463, 23 CD 449.

86. An order by the court of insolvency confirming a sale is not an appealable order under this section, but an order for sale, determining the amount and

terms of sale and the rights of parties in the premises, is appealable: *In re Assignment of Park Co.*, 4 NP 240, 6 OD 341.

87. For failure to exercise right to appeal, see *Mansfield v. Cole*, 16 NP(NS) 209, 25 OD 231.

88. Decree, in foreclosure, and finding amount and ordering sale appealable: *Baker v. Lehman*, W 522.

—Year's allowance

93. Appeal lies on motion to review widow's allowance but formerly did not: *In re Rahe*, 12 OD(NP) 590; *Reidermann v. Tafel*, 9 DecRep 393, 12 Bull 284.

—Conversion of property of decedent

98. The appeal provided for by this section is a right given to both parties, and not simply to the one suspected of having concealed, embezzled or conveyed away the property of a dead person. The latter interpretation is unreasonable: *In re Wilson*, 10 OLA 339.

99. The right of appeal given by this section relates to judgments where the probate court has jurisdiction to hear and determine a complaint for concealing, embezzling or carrying away assets of estate of deceased person: *Meinzer v. Bevington*, 42 OS 325; *Harris v. Westervelt*, 15 CC 534, 8 CD 367.

—Administration by assignees, etc.

104. A decree of confirmation which contains a decree of distribution is appealable: *Kelley v. Staberry*, 13 O 408; *Spence v. Basey*, 34 OS 42; *Metzger v. Meekers*, 6 DecRep 780, 8 AmLRec 98.

105. No appeal lies from the decision of the probate court setting aside or refusing to confirm a sale made by an assignee for the benefit of creditors: *Miller v. Seiberling*, 31 OS 201.

106. An order, decision or decree of the probate court in a proceeding under the statutes in relation to assignments for the benefit of creditors, is not appealable to the court of common pleas unless it is of a definite nature, affecting property rights; and the approval by the probate court of the election of an assignee by the creditors is not an order, decision, or decree of that nature: *Brigel v. Starbuck*, 34 OS 280.

107. Appeal lies from judgment confirming sale of real estate at private sale under insolvency laws of the state: *Browne v. Wallace*, 60 OS 177, 53 NE 957 [reversing, sub nomine *Brown v. Wallace*, 16 CC 124, 8 CD 764].

108. Where the probate court, in case of assignment under the insolvency laws, when the personal property assigned has been sold and the proceeds brought into court for distribution, fixes the priority of lienholders and distributes the proceeds, any person interested may appeal under this section: *Simpson v. Saylor*, 2 CC 73, 1 CD 370 [affirmed, *Saylor v. Simpson*, 45 OS 141].

109. A suit to compel the allowance of a claim by an assignee is equitable, and no jury can be demanded and it is appealable: *Meador v. Root*, 11 CC 81, 5 CD 61 [affirming *Root v. Meador*, 2 OD(NP) 547, 29 Bull 51].

110. An order confirming a sale by an assignee, and overruling a motion to set aside the sale, is appealable: *In re Assignment of Schumacher*, 5 NP 145, 5 OD 386.

111. Appeal lies from a refusal by the court of insolvency to administer upon property declared to have been conveyed in fraud of creditors: *In re Schumacher*, 5 NP 387, 6 OD 125.

—Appointment of guardians, etc.

121. On appeal from judgment of probate court refusing to appoint a guardian for an alleged imbecile,

the common pleas court may appoint guardian upon finding the person an imbecile: In re Oliver, 77 OS 474, 83 NE 795.

121.1 A guardian of a mentally incompetent ward does not have a right of appeal, under RC § 2101.42, from an order of the probate court terminating the guardianship pursuant to the provisions of RC § 2111.47, upon satisfactory proof that the ward has regained his mental competency and the necessity for the guardianship has ceased to exist, where the record does not reflect any interest of the guardian adverse to the ward in such order of termination, or show that the guardian has been aggrieved in any manner by the order of termination: In re Love, 19 OS(2d) 111, 48 OO(2d) 107, 249 NE(2d) 794.

122. An order by the probate court appointing as administrator of the estate of a decedent a person other than the one named in the will is not subject to review by appeal, where there is a finding by the probate court that the applicant for appointment designated in the will is not a suitable person to administer the estate: Miller v. Miller, 3 App 143, 19 CC(NS) 243, 26 CD 195.

123. General Code § 11206 (see now RC § 2101.42) does not give a right of appeal to the common pleas court from an order of the probate court appointing an administrator: Luburg v. Luburg, 13 App 220, 31 OCA 549 [motion to certify record overruled, 17 OLR 112, 65 Bull 278].

123.1. From a decision of the probate court refusing to appoint a guardian for a person upon an application alleging as the ground for such appointment that the person is an incompetent by reason of advanced age, an appeal may be prosecuted to the common pleas court: Romell v. Romell, 18 App 31.

124. An order of the probate court appointing a guardian for an incompetent person is not appealable on questions of law and fact to the common pleas court under this section: In re Watts, 60 App 307, 14 OO 239, 21 NE(2d) 129.

124.1. An order appointing a guardian of a minor is a final order from which an appeal may be taken: In re Moyer, 68 App 319, 22 OO 483, 40 NE(2d) 695.

125. An appeal on questions of law and fact may be taken, under authority of this section (114 v 336), to the common pleas court from an order of the probate court appointing a guardian for a person who is adjudged incompetent by reason of advanced age, improvidence, mental and physical disability and infirmity: In re Jacobs, 73 App 286, 28 OO 449, 43 NE(2d) 879.

125.1 An adjudication by the probate court that a person is incompetent and appointing a resident guardian for such person's property in Ohio is an order affecting such person from which an appeal may be taken on his behalf: In re Reynolds, 106 App 488, 7 OO(2d) 222, 155 NE(2d) 686.

125.2 An executor could appeal from a probate court judgment which established a vested interest in the remainder of the estate in a designated beneficiary under a testamentary trust and which terminated the trust upon the expiration of a designated life interest, all of which was in conflict with provisions of the will to terminate the trust at a different time, under different conditions, and with gifts of remainders to other beneficiaries, if designated events occurred: Fineman v. Central Nat. Bank, 18 OO(2d) 33, 175 NE(2d) 837 (App).

126. Finding of necessity for appointment of guardian for an alleged imbecile is not a final order, in itself, and not appealable: In re Breitenstein, 4 NP (NS) 358, 17 OD 71.

127. An appeal from the appointment of a guard-

ian for an imbecile confers jurisdiction to appoint a guardian for the person only: In re Greer, 24 NP (NS) 46.

128. Where there is no record of the proceedings in probate court in an action to appoint an administrator de bonis non, an appeal on questions of law and fact may be prosecuted to the court of common pleas, and a trial de novo had: State ex rel Schneider v. Brewer, 57 OLA 56, 93 NE(2d) 480 (App).

129. The court of common pleas cannot accept an appeal on questions of law and fact from the probate court where the order appealed from was one denying an application to be appointed testamentary trustee solely on the grounds of non-residency of such applicant and no evidence of any nature was presented or attempted to be presented to the probate court: In re Bicknell, 73 OLA 359, 137 NE(2d) 619 (App).

130. It is well settled that an order appointing a guardian, made by a probate court, in the exercise of jurisdiction, can not be collaterally impeached: In re Titington, 82 OLA 563, 162 NE(2d) 628.

—Wrongful death

133. In action for wrongful death of child, appeal does not lie from order apportioning proceeds among parents. Statute authorizing appeal to common pleas court inapplicable: Parker v. Parker, 35 App 321, 172 NE 450.

—Claims against decedent's estate

138. The judgment of the probate court dismissing a petition for leave to file a claim against a decedent's estate is not appealable to the common pleas court under this section: Devers v. Schreiber, 50 App 100, 3 OO 465, 197 NE 493.

138.1. An ancillary administrator of an estate may appeal from an order of the probate court prescribing that he reject claims of a domiciliary executor set forth in the schedule of debts, which claims were presented to and allowed by the proper court of the state of the domiciliary executor, prescribing that the ancillary administrator require the domiciliary executor to perfect his claims under GC § 10509-112 et seq, and prescribing that, after the proper adjudication of the rejection or allowance of the domiciliary executor's claims, the ancillary administrator distribute the entire funds in his hands to beneficiaries named in the will of the decedent: In re Kelley, 68 App 51, 22 OO 158, 34 NE(2d) 34.

139. A claim presented to the probate court by an administratrix, in which she avers that she went through a marriage ceremony with decedent, believing his representation that he had been divorced and was free to marry, that she had rendered services, expended money and surrendered rights for decedent's benefit and that she was justly entitled to be reimbursed and compensated, does not invoke the chancery jurisdiction of the probate court, and is not appealable on questions of law and fact, but on questions of law only: In re Blaustein, 77 App 286, 33 OO 48, 66 NE(2d) 153.

139.1. An order of the probate court awarding an allowance to a testamentary trustee for services rendered to the trust is not a final order and an appeal will not lie therefrom: In re Thomas, 84 App 30, 39 OO 46, 84 NE(2d) 294.

140. The order of a probate court granting an application for payment by the guardian of an incompetent, of a medical bill for services rendered to the ward's wife, is appealable under this section: Johns v. Shamansky, 18 OLA 675.

141. An action in the probate court for the allowance of attorney fees, for services in adjusting minors'

claim against a divorced father's estate and the establishment of a trust fund, is appealable to the common pleas court: *Sampson v. Mattern*, 18 OLA 693.

142. A suit by a beneficiary under a will against the testamentary trustee to recover a bequest of the proceeds of sale of certain personal property, is not a chancery case and is not appealable: *American Nat. Red Cross v. McCoy*, 19 OLA 603.

Trial on appeal

147. Where the common pleas court erroneously entertained an appeal under this section on questions of law only, considered the judgment appealed from on a bill of exceptions allowed and signed by the probate judge, reversed such judgment as being against the weight of the evidence, and remanded the proceeding for a new trial, without challenge or objection, the judgment of reversal is not invalid, the common pleas court having had jurisdiction: *Sheets v. Hodes*, 142 OS 559, 27 OO 498, 53 NE(2d) 804 [affirming 39 OLA 492].

148. Where an action for a declaratory judgment, instituted in the probate court, is appealed on questions of law and fact to the common pleas court, and that court has before it the journal entry of the probate court, reciting only that the matter came on to be heard on the petition "and the evidence," and the notice of appeal asserting that "no record has been taken of the hearing of any matter before the probate court, so that a bill of exceptions or complete record may be prepared," the common pleas court is warranted in overruling a motion to dismiss the appeal and in hearing the case de novo: *Kolthoff v. Kolthoff*, 79 App 427, 35 OO 226, 74 NE(2d) 394.

149. Where a record of proceedings in the probate court shows conclusively that all procedural steps required by statute for appeal to the common pleas court were taken, the common pleas court acquires jurisdiction for all purposes and cannot be ousted of such jurisdiction unless there is affirmative evidence showing lack of jurisdiction: *In re Schneider*, 81 App 233, 37 OO 69, 72 NE(2d) 904.

150. It is the fact that a record was not taken in the probate court which gives the right to a party aggrieved to appeal to the common pleas court rather than that which could have been done, and this section does not require a party to prepare a narrative bill of exceptions to be entitled to a right of appeal to the common pleas court: *In re Schneider*, 81 App 233, 37 OO 69, 72 NE(2d) 904.

150.1 Where an appeal on questions of law and fact is taken from the probate court to the common pleas court, in accordance with this section, the common pleas court has complete jurisdiction to entertain the cause and conduct a full hearing de novo: *In re Miller*, 59 OO 425, 127 NE(2d) 409 (App).

151. Upon appeal from a judgment of the probate court in settling the account of a guardian, under GC § 11206 (repealed, 114 v 320; see now RC § 2101.42), the case is tried de novo in the common pleas court on the same issues: *In re Jaymes*, 18 OLA 613.

152. Where a case is appealed from the probate to common pleas court, issues made up and the case submitted on the evidence, the case should be determined on the issues thus made up, irrespective of and disregarding any question of technical jurisdiction of the probate court in the proceedings in that court: *Ephriam v. Ephriam*, 19 OLA 86.

153. Where an appeal has been perfected from the probate court to the common pleas court, appellant is entitled to a trial de novo in the common pleas court, although there is a motion pending in the lower court to vacate the judgment; the fact that there is no bill of exceptions and no motion for new trial was

made, does not affect the right: *In re Murphy*, 27 OLA 221.

154. On appeal from an order of the probate court fixing attorneys' fees to be allowed to the executor, the court of common pleas will follow the decision of the probate court unless the facts indicate that such finding was made without due regard to the evidence presented and to the surrounding circumstances, especially as the probate judge in question has had a long experience in matters of that sort: *In re Messang*, 20 NP(NS) 60; sub nomine, *In re Massang*, 27 OD 481 [affirmed by court of appeals].

Successive appeals

165. After the amendment of GC § 11206 (95 v 406) (see now RC § 2101.42) and GC § 12241 (95 v 391) (see now RC § 2505.24), the circuit court (now the court of appeals) had jurisdiction to review, on error, an order of the court of common pleas, made on appeal from the probate court, removing or refusing to remove an executor, guardian, etc.: *North v. Smith*, 73 OS 247, 76 NE 619 [reversing 5 CC(NS) 495, 7 CD 367]; *In re Estate of Breckenridge*, 7 CC (NS) 86, 17 CD 688. Contra: *Smith v. Bracey*, 13 CC(NS) 529, 22 CD 383.

Bond on appeal

173. Under the provisions of GC § 10501-59 (repealed, 118 v 78 [80]), an appellant, who is a party in a fiduciary capacity, from an order or judgment of the probate court sustaining exceptions to an account, is exempt from giving an appeal bond only if he has given bond in Ohio for the faithful discharge of his duties, and appeals in the interest of his trust: *In re Logan*, 133 OS 341, 10 OO 533, 13 NE(2d) 911.

174. Where an appeal on questions of law and fact is taken from a judgment of a probate court, directing the payment of money by a guardian, to the common pleas court, the appellant must, by virtue of GC §§ 10501-57 and 10501-58 (repealed, 118 v 78 [80]), furnish bond in double the amount of the judgment, and upon failure to do so the common pleas court may dismiss the appeal: *Caryl v. Scheiderer*, 61 App 147, 15 OO 115, 22 NE(2d) 463.

175. Where an administrator appeals from the judgment on exceptions to his account wherein certain credits are disallowed and there is no other matter involved, the appeal is not in the interest of the trust and the administrator is not relieved from giving an appeal bond by GC § 10501-59 (repealed, 118 v 78 [80]). The finding of probate court that the appeal is in the interest of the trust and order that the appeal be allowed without bond, do not give the right of appeal without bond unless as a matter of fact the appeal is in the interest of the trust: *In re Wilson*, 29 OLA 49.

Transcripts

180. An appeal on questions of law and fact from the probate court to the common pleas court is perfected when a "transcript of the docket or journal entries in the cause, and of the order, decision or decree, appealed from" is filed with the clerk of the common pleas court on or before the second day of its next term in accordance with the provisions of GC § 10501-60 (repealed, 118 v 78 [80]): *Paden v. Pearce*, 61 App 42, 15 OO 64, 22 NE(2d) 301.

181. The right of appeal to the court of common pleas on questions of law and fact, as provided in this section, is dependent upon whether or not a record has, in fact, been taken upon which a bill of exceptions or a complete record could be made available to the reviewing court: *In re Schneider*, 81 App

233, 37 OO 69, 72 NE(2d) 904.

182. Revised Code § 2101.42 provides for an appeal from the probate court to the court of common pleas only in those instances where a record has not been taken in the probate court so that a bill of exceptions or a complete record may be prepared as provided by law in the court of common pleas: *Thompson v. Allen*, 72 OLA 215, 133 NE(2d) 812 (CP).

Notice of appeal

188. Under the amended provisions of this section and GC § 12223-7 (RC § 2505.07), a notice of appeal from a court of probate to a court of common pleas on questions of law and fact may be filed within a period of twenty days after the entry of the order, judgment, or decree in a case in which a record has not been taken: *In re Knechtges*, 138 OS 24, 19 OO 481, 32 NE(2d) 410.

§ 2101.43 Petition for submission of question of combining probate court and court of common pleas. (GC §§ 10501-47, 10501-48)

Whenever ten per cent of the number of electors voting for governor at the next preceding election in any county having less than sixty thousand population, as determined by the next preceding federal census, petition a judge of the court of common pleas of such county, not less than ninety days before any general election for county officers, for the submission to the electors of such county the question of combining the probate court with the court of common pleas, such judge shall place upon the journal of said court an order requiring the sheriff to make proclamation that at the next ensuing general election there will be submitted to the electors the question of combining the probate court with the court of common pleas. The clerk of the court of common pleas shall, thereupon, make and deliver a certified copy of such order to the sheriff, and the sheriff shall include notice of the submission of such question in his proclamation of election for the ensuing general election.

Each elector joining in a petition for the submission of said question shall sign such petition in his own handwriting, unless he cannot write and his signature is made by mark, and shall add thereto the township, precinct, or ward of which he is a resident. Such petition may consist of as many parts as are convenient. One of the signers to each separate paper shall swear before some officer qualified to administer the oath that the petition is bona fide to the best of his knowledge and belief. Such oath shall be a part of or attached to such paper. The judge upon receipt of such petition shall deposit it with the clerk of the court of common pleas.

No signature shall be taken from or added to such petition after it has been filed with the judge. When deposited such petition shall be preserved and open to public inspection, and

if it is in conformity with this section, it shall be valid, unless objection thereto is made in writing by an elector of the county within five days after the filing thereof. Such objections, or any other questions arising in the course of the submission of the question of combining said courts, shall be considered and determined by the judge, and his decision shall be final.

HISTORY: GC §§ 10501-47, 10501-48; 114 v 320 (333). EF 10-1-53. Analogous to former GC §§ 1604-1, 1604-2.

Cross-References to Related Sections

Constitutional provisions providing for probate division in court of common pleas, Const. Art. IV, § 4.

See RC §§ 2101.45, 2101.46 which refer to this section.

Research Aids

Consolidation with common pleas court:
O-Jur2d: Courts § 20

§ 2101.44 Conduct of election; form of ballot; returns and canvass. (GC § 10501-49)

The election upon the question of combining the probate court and the court of common pleas shall be conducted as provided for the election of county officers.

The board of election shall provide separate ballots, ballot boxes, tally sheets, blanks, stationery, and all such other supplies as may be necessary in the conduct of such election.

Ballots shall be printed with an affirmative and negative statement thereon, as follows:

	The probate court and the court of common pleas shall be combined.
	The probate court and the court of common pleas shall not be combined.

Returns of said election shall be made and canvassed at the same time and in the same manner as an election for county officers. The board shall certify the result of said election to the secretary of state, to the probate judge of said county, and to the judge of the court of common pleas, and such result shall be spread upon the journal of the probate court and of the court of common pleas.

If a majority of the votes cast at such an election are in favor of combining said courts, such courts shall stand combined upon determination of the fact that a majority of the persons voting upon the question of the combination of such courts voted in favor of such combination.

HISTORY: GC § 10501-49; 114 v 320 (333); 116 v 385 (386), § 1. EF 10-1-53.

Comment

General Code § 10501-49 was amended in 1935 so as to make it conform to the constitution as construed by the supreme court in *State ex rel Shirley v. Corbett*, 113 OS 23, 148 NE 357, wherein the question arose as to the time when the combination of the probate court and common pleas court in Paulding county took effect.

Before this statute was amended in 1935 it was an exact re-enactment of former GC § 1604-3, which provided that the common pleas court and probate court should be combined and consolidated at the expiration of the term for which the probate judge had been elected in the county wherein such election had been held. However, Art. IV, § 7 of the constitution of Ohio provides that such courts shall be combined and shall be known as the court of common pleas in case the majority of the electors voting upon such question vote in favor of such combination. In *State ex rel Shirley v. Corbett*, supra, the court held that it was unconstitutional to attempt to postpone the combination of the courts, after such election had resulted favorably to such combination, to the expiration of the term of the incumbent in the office of probate judge in said county.

The comment of the probate court committee of the Ohio state bar association, with reference to the amendment to this section, is as follows:

"This section was formerly GC § 1604-3. Following its reenactment as GC § 10501-49 it was brought to our attention that the last paragraph had previously been held unconstitutional by the supreme court in the case of *Shirley v. Corbett*, 113 OS 23, 148 NE 357."

Cross-References to Related Sections

See RC §§ 2101.45, 2101.46 which refer to this section.

Research Aids

Consolidation with common pleas court:
O-Jur2d: Courts § 20

CASE NOTES AND OAG

1. Time of consolidation is controlled by Art. IV, § 7, Ohio Constitution: *State ex rel Shirley v. Corbett*, 113 OS 23, 148 NE 357.

§ 2101.45 Probate division established; appeals. (GC § 10501-50)

When the probate court and the court of common pleas have been combined as provided in sections 2101.43 and 2101.44 of the Revised Code, there shall be established in the court of common pleas a probate division and all matters of which the probate court has jurisdiction shall be filed and separately docketed in said division. The resident judge of the court of common pleas shall appoint the necessary deputies, clerks, and assistants to have charge of and perform the work incident to the division. An appeal on questions of law may be prosecuted from said division to the court of appeals in all cases where such appeal lies to the court of common pleas in counties where such courts have not been combined. Appeal on questions of law and fact

may be taken from said division to the court of appeals in chancery cases.

HISTORY: GC § 10501-50; 114 v 320 (334); 116 v 385 (387), § 1. Eff 10-1-53.

Cross-References to Related Sections

Constitutional provisions providing for probate division in court of common pleas, Const. Art. IV, § 4.

See RC § 2101.46 which refers to this section.

Research Aids

Appointment of deputies:
O-Jur2d: Courts § 34

Ohio Appellate Rule

This section is affected by Appellate Rules 1, 2. See Koykka: Ohio Appellate Process.

CASE NOTES AND OAG

1. The probate court is not extinguished by the combination of the probate and common pleas courts: *State ex rel Sattler v. Cahill*, 122 OS 354, 171 NE 595.

2. The part of this section which formerly undertook to authorize appeals from the probate division of the court of common pleas in those counties where the probate court and court of common pleas had been combined, was in conflict with Art. IV, § 6 of the constitution in so far as it attempted to authorize such appeals in cases which were not chancery cases: *In re Stroman*, 17 App 108.

3. In counties, when the office of probate judge has been abolished by the combining of the probate court with the court of common pleas, under the provision of RC § 2101.43 et seq, the "commission on justice courts" created by the terms of RC § 1907.01, as amended eff. 1-1-56, will consist of two members only, i.e., the presiding judge of the common pleas court and the president of the board of county commissioners: 1955 OAG 5810.

§ 2101.46 Re-establishment of the probate court. (GC §§ 10501-51, 10501-52)

After three years from the date of an election held under sections 2101.43 to 2101.45, inclusive, of the Revised Code, another election may be petitioned for and shall be ordered by the judge of the court of common pleas as provided in such sections either to perfect a combination of said court or to dissolve said combination and re-establish the probate court.

Whenever in any county where such courts have been combined a decennial federal census shows that such county has a population of sixty thousand or more, and such fact is certified by the secretary of state to said court of common pleas and entered upon its journal, the probate court shall be re-established in such county. A probate judge shall be elected for the regular term at the next election ensuing in an even-numbered year, and the records of the probate division of the court of common pleas shall be delivered to such re-established probate court

upon the entry into office of an elected probate judge.

HISTORY: GC §§ 10501-51, 10501-52; 114 v 320 (334). **EF** 10-1-53. Analogous to former GC §§ 1604-5, 1604-6.

Research Aids

Consolidation with common pleas court:

O-Jur2d: Courts § 20

Election:

O-Jur2d: Judges § 7

§ 2101.99 Penalties.

(A) Whoever violates section 2101.09 of the Revised Code shall be fined not more than one hundred dollars.

(B) Whoever violates section 2101.15 of the Revised Code shall be fined not less than ten nor more than two hundred dollars.

(C) Whoever violates section 2101.41 of the Revised Code shall be fined not more than fifty dollars.

HISTORY: Bureau of Code Revision. **EF** 10-1-53.

Comment

This section was derived from GC §§ 10501-27, 10501-41 and 12854. See also RC §§ 2101.10, 2101.15 and 2101.41.

Cross-References to Related Sections

See RC §§ 2101.09, 2101.15, 2101.41 which refer to this section.

Forms

1 **A&H Probate FORM** 2101.09a, 2101.10a et seq; Amercement proceedings.

Research Aids

Coroners:

O-Jur2d: Coroners §§ 11, 22; Crim. Prac. § 42;

Process §§ 31, 77

Filing itemized account of fees:

O-Jur2d: Judges § 64

Practice of law prohibited:

O-Jur2d: Judges § 54

Sheriffs and constables:

O-Jur2d: Sheriffs, Marshals and Constables §§ 21, 37, 70; Crim. Prac. § 42; Process §§ 31, 77

CHAPTER 2103: DOWER

Section

- 2103.01 "Property" construed.
2103.02 Dower.
[2103.02.1] 2103.021 When affidavit required to preserve dower.
2103.03 Conveyance in lieu of dower.
2103.04 Eviction from premises conveyed in lieu of dower.
2103.05 [Repealed.]
2103.06 Lands given up by fraud.
2103.07 Dower is forfeited by waste.
2103.08 Assignment of dower.
2103.09 Estate by curtesy abolished.

Forms

- 1 A&H Probate FORM 2103a et seq: Dower.

§ 2103.01 "Property" construed. (GC § 10502-9)

In sections 2103.01 to 2103.09, inclusive, of the Revised Code, unless the context shows that another sense was intended, "property" includes lands, tenements, hereditaments, money, chattels, choses in action, and evidences of debt.

HISTORY: GC § 10502-9; 114 v 320 (339). Eff 10-1-53. For an analogous section, see former GC § 8615.

Cross-References to Related Sections

- See RC § 2131.02 which refers to this chapter.
See RC § 2103.09 which refers to RC § 2103.01 et seq.

Research Aids

- Property defined:
O-Jur2d: Dower § 6

ALR

Adultery on part of surviving spouse as affecting marital rights in deceased spouse's estate, 13 ALR3d 486.

Contract: dower or curtesy in property subject at time of marriage to contract for disposition by sale or will, 8 ALR3d 569

§ 2103.02 Dower. (GC § 10502-1)

A spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage. Such dower interest shall terminate upon the death of the consort except:

(A) To the extent that any such real property was conveyed by the deceased consort during the marriage, the surviving spouse not having relinquished or been barred from dower therein;

(B) To the extent that any such real property during the marriage was encumbered by the deceased consort by mortgage, judgment, lien, except tax lien, or otherwise or aliened by involuntary sale, the surviving spouse not having relinquished or been barred from dower therein. If such real property was encumbered or aliened prior to decease, the dower interest of the sur-

viving spouse therein shall be computed on the basis of the amount of the encumbrance at the time of the death of such consort or at the time of such alienation, but not upon an amount exceeding the sale price of such property.

In lieu of such dower interest which terminates pursuant to this section, a surviving spouse shall be entitled to the distributive share provided by section 2105.06 of the Revised Code.

Dower interest shall terminate upon the granting of an absolute divorce in favor of or against such spouse by a court of competent jurisdiction within or without this state.

Wherever dower is referred to in Chapters 2101. to 2131., inclusive, of the Revised Code, it means the dower to which a spouse is entitled by this section.

HISTORY: GC § 10502-1; 114 v 320 (337); 116 v 385 (387), § 1; 125 v 903 (962). Eff 10-1-53. See former GC § 8606.

Comment

In the sixth line after the word "terminate" the words "and be barred" have been eliminated. In the third line of the last paragraph after the word "is" the words "or may be" have been omitted.

General Code § 10502-1, as amended on January 1, 1932, superseded former GC § 8606 which made provision for dower to a widow or widower. The changes in the dower law of Ohio effected by the repeal of this former section and the enactment of GC § 10502-1 as it existed on January 1, 1932, to September 2, 1935, virtually abolished all vested dower, except in such real estate (a) conveyed during coverture, without the spouse joining in the deed, and (b) to the extent that such property during coverture was encumbered by mortgage without the spouse joining in the mortgage, or by judgment lien or otherwise without the surviving spouse having relinquished or been barred of dower.

General Code § 10502-1 was amended in 1935 so as to provide: (1) that if real estate was aliened during the marriage by judicial or other involuntary sale, nevertheless the surviving spouse would not be entitled to dower; (2) the amount upon which dower could be computed was limited to an amount not exceeding the sale price of such property in any event.

The most significant part of the statute is in the paragraph following exception (B) which provides that the surviving spouse, instead of vested dower, shall be entitled to a distributive share of real property as provided by the statute of descent and distribution. This will probably apply to the vast majority of cases.

The signature of a spouse on a deed or mortgage is still required if the spouse is to be barred of dower in property so conveyed or mortgaged.

Cross-References to Related Sections

- Action for dower not to abate, RC § 2311.22.
Assignment of dower, RC § 5305.01 et seq.
Conveyance in lieu of dower, RC § 2103.03.
Divorce, effect of, RC § 3105.10.
Execution not to affect, RC § 2329.83.
Fees of commissioner, RC § 2335.01.
Insolvent debtors, RC § 1313.29.
Partition proceedings, RC § 5307.17.

Probate court, jurisdiction over, RC § 2101.24(H).
 Registered land, attachment to, RC §§ 5309.70, 5309.85.
 Sale by executor, etc., free of dower, RC § 2127.16.
 Sale by guardian, compromise of, RC § 2111.21.
 Tax, forfeiture on failure to pay, RC § 5719.22.
 Waste bars dower, RC § 2103.07.

Hidden risks in real estate title transactions. Sherman Hollander. 19 ClevStLRev 111.

Vestiges of sexism in Ohio and Kentucky property law; a case of de facto discrimination. Charlotte L. Levy. 1 No Ky St L F 193.

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For election to take under the will or to take dower and distributive share, see case notes under RC § 2107.42.

1. An inchoate right of dower cannot be reached by a creditor's bill: Geiselman v. Wise, 137 OS 93, 17 OO 430, 28 NE(2d) 199.

2. This section provides for inchoate but not vested dower, thereby abolishing the latter: Geiselman v. Wise, 137 OS 93, 17 OO 430, 28 NE(2d) 199.

3. Dower is a creature of statute, is founded on reasons of public policy and is subject, while it remains inchoate, to such modifications and qualifications as legislative authority, for like reasons of public policy, may see proper to impose: Goodman v. Gerstle, 158 OS 353, 49 OO 235, 109 NE(2d) 489.

4. A conveyance of realty to children of a former marriage, without consideration other than love and affection, by a man engaged to be married, without disclosure of the conveyance to his intended wife whom he later marries, does not defraud her of her right of dower, provided for in RC § 2103.02: Perlberg v. Perlberg, 18 OS(2d) 55, 47 OO(2d) 167, 247 NE(2d) 306.

5. Under this section a divorce was held to extinguish all dower rights so that words in the decree granting the husband a divorce which barred dower were mere surplusage: Ball v. Ball, 47 App 547, 192 NE 364, 40 OLR 407.

6. In computing the amount of dower to which a widow is entitled under this section, computation must be made separately on each tract of land owned by the deceased consort. Computation of dower interest in each tract must be limited to the proceeds of sale of such tract where the aggregate of the judgment liens on the tract exceeds the sale price: Dillman v. Warner, 54 App 170, 7 OO 492, 6 NE(2d) 757.

7. A surviving spouse, having only a consummate dower right, is not entitled to possession, rents, profits, or right of entry on the premises of the deceased spouse until dower has been ascertained and set off to him: Huffman v. Huffman, 57 App 33, 10 OO 24, 11 NE(2d) 271.

8. A vested dower right in real estate is a personal right which must be asserted during the life of the owner and no right thereto survives unless an action to have it assigned is commenced during that life: Dick v. Bauman, 73 App 107, 28 OO 176, 55 NE(2d) 137.

9. Although inchoate right of dower becomes

Comparative Legislation

Dower:

Ill.—Rev Stat, ch 3, § 2-9
 Ind.—Burns' Stat, § 29-1-2-2
 Ky.—KRS, § 392.020
 Mich.—MCLA, § 701.73
 N.Y.—Real Prop. Actions, § 1001
 Pa.—Purdon's Stat, Tit. 20 § 2105
 Fla.—FSA, § 732.213

Test Discussion

1 Anderson Fam. L. § 14.4

Research Aids

Computation of dower:

O-Jur2d: Dower §§ 63-69, 125
 Am-Jur2d: Dower and Curtesy § 20

Distribution share:

O-Jur2d: Descent and Distribution §§ 12, 125
 Am-Jur2d: Dower and Curtesy § 169

Dower generally:

O-Jur2d: Dower §§ 2, 3, 11-17
 Am-Jur2d: Dower §§ 1-3, 21-37

Dower statute:

O-Jur2d: Dower §§ 5, 7, 8
 Am-Jur2d: Dower § 38

Inchoate dower:

O-Jur2d: Dower §§ 18-25
 Am-Jur2d: Dower and Curtesy § 6

Relinquishment or bar of dower:

O-Jur2d: Dower §§ 77-109
 Am-Jur2d: Dower and Curtesy §§ 112-170

Rights of consort's creditors:

O-Jur2d: Dower § 57
 Am-Jur2d: Dower and Curtesy §§ 100-105

Termination of dower by divorce:

O-Jur2d: Dower § 105
 Am-Jur2d: Dower and Curtesy §§ 141-148

ALR

Dower right as affected by divorce in another state or country. 168 ALR 793.

Misconduct of surviving husband as affecting marital rights in wife's estate. 139 ALR 486.

Abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate. 13 ALR3d 446

Dower or curtesy in property subject at time of marriage to contract for disposition by sale or will. 8 ALR3d 569.

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Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

Protecting the surviving spouse by restraints on the dead hand. Lewis M. Simes. 26 CinLRev 1.

Dower in purchase money mortgage. (Case note.) 2 OSLJ 305; 9 OBar (No. 10) 124.

Dower in fee tail estates in Ohio. (Case note.) 9 OO 486.

Rights of a surviving spouse in a fee tail estate in Ohio. 18 CinLRev 332.

Dower in Ohio in case of forced sale. (Case note.) 8 OSLJ 220.

Dower—inchoate interest—barred by divorce. (Case note.) 22 CinLRev 253.

choate only upon the death of a spouse, such right may be protected by a court in a judicial sale of real estate by sequestering from the proceeds of the sale, pending the determination of the contingency of such right, an amount equal in value to the calculated value of such dower interest: *Liberty Folder Co. v. Anderson*, 86 App 399, 41 OO 521, 90 NE(2d) 412.

10. Inchoate right of dower is a contingent interest in the land of a consort, is of substantial value, and cannot be barred by any act of the consort: *Grundstein v. Suburban Motor Freight, Inc.*, 92 App 181, 49 C 312, 107 NE(2d) 366.

11. Where a wife obtained a divorce prior to January 1, 1932, reason of the husband's aggression, and under former GC § 11991 (RC § 3105.18) became entitled to her right of dower in lands in which he was seized during coverture, not allowed to her as alimony and in which she had not relinquished her right of dower, the enactment of this section, effective January 1, 1932, barring such right, was a valid exercise of the legislative power, and upon the subsequent death of such former husband, such surviving former wife is not entitled to any dower interest in the decedent's estate: *Morgan v. Morgan*, 6 OO 6 (CP).

12. The legislature intended generally to terminate dower interests as such, and such interest was retained only under the exceptions in the dower statute: *Disher v. Disher*, 8 OO 203 (App).

13. Where the mortgage had been executed by a widow who subsequently married, and after foreclosure proceedings there was no surplus from the receipts of a sheriff's sale for distribution to the mortgagor, and there was no deficiency remaining due the mortgagee on its judgment, the mortgagor's husband was not entitled to dower in the real estate: *Home Owners Loan Corp. v. Grant*, 20 OO 116 (CP).

14. An inchoate right of dower is terminated upon the death of the consort by this section, and may not be advanced as a bar to specific performance of a contract by the consort to sell realty free of dower: *Patterson v. McComas*, 21 OO 276, 37 NE(2d) 655 (App).

15. Where property was mortgaged by the owner during his lifetime but subsequent to his marriage and without the wife joining in the mortgage, by virtue of this section, the widow is entitled to a dower interest for the full amount of the mortgage but not to an amount exceeding the sale price of the property: *In re Freeman*, 31 OO 232, 16 OSupp 6 (PC).

16. An estate in fee tail is an estate of inheritance and is, therefore, subject to dower during the life of the first donee in tail: *Miller v. Miller*, 41 OO 233 (CP).

17. If the first donee dies survived by a widow and heirs of his body, and has not so aliened or encumbered his estate as to bring the case within the exceptions to the barring of dower as set out in this section, then by the provision of the statute the right to dower terminates upon his death: *Miller v. Miller*, 41 OO 233 (CP).

18. Wife is entitled to share of proceeds of sale, equal in value to dower rights, ahead of judgment creditors of husband: *Welbaum v. Baker*, 19 OLA 23.

19. The provision of this section, that a spouse "shall be endowed of an estate for life in one-third of all the real property of which the consort was seized," definitely limits dower in any case to a third, and is a limitation on paragraph (B) of the same section which provides that dower "shall be computed on the basis of the amount of the encumbrance at the time of the death of such consort": *Maher v. Greene*, 21 OLA 246.

20. Where the first donee in fee tail leaves no heir of his body, that issue having predeceased him leav-

ing a widow and two children, such widow is not entitled to her share in lieu of dower under this section as the surviving spouse of the deceased son: *Mays v. Mays*, 37 OLA 102, 42 NE(2d) 446 (App).

21. This section and GC § 10502-6 (RC § 2103.06) provide the only statutory limitations against a husband disposing of his real property during his lifetime without the consent of his wife. A wife's right to her distributive share and that portion of the estate exempt from administration and a year's allowance, do not come into existence until the death of the husband and therefore any transfer of the property of the husband during his lifetime will be free of such claims: *Neville v. Sawicki*, 44 OLA 408, 64 NE(2d) 685 (App) [affirmed 146 OS 539, 33 OO 19, 67 NE(2d) 323].

22. The enactment of this section virtually abolished all vested dower except: (a) in such real estate conveyed during coverture without the spouse joining in the deed, (b) to the extent that such real property during coverture was encumbered by mortgage without the spouse joining in the mortgage or by judgment lien without the surviving spouse having relinquished, or being barred of, dower, and (c) to such real property alienated during coverture by judicial or other involuntary sale, the surviving spouse not having relinquished or having been barred of dower: *Liberty Folder Co. v. Anderson*, 55 OLA 388, 90 NE(2d) 409 (App).

23. The spouse of a co-tenant is neither a necessary nor a proper party in an action in partition between co-tenants: *Dunkle v. Dunkle*, 2 OO(2d) 399, 137 NE(2d) 170 (CP).

24. By incorporating in the first sentence of GC § 10502-1, and again in RC § 2103.02, the same definition of dower which was included in the previous dower statute, GC § 8606, and earlier statutes, the legislature must have intended that inchoate dower should be limited in accordance with such definition: *Central Trust Co. v. Gilardi*, 21 OO(2d) 183, 186 NE(2d) 771 (CP).

25. The inchoate dower interest of a wife in real estate which was owned by her husband prior to a sheriff's sale in a foreclosure action must be computed on the surplus remaining after the satisfaction of the mortgage and payment of court costs and real estate taxes: *Central Trust Co. v. Gilardi*, 21 OO(2d) 183, 186 NE(2d) 771 (CP).

DECISIONS UNDER FORMER LAW

Since cases involving a dower interest in real estate which occurred prior to January 1, 1932, will sometimes now arise, the following decisions under the former law are given herewith:

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- Estate by coverture, 286 et seq
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 - Fee of which consort was seized during coverture, 25 et seq
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 Release or bar of dower, 65 et seq
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 Divorce, 146 et seq
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her dower therein: *Brown v. Kerns*, 6 NP 68, 9 OD 112.

—Reversion or remainder

17. Prior to the enactment in 1858 of the amendment of this section, which gave a right to dower in a remainder or reversion, a widow had no dower in which her husband had a vested remainder in case he died before the particular estate determined: *Wood v. Phillips*, 2 CC 136, 1 CD 406.

18. There is no right of dower in a contingent remainder if the remainderman dies before such contingency occurs: *Miller v. Miller*, 86 OS 345, 99 NE 1130; *Parthe v. Parthe*, 6 App 317, 26 CC(NS) 577, 28 CD 242 [motion to certify record overruled, 15 OLR 199, 62 Bull 291].

—Fee of which consort was seized during coverture

25. If realty is bought by a partnership, paid for by partnership funds, and the partnership is insolvent, the widow of a partner who is himself indebted to such partnership is not entitled to dower in such realty as against the surviving partners or the creditors: *Greene v. Greene*, 1 O 535.

26. Under a partnership agreement whereby the partners show their intention of holding land as partnership stock and buying it and selling it as such, dower cannot be claimed in such realty as against the partnership creditors: *Sumner v. Hampson*, 8 O 328 [for another opinion in this case, see *Hampson v. Sumner*, 18 O 444].

28. In order to entitle the widow of the former owner to dower he must have been seized of a legal estate of inheritance in the realty at some time during marriage, or he must have had an equitable estate in fee therein at his death: *Miller v. Wilson*, 15 O 108.

29. If land has been mortgaged by the husband, and the condition thereof is broken before marriage, it is said that as between the mortgagor and the mortgagee the mortgagor has only an equitable interest, the legal title being in the mortgagee; and accordingly if such mortgagor releases or otherwise transfers his equitable interest during his lifetime, his widow is not entitled to dower therein: *Rands v. Kendall*, 15 O 671.

30. A widow not being a purchaser for value, takes subject to all bona fide rights, interest and liens, which could have been asserted against the title of her husband at the time when he acquired the same: *Firestone v. Firestone*, 2 OS 415.

31. After the purchase money mortgage is paid, the right of the wife of the grantee to dower is prior to that of grantees or mortgagees from her husband, to whom she has not released her dower: *Carter v. Goodin*, 3 OS 76.

32. One who purchases realty and gives back a purchase money mortgage therefor, does not acquire seizin therein so as to give his wife a right of dower as against the mortgagee, even if she does not join in such mortgage: *Welch v. Buckins*, 9 OS 331; *Ward v. Carey*, 39 OS 361; *Elliot v. Plattor*, 43 OS 198, 1 NE 222.

33. As to the right of a mortgagee under a purchase money mortgage, see also *Falson v. Rhodes*, 22 OS 435; *Culver v. Harper*, 27 OS 464; *Fox v. Pratt*, 27 OS 512; *Nichols v. French*, 83 OS 162, 93 NE 897; *In re Hays*, 181 Fed 674, 16 OFD 436, 8 OLR 155; *Hickey v. Conine*, 6 CC(NS) 321, 17 CD 369 [affirmed, without report, 71 OS 548].

34. If a perpetual leasehold is defective in having but one witness, the interest of the lessee is equitable and not legal; and his surviving consort is not entitled to dower therein unless he owned it at the time of his death: *Abbott v. Bosworth*, 36 OS 605.

Widow or widower

1. A woman who has a husband living from whom she has not been divorced at the time of her second marriage is not entitled to dower in the realty of her second husband, since such marriage is absolutely void and not voidable; even though having a husband or wife already living is made a ground of divorce by GC § 11979 (RC § 3105.01): *Smith v. Smith*, 5 OS 32.

2. If a wife who has left her husband and remained absent in some unknown locality for a considerable space of time, declares on her return that she has obtained a divorce from her husband, and he, relying upon such statement, marries again, the first wife is estopped from claiming dower in his property in case her statement that she had obtained a divorce was false: *Edgar v. Richardson*, 33 OS 581.

3. The existence and validity of the marriage may be attacked in any proceeding in which it is sought to enforce dower; as in a suit which was originally brought for the purpose of marshaling liens, but which also became a partition suit by reason of the death of the owner of such realty, and the descent thereof to his heirs: *Ashbaugh v. McGillin*, 16 CC (NS) 381, 31 CD 555.

4. If a woman marries a man who has a wife living at the time of such second marriage, the second wife is not entitled to dower, although she does not know of such former marriage: *Kennelly v. Cowle*, 4 NP 105, 6 OD 170.

5. Misgiving on the part of a common law wife and some of her neighbors as to the legality of her marriage is without significance, where it appears that she and her reputed husband entered into a solemn contract, in the presence of a witness, to henceforth live together as man and wife, and this agreement was carried out, and a child was born to them, and they continued to live together, with short interruptions, and to hold themselves out as man and wife until the death of the husband, and in such a case the court will decree that the woman has a dower interest in the estate of the decedent: *Walker v. Walker*, 15 NP(NS) 189.

Estate or interest in which dower allowed

14. Contrary to the English rule, dower is allowed in Ohio in timber land or other land which is not used or cultivated and which produces no revenue: *Allen v. McCoy*, 8 O 418.

15. Stock in a private corporation is not real property, even though it is a corporation such as a railroad, the greater part of the property of which is realty or some interest therein; and the widow of an owner thereof is accordingly not entitled to dower therein: *Johns v. Johns*, 1 OS 350.

16. If a husband sells land and with the proceeds buys other land, his wife is entitled to dower in each tract of land, if she has in no way released or barred

35. As to the effect of a permanent leasehold, see also *McAlpin v. Woodruff*, 11 OS 120; *St. Bernard v. Kemper*, 60 OS 244, 54 NE 267, 45 LRA 662.

36. A wife is not entitled to dower in lands acquired by her husband subsequent to the termination of the marriage relation by divorce granted to husband: *Spaulding v. Spaulding*, 11 App 143, 20 OCA 475.

37. Where a husband's estate as lessee, under a 99-year lease, renewable forever, is subject to forfeiture by reason of his failure to comply with the terms of the lease, and he agrees to a forfeiture of his estate, and surrenders the same in consideration of being relieved of the burdens of the lease, and the transaction is free from fraud or collusion, his wife's inchoate right of dower in said estate is thereby terminated: *National Holding Co. v. Oram*, 29 App 138, 162 NE 704.

38. The husband is not seized of an estate of inheritance during coverture in mortgaged realty, the condition of which mortgage was broken before marriage, and at the time of his death he owns but an equity therein: *Kern v. Kern*, 15 CC(NS) 279, 24 CD 22 [affirmed, without opinion, 87 OS 481].

39. A widow is entitled to dower in land which was devised to her husband subject to a life estate, although the husband died before the life estate terminated: *Hammond v. Hammond*, 29 OCA 85, 35 CD 587 [motion to certify record overruled, 16 OLR 307, 63 Bull 351].

40. A permanent leasehold is said not to be an estate of inheritance within the meaning of this section: *Oliver v. Jones*, 3 NP 129, 6 OD 194.

42. If the deceased consort held a fee simple which was subject to be determined upon a condition subsequent (as where such property was devised over in the event of the first devisee's dying before his brother), the happening of such condition subsequent will defeat the dower interest of the surviving consort: *Myers v. Moore*, 12 OD(NP) 805.

43. The real estate of a deceased wife, upon her death without issue, who has title to such real estate from a former deceased husband, passes to and descends, under former GC § 8577 (see now RC §§ 2105.01, 2105.10), one-half to the brothers and sisters of such wife, and one-half to the brothers and sisters of the deceased husband, subject to the dower interest of the second surviving husband. Such surviving husband does not receive a life estate under GC § 8574 (see now RC § 2105.06): *Fay v. Scott*, 14 NP(NS) 241, 23 OD 464.

44. It is said that the surviving consort is not entitled to dower in a leasehold, unless the deceased consort owned the same at the time of his death: *Kampman v. Schaaf*, 8 DecRep 351, 7 Bull 159.

45. While dower is inferior to a vendor's lien, it attaches to the realty and must be paid out of the proceeds after the vendor's lien is paid: *Unger v. Leiter*, 32 OS 210.

46. If a deed has been delivered absolutely to the officer who takes the acknowledgment with unqualified instructions to deliver it to the grantee, and after such grantee has accepted such deed but has not taken possession of the realty the grantor marries, the wife of such grantor has no dower in such realty: *Black v. Hoyt*, 33 OS 203.

47. A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 OS 125, 57 NE 1095, 81 AmSt 621, 51 LRA 858; see also *Fast v. Umbaugh*, 22 CC 409, 12 CD 434 [reversed, without opinion,

Umbaugh v. Fast, 68 OS 672].

48. A testator gave to his wife all that part and interest in his estate, real, personal and mixed, which is secured to her, as his widow, by the laws of distribution of estates of the state of Ohio, in the cases where wives survive husbands who die intestate, and gave, absolutely, the remainder of his property, real, personal and mixed, to his brother. It was held that, under this will, the widow took her dower interest in the real estate of the testator, situated in Ohio, one-half of the first four hundred dollars and one-third of the remainder of the personal property subject to distribution, the use of the mansion house, under the provisions of former GC § 8607 (see now RC § 2109.57), and the year's allowance provided for in GC § 10656 (see now RC § 2109.53), and that the remainder of the estate, real, personal, and mixed, went to the brother: *Foster v. Clifford*, 87 OS 294, 101 NE 269, AnnCas 1915B, 65 [reversing *Clifford v. Foster*, 14 CC(NS) 391, 23 CD 429; which affirmed 10 NP (NS) 446].

—Realty held by article, bond or other evidence of claim

53. This provision of the statute seems to apply to all equitable estates as distinguished from legal estates: *Miller v. Wilson*, 15 O 108; *Abbott v. Bosworth*, 36 OS 605.

54. One who was in possession of land under a contract to buy the same, caused the deed therefor to be made to his children as grantees in order to defraud his creditors. Such conveyance being good as against the father, and the interest under the contract of sale being merely an equitable one, such transaction barred the widow of such vendee of her dower, even though such conveyance might have been set aside by the creditors: *Miller v. Wilson*, 15 O 108.

55. If land has been mortgaged and the condition thereof broken before the marriage of the mortgagor, such interest in his lands at the time of the mortgage is said to be a mere equity of redemption; and if he releases or disposes of the same during coverture, so that he does not own it at his decease, his widow is not entitled to dower: *Rands v. Kendall*, 15 O 671.

56. Where a husband, holding title to land in trust for his wife, at her request bargains and sells the same to a stranger, a specific execution of the contract of sale will be decreed against the husband, at the suit of the purchaser, although the wife joins the husband in resisting the same. As the right of the wife in such case is a mere equity, and she can have no claim of dower in the property, it is unnecessary for her to join the husband in the deed of conveyance, in order to vest in the purchaser a title freed from her claim; and it is not error in the court to order the husband to convey such a title: *Rostetter v. Grant*, 18 OS 126.

57. A permanent leasehold, renewable forever, and attested by but one witness, transfers an equitable interest; and if the owner thereof disposes of the same during his lifetime, his surviving widow is not entitled to dower therein: *Abbott v. Bosworth*, 36 OS 605.

58. Where the owner of real estate leases the same to another and to his heirs and assigns for a term of ninety-nine years, renewable forever, the estate created becomes a freehold estate in real property, and becomes subject to the laws of descent as an estate in fee. Such an estate is subject to dower under former GC § 8606 (see now RC § 2103.02): *Ralston Steel Car Co. v. Ralston*, 112 OS 306, 147 NE 513, 39 ALR 334.

59. If the owner of an equitable interest in prop-

erty (as where such person, being the former legal owner, had conveyed the same under a contract whereby the grantee was to support him, which contract was subsequently rescinded by mutual consent) conveys such property during coverture voluntarily and without consideration, without the knowledge or consent of his wife, such transfer operates as a fraud upon her rights, and she is entitled to dower in such property as against all except a subsequent bona fide grantee for value, and without notice of her rights: *Fast v. Umbaugh*, 22 CC 409, 12 CD 434 [reversed, without opinion, *Umbaugh v. Fast*, 68 OS 672].

60. That a permanent leasehold is an equitable estate in which the widow is not entitled to dower unless her husband owned it at his decease, see *Kampman v. Schaaf*, 8 DecRep 351, 7 Bull 159.

Release or bar of dower

65. Under a former statute dower was barred if a wife joined her husband in a power of attorney to convey: *Glenn v. Bank of United States*, 8 O 72.

66. If the spouse of the owner joins in the granting clause of a deed, this is sufficient to bar dower without any special release of dower or without joining in the covenants of warranty: *Smith v. Handy*, 16 O 191.

67. If a person entitled to dower joins in a warranty deed and in the covenants of warranty therein, she is thereby estopped from subsequently claiming dower in such premises, although there is no special release of dower therein: *Rosenthal v. Mayhugh*, 33 OS 155.

—Deed or mortgage—as against others

72. A release of dower cannot be taken advantage of except by one who claims through or under the person to whom such release was given: *Taylor v. Fowler*, 18 O 567; *Woodworth v. Paige*, 5 OS 70; *Ridgway v. Masting*, 23 OS 294; *Black v. Kuhlman*, 30 OS 196; *Kling v. Ballentine*, 40 OS 391; *Mandel v. McClave*, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519 [see also *Finley v. First Nat. Bank*, 52 OS 624]; see, as apparently contra in some respects, *State Bank v. Hinton*, 21 OS 509.

73. A sale upon execution or to satisfy the lien of a judgment against the owner of realty does not bar the dower of his wife, although she has released her dower to a mortgagee: *Taylor v. Fowler*, 18 O 567; *Jewett v. Feldheiser*, 68 OS 523, 67 NE 1072.

74. If a conveyance is made to defraud creditors in which the wife joins to release her dower, and such conveyance is subsequently set aside, such release is inoperative and does not release dower to the creditors of the husband: *Woodworth v. Paige*, 5 OS 70; *Ridgway v. Masting*, 23 OS 294.

75. If land has been sold on execution against the husband, and subsequently the husband and wife convey such property to another, the wife releasing her dower to the grantee, such conveyance does not inure to the benefit of the purchaser at the execution sale after he has ousted the grantee under such deed under his paramount title: *Kitzmiller v. Van Rensselaer*, 10 OS 63.

76. If there are several mortgages upon the property executed by the owner thereof during coverture, a release of dower in one mortgage does not inure to the other mortgagees: *Black v. Kuhlman*, 30 OS 196.

77. For the expression of an apparently different view, see *State Bank v. Hinton*, 21 OS 509, which, however, was criticized and not followed in *Mandel v. McClave*, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519, although it was not there expressly overruled.

78. If, however, a conveyance is in legal effect a general assignment for the benefit of the creditors of the owner of realty, and the creditors agree, in consideration of such conveyance and of the wife's release of dower, to reduce the amount of their claims and to give an extension of time, a release of dower in such conveyance inures to the benefit of the creditors whose claims are covered by such deed, although as to other creditors who are intended to be omitted from the operation of such deed, dower is not barred: *Case v. Hewitt*, 21 CC 730, 11 CD 823 [affirming 7 NP 609, 10 OD 365, and affirmed, without opinion, *Hewitt v. Case*, 67 OS 553].

79. The release of dower to a mortgagee does not operate as a release for the benefit of judgment creditors of the owner of the realty: *Kling v. Ballentine*, 40 OS 391; *Mandel v. McClave*, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519 [see also *Finley v. First Nat Bank*, 52 OS 624].

—As against those claiming under conveyance

84. If the consort of the owner of realty joins in a deed or mortgage which contains a clause providing specially for the release of dower, and such conveyance is properly executed, dower is thereby released: *St. Clair v. Morris*, 9 O 15; *Carter v. Walker*, 2 OS 339; *Baker v. Fettes*, 16 OS 596; *Mandel v. McClave*, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519 [see also *Finley v. First Nat. Bank*, 52 OS 624].

85. A conveyance by the husband at the request of his wife of realty which he holds in trust for her operates as a release of her dower: *Rostetter v. Grant*, 18 OS 126.

86. If, however, a married woman signs a deed in blank, understanding that a certain small tract is to be conveyed thereby, and subsequently the husband, without her knowledge or consent, inserts the description of a much larger and more valuable tract, the wife is not thereby barred of her dower in the tract thus inserted: *Conover v. Porter*, 14 OS 450.

87. The fact that the mortgage is defective as to the owner of the property and because his acknowledgment is omitted from the certificate of the officer taking the acknowledgment, does not prevent the dower of the consort from being barred after such conveyance is reformed: *Straman v. Rechtime*, 58 OS 443, 51 NE 44.

88. If the spouse of the owner is named in the deed only in the clause wherein the parties are named, and executes such deed, but without joining in the granting clause or in the covenants of warranty, the deed having no special release of dower therein, such execution does not release dower: *McFarland v. Febiger*, 7 O (pt1) 194; *Carter v. Goodin*, 3 OS 76.

89. Dower is barred by an appropriation proceeding to which the owner of inchoate dower is not a party: *Weaver v. Gregg*, 6 OS 547; *Long v. Long*, 99 OS 330, 124 NE 161, 5 ALR 1343.

90. If realty is conveyed for a public purpose for which such realty could have been appropriated in eminent domain, the dower of the consort of the owner is barred, although such consort does not join in such conveyance: *Gwynne v. Cincinnati*, 3 O 24; *Steel v. Board of Education*, 1 OD(NP) 276.

91. This principle applies to conveyance of land for a market house: *Gwynne v. Cincinnati*, 3 O 24, or to conveyance of land for school purposes: *Steel v. Board of Education*, 1 OD(NP) 276, 31 Bull 84.

—Who may take advantage of release

96. Any person who claims through or under a person to whom dower has been released may take advantage thereof: *Carter v. Walker*, 2 OS 339.

97. If a husband has given a mortgage upon realty in which his wife does not join, and subsequently the husband and wife unite in a mortgage in which she releases dower; and subsequently such land is sold in foreclosure proceedings upon the second mortgage, and the purchaser at such sale assumes the first mortgage, such sale passes the rights in the second mortgage and frees the property from dower; and if there is a subsequent sale of such property in foreclosure proceedings upon the first mortgage, the purchaser at such sale takes the realty free from dower: *Carter v. Walker*, 2 OS 339.

98. A wife who signed a mortgage with her husband is a necessary party to a suit by judgment creditor who attempts to marshal liens of the debtor husband. If the mortgagee files a cross-petition, he must, therefore, make the debtor's wife a party, and cause her to be served with summons: *Kaufman v. Heckman*, 13 CC(NS) 309, 22 CD 277 [affirmed, without opinion, *Heckman v. Kaufman*, 82 OS 453].

99. One who holds a dower interest in realty cannot maintain a suit in equity to compel a mortgagee to bring proceedings in foreclosure upon his mortgage, against the objection of the mortgagee and the heirs of the deceased spouse to whom the legal title has descended: *Winship v. West*, 4 NP 84, 6 OD 93.

—Defective or invalid deed

104. If the deed does not operate to pass the interest of the owner, the contingent dower of the spouse of the owner will not pass as a separate estate: *Douglass v. McCoy*, 5 O 523.

105. If such deed is invalid, the fact that the married woman who joins therein believes it to be inoperative as to herself does not estop her from taking advantage of such defect: *McFarland v. Febinger*, 7 O (ptl) 194.

106. The execution of a deed by a married woman while under the age of eighteen years does not operate as a bar to her dower; and it is not necessary that she disaffirm such conveyance before she brings suit to have her dower assigned: *Hughes v. Watson*, 10 O 127.

107. As to the effect of a defective release of dower, see *Ward v. McIntosh*, 12 OS 231.

108. Under our present statute, which does not require a married woman to join in a deed with her husband in order to render her conveyance valid, the release of dower by a married woman may be good in equity at least, although a conveyance by her husband is invalid in law, because the certificate of the notary did not show an acknowledgment on his part; reformation of such conveyance as to such husband being subsequently granted: *Straman v. Rechline*, 58 OS 443, 51 NE 44.

—Decree and judicial sale

116. If a married woman is properly made a party in foreclosure proceedings based on a mortgage whereby she has released her dower, the sale under such foreclosure operates as a bar of her dower, and she cannot assert it as against the purchaser at such sale or those claiming under him: *Carter v. Walker*, 2 OS 339.

117. If an administrator brings suit to sell the land of the deceased to pay his debts, and the mortgagee of the deceased is made a party to such suit, the petition containing an allegation that the widow of the deceased is entitled to dower, the order of the court finding that the widow is entitled to dower and assigning her dower in the whole of the realty covered by such mortgage and ordering a sale of such realty subject to such dower, is conclusive upon the mortgagee, and he cannot ignore such decree and

maintain an action thereafter to enforce such mortgage. Even if, by reason of the release of such married woman, the mortgage was a lien paramount to her dower, such adjudication bars the mortgagee from asserting such priority: *Affleck v. Snodgrass*, 8 OS 234.

118. A sale for delinquent and unpaid taxes operates as a bar of dower (in this case of inchoate dower): *Jones v. Devore*, 8 OS 430.

119. If a judgment is rendered against the owner of realty and becomes a lien after coverture, a sale either on execution or under proceedings in equity to enforce such judgment cannot operate as a bar of the dower of the wife of such owner: *Kitzmiller v. Van Rensselaer*, 10 OS 63; *Dingman v. Dingman*, 39 OS 172; *Arnold v. Donaldson*, 46 OS 73, 18 NE 540; *Jewett v. Feldheiser*, 68 OS 523, 7 NE 1072; *Kaufman v. Heckman*, 22 CD 282 [affirmed, without report, *Heckman v. Kaufman*, 82 OS 453].

120. If a married woman has joined in a mortgage to release her dower, but is not made a party to the foreclosure thereon, she is not thereby barred of her right to redeem: *McArthur v. Franklin*, 15 OS 485.

121. If a married woman is made a party to a foreclosure suit based upon a mortgage in which she did not join, a decree in such suit cannot bar her dower, even if a subsequent mortgagee claiming under a mortgage in which she joined files an answer but does not make the wife a party to such answer and asks no relief as against her, the decree not purporting to affect the interest of the wife: *Parmenter v. Binkley*, 28 OS 32.

122. While a sale under foreclosure proceedings does not bar dower if the party claiming dower is not made a party to such proceedings, and such party is free to claim dower in such realty, such party may elect to come in and take dower from the proceeds of such sale, and the election to take dower in either way bars such persons from claiming it in the other way: *Ketchum v. Shaw*, 28 OS 503.

123. If land is sold under an assignment by the owner thereof for the benefit of his creditors, and his wife is not made a party thereto, she is entitled, after payment of a mortgage wherein she had released her dower, to dower in the entire proceeds of the sale: *Ketchum v. Shaw*, 28 OS 503.

124. In an action to enforce the lien of a judgment rendered against the owner of the realty, the fact that the wife of such owner has released her dower to a mortgagee, and that such mortgagee is made a defendant in such suit, does not authorize the court to render a decree barring dower by virtue of a sale upon such judgment: *Jewett v. Feldheiser*, 68 OS 523, 67 NE 1072; see also *Taylor v. Fowler*, 18 O 567; *Cole v. Mathews*, 38 Bull 223.

126. A spouse who has an inchoate right of dower is not a proper party to a proceeding in eminent domain; nor is such spouse entitled to compensation for such dower: *Long v. Long*, 99 OS 330, 124 NE 161, 5 ALR 1343.

127. In action to foreclose mechanic's lien, in which mortgagees intervened, and their claims were found superior to dower estate, and sale pursuant thereto was required to be made free of dower estate, so that wife was divested of her dower by sale, it was duty of court to ascertain value thereof and pay same out of proceeds of sale: *Canan v. Heffey*, 27 App 430, 161 NE 235.

—Estoppel to claim dower

132. A widow who is present at a judicial sale at which it is announced that the property is sold free from dower, and that she is to receive dower in the proceeds of the sale, is estopped from claiming dower subsequently in such property as against such pur-

chaser: *Smiley v. Wright*, 2 O 506.

133. If land is sold to satisfy a judgment, a grantee who claims under a deed inferior to the title created by such sale cannot set up the dower which has been released to him in such deed as a designated and separate estate, as against the purchaser at such sale to whom such dower interest was not released: *Dougllass v. McCoy*, 5 O 523.

135. A married woman who, by her conduct, induces third persons to believe that she has been divorced from her husband; who has in fact married another man; and who has without objection seen her former husband marry again and has seen him convey land to grantees by deeds in which his second wife joined, releasing her dower, is estopped from claiming her dower in such property, even though no divorce had in fact been granted to her from her first husband, and she had in good faith believed that he had obtained such divorce from her: *Brown v. Kerns*, 6 NP 68, 9 OD 112.

136. The fact that a married woman has practically denied the fact that she was married during the lifetime of her husband, does not estop her from claiming dower as against his heirs, since they have not acted in reliance upon such statement: *Brown v. Kerns*, 6 NP 68, 9 OD 112.

137. In order that acts or a course of conduct of the surviving consort of a deceased testator should operate to estop such consort equitably from claiming dower and a distributive share of the personal property under the law and to amount to an election to take under the will, such acts must be of such an unequivocal character as will clearly and distinctly demonstrate a purpose to accept the provisions of the will: *Colored Industrial School v. Bates*, 90 OS 288, 107 NE 770, AnnCas 1916C, 1198 [affirming *Bates v. Creed*, 2 App 59, 15 CC(NS) 433; for opinion below, see *Creed v. Bates*, 14 NP(NS) 81].

138. Wife was not estopped to assert dower rights in foreclosure of mechanic's lien for improving property under contract with husband because she stood still while improvement was made, since there was no duty to speak: *Canan v. Heffey*, 27 App 430, 161 NE 235.

—Divorce

146. After divorce is granted, relation of husband and wife ceases, and former wife, not being wife at time of death of former husband, is not his widow thereafter, and is not entitled to dower: *Walker v. Walker*, 3 OLA 493.

—Election

152. As to the time of making election, see *Stilley v. Folger*, 14 O 610.

153. If the widow elects to take her dower and distributive share, she thereby waives her right to gifts in lieu of dower: *Jones v. Lloyd*, 33 OS 572.

154. Husband electing to take under will waives right to dower in wife's realty: *Barrett v. W.P. Southworth Co.*, 35 App 452, 172 NE 563.

155. The election of a widow to take under the will operates as a release of her dower as far as concerns the interest of the devisees: *Corry v. Lamb*, 45 OS 203, 12 NE 660.

156. As to the right of a surviving spouse who elects not to take under the will, see *Wilson v. Hall*, 6 CC 570, 3 CD 589 [affirmed, without report, *Hall v. Wilson*, 53 OS 679]; *Moyses v. Neilson*, 7 NP 607, 9 OD 623.

157. For the effect of a defective election, see *Hessenmueller v. Mulrooney*, 4 NP 50, 6 OD 123.

158. The interest of the wife in the estate of her deceased husband is a property right, which cannot

be taken away from her by the last will and testament of the husband, or by any other act on his part, unless she elects to take the provisions made for her by such last will, and to waive the rights conferred upon her by law: *State ex rel Zollinger v. Sloane*, 24 OD (NP) 119.

—Partition

163. A sale under the act "to provide for the partition of real estate" of an estate held in common, divests the wife of a cotenant in fee of the estate of her inchoate right of dower therein, and passes the entire estate to the purchaser: *Weaver v. Gregg*, 6 OS 547.

164. Where, at the time of the partition of an estate between co-devisees, one of them had an inchoate right of dower in premises set off by the partition to another, and, subsequently to the partition, the inchoate right of dower became perfect by the death of her husband, she will not, in equity, be held estopped to claim her dower against her co-partitioners. In such a case equity will, while sustaining the claim to dower, decree and enforce a contribution, by all the parties to the partition, to make good to the co-devisees, in whose share the dower is assigned, their equal share in the common estate remaining after the assignment of dower: *Walker v. Hall*, 15 OS 355.

165. The husbands and wives of cotenants have an inchoate contingent right of dower in the respective shares so held in common, and in an action to partition the lands it is necessary, in order to foreclose their rights, that such husbands and wives be made parties. Accordingly an attorney who makes the spouses of the tenants in common parties to the proceeding performed services for the benefit of all the parties and is entitled to a part of the attorney fee: *Richards v. Richards*, 15 CC(NS) 287, 23 CD 640 [reversing 13 NP(NS) 153, 23 OD 312, and reversed by consent, 11 OLR 2, 58 Bull 116, on authority of *Weaver v. Gregg*, 6 OS 547].

166. In a case of amicable partition by mutual conveyances of unequal purparts, a mortgage given by one tenant in common (his wife not joining) to another to equalize the allotments, is subordinate to the wife's inchoate right of dower in the undivided interest acquired by descent of such mortgagor in the purpart so allotted to him, but is superior to dower in the share acquired by purchase from the mortgagee: *Fleming v. Morningstar*, 4 NP(NS) 405, 17 OD 430 [affirmed by circuit court, without report, which was affirmed by the supreme court, without report, 72 OS 647].

167. A proceeding in partition bars the contingent dower of the wife of one of the cotenants, although she was not made a party to such proceeding, and although the land was sold in such proceeding: *Richards v. Richards*, 13 NP(NS) 153, 23 OD 312 [reversed, 15 CC(NS) 287, 23 CD 640; which was reversed by consent, 11 OLR 2, 58 Bull 116, on authority of *Weaver v. Gregg*, 6 OS 547].

168. See to the same effect: *Kibler v. Hand*, 88 OS 533, 106 NE 1064 [reversing *Hand v. Kibler*, 15 CC (NS) 360, 24 CD 95, on authority of *Weaver v. Gregg*, 6 OS 547].

Priorities and distribution—dower not barred

173. If the land is one of which the deceased consort was seized during coverture, and the surviving consort has not released dower or been barred thereof, the surviving spouse is entitled to dower in the specific realty, and cannot be compelled to accept such dower out of the proceeds of such realty: *Dougllass v. McCoy*, 5 O 523; *McFarland v. Febiger*, 7 O (pt1) 194; *Hughes v. Watson*,

10 O 127; *Conover v. Porter*, 14 OS 450; *Woodworth v. Paige*, 5 OS 7; *Ridgway v. Masting*, 23 OS 294.

174. If, under such circumstances, she elects to and does receive her dower in money out of the proceeds of the realty, she is thereby precluded from claiming dower in the realty: *Sweesey v. Shady*, 22 OS 333.

175. Where a mechanic or materialman furnishes labor and material under a contract with the husband alone, in improvement of his separate realty, and the wife is not a party to the contract, and has given no release, her inchoate dower right is paramount to the right of the mechanic's lien: *Glassmeyer v. Michelson*, 23 NP(NS) 537.

176. That dower is exempt from debts of the decedent which have not become specific liens upon the realty prior to the attaching of the inchoate right of dower, see *Smith v. McIntire*, 83 Fed 456, 12 OFD 688.

—Dower released or barred

181. If the dower of a widow is released or barred by deed, she has, in the absence of special contract, no rights of any sort either to dower in the land itself or to compensation out of the surplus: *St. Clair v. Morris*, 9 O 16; *Rostetter v. Grant*, 18 OS 126.

182. If she has released her dower by mortgage, or if there is a lien upon the realty prior to her dower, she cannot assert her right to dower in such realty as against such mortgagee or lienholder, but after such mortgage or lien is discharged she has a right to compensation in money out of the proceeds of such sale: *Baker v. Fetter*, 16 OS 596; *Straman v. Rechline*, 58 OS 443, 51 NE 44.

183. A widow who, during the lifetime of her husband, entered into a separation agreement with him, by the terms of which she agreed to be barred of dower in his real estate and to release the same upon his demand, will not be permitted to have dower as against one who loaned money to him and took a mortgage upon his real estate to secure the same in reliance upon the terms of said agreement: *Kneiley v. Kneiley*, 38 App 467, 176 NE 476.

—Purchase money mortgage

See also case notes 25 et seq, this section.

187. If a purchase money mortgage has been discharged, as where the husband conveys land to a third person by a deed in which the wife does not join, and said third person agrees to pay such mortgage debt and does pay it, the right of such wife to dower in such land exists: *Carter v. Goodin*, 3 OS 76.

188. A married woman has no right of dower as against a purchase money mortgage given by her husband for land purchased by him during coverture, even though she does not join in the mortgage to release her dower: *Welch v. Buckins*, 9 OS 331; *Ward v. Carey*, 39 OS 361; see also *Elliot v. Plattor*, 43 OS 198, 1 NE 222.

189. Where the purchaser of land executes a mortgage to the vendor for unpaid purchase money, and the land is afterward, and during the lifetime of the purchaser, sold under judicial proceedings for foreclosure of the mortgage, the widow of the purchaser, although she did not sign the mortgage, and was not made a party to the proceeding of foreclosure, is not entitled to dower in the premises, or to redeem the same: *Folsom v. Rhodes*, 22 OS 435.

190. A widow is dowerable of the surplus remaining after the payment of a purchase money mortgage. Having had her full dower in the residue of the estate, a portion of which was sold, and the proceeds applied to remove a purchase money mortgage, larger in amount than the property mortgage, she cannot

thereafter be endowed of such property as though no mortgage existed. The heirs and others having, with the sanction of the court, sold property of which the widow had already been endowed, and with moneys arising therefrom having paid off the purchase money mortgage, the widow is not thereby invested with right of dower in the whole property so mortgaged: *Fox v. Pratt*, 27 OS 512.

191. The widow of a purchase money mortgagor, mortgage given before marriage and property sold by executors to pay the mortgage debt, is not dowerable of the whole proceeds, but only of the surplus remaining after satisfying the mortgage: *Nichols v. French*, 83 OS 162, 93 NE 897 [approving and following *Culver v. Harper*, 27 OS 464, and distinguishing *Kling v. Ballentine*, 40 OS 391, and *Mandel v. McClave*, 46 OS 407]; see, to the same effect, *Fox v. Pratt*, 27 OS 512; *In re Hays*, 181 Fed 674, 16 OFD 436, 8 OLR 155.

192. In *Hickey v. Conine*, 6 CC(NS) 321, 17 CD 369 [affirmed, without report, 71 OS 548], however, it was said that if land is encumbered by a purchase money mortgage given by the deceased spouse, and by another purchase money mortgage given by the grantor of such spouse and assumed by such spouse as a part of the purchase price, on sale of such realty by an administrator to pay his debts, and upon payment of the mortgages out of the proceeds thereof, there being a surplus remaining, the widow is entitled to have her dower interest in such realty computed upon the entire proceeds of the sale and payable out of such surplus.

193. Where a husband and wife executed a new mortgage to secure party advancing money to pay purchase money mortgage, without lapse of time during which mortgage indebtedness did not operate, the wife was held dowerable only out of the proceeds of the sale of husband's interest in property after payment of mortgage, since new mortgagee became substituted to original security (former GC § 8606 [see now RC § 2103.02]): *George v. George*, 51 App 169, 4 OO 260, 200 NE 142.

—Vendor's lien

198. Where the vendor of a tract of land, having a lien for the purchase money, obtains a judgment against the administrator of the vendee, upon which the land is sold for a sum sufficient to pay the whole amount, the lien does not pass to the purchaser of the land, so as to enable him to set it up against the dower estate of the widow of the original vendee, but such lien is extinguished by the sale on execution: *McArthur v. Porter*, 1 O 99.

199. The vendor's lien is superior to the inchoate right of dower of the wife of the vendee: *Elliot v. Plattor*, 43 OS 198, 1 NE 222.

200. Where, in a suit brought to enforce a vendor's lien for purchase money, to which the vendee and his wife, and also the holder of a subsequent mortgage executed by the vendee alone, are made defendants, and the proceeds of sale of the land covered by the liens are more than sufficient to discharge the vendor's claim, the wife is entitled, as against such mortgagee, to assert her contingent right of dower in the surplus fund. But such right of the wife must be protected in a mode which will not interfere with the right of the mortgagee to subject the whole estate of the husband in the premises, to the present satisfaction of the mortgage debt, in its order of priority: *Unger v. Leiter*, 32 OS 210.

—Bankruptcy

205. Bankruptcy court could determine husband's dower rights under state statutes in realty of bank-

rupt wife: In re Rosing, 56 F(2d) 1049.

206. A wife's inchoate dower in her husband's real estate does not pass to her trustee when she is adjudged bankrupt, and when the husband's property is sold by his trustee in bankruptcy the value of her dower, as fixed under Ohio statutes, should be paid to her: In re Kiehl, 36 OLR 633 (Fed).

—Federal estate taxes

211. Dower should be paid to the surviving spouse without deduction of federal estate taxes; there is no difference between dower and the proceeds thereof in money: Allen v. Miller, 27 NP(NS) 49.

—Mortgage given before coverture

216. When property owner mortgages same, and thereafter marries before condition of mortgage is broken, and property is subsequently sold on foreclosure, wife is entitled, out of surplus, to value of her inchoate dower calculated on entire proceeds of sale, unless mortgage was for purchase money, in which case wife is dowerable only in surplus arising after purchase money has been paid: Canan v. Hefey, 27 App 430, 161 NE 235.

217. Where land was mortgaged by the husband and the condition was broken before marriage and after marriage the husband dies, upon sale of the land by his administrator for payment of his debts, and the proceeds of the sale of the mortgaged land were large enough to pay the mortgage debt and leave a surplus sufficient to allow the widow dower in the entire proceeds, it was held that the widow was only dowerable of the surplus proceeds after paying the mortgage debt and not out of the entire purchase money: Kern v. Kern, 15 CC(NS) 279, 24 CD 22 [affirmed, without opinion, 87 OS 481].

218. A widow is dowerable only in the surplus arising from the sale of lands held by her husband in which he had only an equity of redemption at the time of his marriage to her, having mortgaged the land before the marriage: King v. Alt, 11 NP(NS) 433.

—Mortgage given during coverture

225. A widow who, in the lifetime of her husband, united with him in a mortgage upon lands of which he was seized in fee during coverture, has, in equity, a right to redeem, and a foreclosure in the lifetime of her husband, to which she was not a party, does not divest her of such right: McArthur v. Franklin, 16 OS 193 [approving and following 15 OS 485].

226. In State Bank v. Hinton, 21 OS 509, it was said that where realty was sold upon a mortgage executed by husband and wife, and the proceeds were more than sufficient to pay off the mortgage debt and costs, the widow is dowerable as to the surplus, and not of the entire proceeds. This, however, was in part obiter since in this case the widow permitted an order to be made distributing the surplus among the owners of the equity of redemption; and after such order was made and such distribution had, it was held that she was precluded from recovering from the persons to whom such surplus had been paid.

227. In a proceeding at the suit of sundry mortgagees to foreclose their respective mortgages, it appeared that the wife of the mortgagor had united with her husband in the execution of only one of the mortgages, in which she had released her contingent right of dower. At the instance of the mortgagee holding such release the wife was made a party, and the premises were sold, pursuant to an order, free from her contingent claim to dower. It was held that the mortgagee holding such release is entitled, on distribution, to receive the proportionate value of such

inchoate right of dower, though the net proceeds of the sale are insufficient to satisfy the prior mortgages: Black v. Kuhlman, 30 OS 196.

228. The owner of realty died intestate, leaving land encumbered by a mortgage, for his debt, made by himself and wife, who survived him. She duly elected to take under the law, and not under the will. The land was sold upon a proper petition of the administrator with the will annexed. The proceeds of the land, added to the personalty, made a sum large enough to pay all debts (including the mortgage), the statutory allowance for one year, the costs of administering the estate, dower in the entire proceeds of the land and leave a surplus for the devisees. It was held that the widow, as against the devisees, is entitled to dower in the entire proceeds of the land: Kling v. Ballentine, 40 OS 391.

229. Where the wife has joined in a mortgage of the husband's lands to secure his debt, upon a judicial sale of the premises, she may have the value of her contingent right of dower in the entire proceeds ascertained, and the husband's entire interest therein shall be exhausted to pay the debt before resorting to the interest of the wife therein: Mandel v. McClave, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519; see also Finley v. First Nat. Bank, 52 OS 624, 44 NE 1135.

—Judgment against owner of fee

234. The fact that a part of the proceeds of a sale are applied to the payment of the mortgage in which the wife has joined to release her dower, does not cause such sale to operate as a bar of her dower: Taylor v. Fowler, 18 O 567.

235. A married woman joined her husband in executing a mortgage. The assignee of such mortgage became assignee in insolvency of the husband and sold the mortgaged property to defendant under the general authority of the probate court, no special proceedings having been instituted, to which the wife was made party. The proceeds of sale being more than double the amount of the mortgage, went into the hands of the assignee, who paid himself his debt out of the general funds of the husband's estate and during his lifetime. It was held that upon the death of the husband, the mortgage having been discharged, his widow was entitled to dower in the whole property: Ketchum v. Shaw, 28 OS 503.

236. That the dower of the consort of the owner of the realty cannot be divested by a sale to enforce the lien of a judgment rendered against the owner of the fee during coverture, even if such consort had executed a mortgage wherein she released her dower to the mortgagee, see Dingman v. Dingman, 39 OS 172; Kaufman v. Heckman, 13 CC(NS) 309, 22 CD 277 [affirmed, without report, Heckman v. Kaufman, 82 OS 453].

237. The fact that the realty in question was devised to the husband, charged with the payment of legacies, and that upon sale payment of legacies was ordered out of the proceeds of the sale, does not bar the dower of the wife, the judgment on which it was sold having become a lien on the realty during coverture: Dingman v. Dingman, 39 OS 172.

238. As to the right of the surviving consort of the owner of realty to dower as against a judgment creditor, the dower right of the party claiming dower having been released to the mortgagee whose mortgage is paid out of the proceeds of the sale, see Kling v. Ballentine, 40 OS 391; Mandel v. McClave, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519 [see also Finley v. First Nat. Bank, 52 OS 624].

239. An executor, under an order issued by the probate court in a suit to sell lands to pay the debts

of the decedent, sold the same without making the former wife of the decedent, who had obtained a divorce from him on account of his aggressions, a party to the suit. The purchaser, being advised by counsel that the title to the lands was clear and unencumbered, and that the wife had no dower estate therein, bought the lands at their full value in money, paid over the money to the executor, and entered into possession of the premises. The court of common pleas afterwards adjudged that the divorced wife was dowerable of the lands, and dower therein was accordingly assigned and set off to her. It was held that the purchaser cannot maintain an action to recover back sufficient of the purchase money to compensate him for the loss he has sustained, by reason of the assignment of dower, and that the rule, caveat emptor, is applicable: *Arnold v. Donaldson*, 46 OS 73, 18 NE 540.

240. A sale of land at the suit of a judgment creditor of the husband, brought to marshal liens, does not have the effect to bar or foreclose the inchoate dower of the wife. The rule is not different, although the wife is made a party to the creditor's suit and is in default of answer when the judgment ordering a sale is entered and the sale is made, and although a mortgagee, in whose mortgage the wife has joined, releasing dower, is also made defendant, but is in default at the time the judgment is rendered and the rule is made: *Jewett v. Feldheiser*, 68 OS 523, 67 NE 1072.

Judgment rendered before coverture

245. If a judgment has been rendered against the owner of realty before his marriage and has become a lien upon such realty, such judgment is prior to the dower right of his wife; and if such realty is sold in proceedings to satisfy the lien of such judgment, brought after marriage and before the death of the owner, it is said that such sale will prevent the wife of the owner from asserting her dower in such realty, even if she is not made a party to such proceedings: *Phillips v. Keels*, 4 CC 316, 2 CD 568.

—Judgment rendered during or after coverture

250. After the death of the owner of the fee, and before the assignment of dower, the right of the surviving consort to dower is an interest which may be seized by proceedings in equity to satisfy a judgment rendered against such surviving consort or a debt created after the death of the owner of the fee: *Boltz v. Stolz*, 41 OS 540; *Gildehaus v. Fidelity Bldg. & Co.*, 3 CC(NS) 598, 14 CD 110; see also *Maclaren v. Stone*, 18 CC 854, 9 CD 794, and *Moore v. Moore*, 7 NP 320, 6 CD 154 [affirmed in *Simmons v. Moore*, 3 CC(NS) 178, 13 CD 11].

251. Such interest is not subject to levy or sale upon execution, and no lien is obtained thereby: *Simmons v. Moore*, 3 CC(NS) 178, 13 CD 11 [affirming *Moore v. Moore*, 7 NP 320, 6 CD 154]; see also *Maclaren v. Stone*, 18 CC 854, 9 CD 794.

Nature of dower—vested dower

256. A dower right is an insurable interest: *Ohio Farmers Ins. Co. v. Britton*, 31 OS 488.

257. Vested dower is an interest which may be conveyed by the party entitled thereto, even before assignment: *Weyer v. Sager*, 21 CC 710, 12 CD 193; *Bausch v. McCunnell*, 7 NP 387, 5 OD 162; *Fletcher v. Huntington*, 8 NP 333, 11 OD 338; *Todd v. Beatty*, W 460.

258. The surviving spouse has no right to the possession or management of the realty of the deceased spouse. The remedy is to proceed under GC § 12005

(RC § 5305.02) to have dower assigned: *Bates v. Creed*, 2 App 59, 15 CC(NS) 433, 26 CD 338 [affirming *Creed v. Bates*, 14 NP(NS) 81, and affirmed, *Colored Industrial School v. Bates*, 90 OS 288].

259. Under GC § 8606 (see now RC § 2103.02) the words “an estate for life in” specifically indicate the time of the continuance or duration of the dower right rather than establish it as an “estate” in the property to which it attaches; and a dower interest unassigned is not a life estate, nor such an estate in lands as will prevent a partition by heirs: *Lape v. Lape*, 22 NP(NS) 392, 31 OD 188, 312.

—Inchoate or contingent dower

265. If inchoate dower is released to the purchaser of the fee, it is not a separate estate, the existence of which may be set up by someone who is not the owner of the fee, and does not claim under him: *Douglass v. McCoy*, 5 O 523.

266. The right of the party entitled to dower ceases to be an inchoate right and becomes a contingent right at the moment of the death of the consort in whom the fee was vested: *Conger v. Barker*, 11 OS 1; *Hickle v. Hickle*, 6 CC 490, 3 CD 552.

267. Inchoate right of dower is said to be not an estate, but a right or interest in land, which the law creates for the benefit of the wife. It is said to be a legal right which is not uncertain or contingent, except that being a life interest only, the party entitled to dower can have such dower assigned and can take possession of the property so set off only in the event that such party outlives the spouse in whom the fee vests: *McArthur v. Franklin*, 16 OS 193.

268. Inchoate right of dower is a present vested right which may be reduced to a money value and which may be barred by estoppel. While contingent for its enjoyment in possession upon the death of the owner of the fee, before the death of the party claiming dower, it is not the mere possibility, which is all that an heir possessed in his ancestor's estate during his life: *Rosenthal v. Mayhugh*, 33 OS 155.

269. Inchoate right of dower may be reduced to a money value by the use of tables of mortality: *Mandel v. McClave*, 46 OS 407, 22 NE 290, 15 AmSt 627, 5 LRA 519; see also *Finley v. First Nat. Bank*, 52 OS 624, 44 NE 1135.

270. Inchoate dower, while an encumbrance upon realty, is not a breach of a covenant of warranty as distinguished from a covenant against encumbrances: *Peoples Sav. Bank Co. v. Parisette*, 68 OS 450, 67 NE 896, 96 AmSt 672.

271. The inchoate dower of the wife is not a lien upon the land of the husband, but is an interest in it: *Jewett v. Feldheiser*, 68 OS 523, 67 NE 1072.

272. One having an inchoate right of dower is neither a proper or necessary party to an action in condemnation of real estate or any interest therein in the exercise of the power of eminent domain: *Long v. Long*, 99 OS 330, 124 NE 161, 5 ALR 1343.

275. In an action to enforce the specific performance of a written contract for the sale of real estate, made by the owner of the fee, which contains no stipulation to convey with release of dower by his wife, if the wife refuses to release in any way her inchoate right of dower in the land and her refusal is not procured directly or indirectly by her husband, it is error to decree specific performance against the husband with an abatement from the contract price of the prospective value of the dower of the wife (*Lucas v. Scott*, 41 OS 636, and *Peoples Sav. Bank Co. v. Parisette*, 68 OS 450, 67 NE 896, 96 AmSt 672, approved and followed): *Barnes v. Christy*, 102 OS 160, 131 NE 352 [for subsequent report in the supreme court, see 107 OS 360].

276. If the vendor of realty does not agree to secure the release of the dower of his spouse, the purchaser must take, subject thereto, without abatement: *Peoples Sav. Bank Co. v. Parisette*, 68 OS 450, 67 NE 896, 96 AmSt 672; *Barnes v. Christy*, 102 OS 160, 131 NE 352 [for subsequent report in the supreme court, see 107 OS 360]; *Edmund v. Boring*, 30 OCA 238, 35 CD 659 [wife as vendor].

277. Contingent right of wife to dower during husband's life, in his real estate, is property having substantial value: *Smith v. McKelvey*, 28 App 361, 162 NE 722.

278. An inchoate dower right will not constitute an ownership within the meaning of the lien act, and is not subject to mechanics' liens: *Glassmeyer v. Michelson*, 23 NP(NS) 537.

279. Inchoate dower cannot be conveyed as a separate interest to one to whom the owner of the fee has not conveyed such fee: *Thoms v. Thoms*, 1 Hosea 185 [affirmed, without report, 73 OS 333].

280. The nature of dower in Ohio is fixed by statute rather than by the rules of the common law: *In re Russell*, 13 AmBankruptcyRep 24, 14 OFD 364.

281. The inchoate dower of a bankrupt cannot be sold during the life of the spouse in whom the fee is vested: *In re Russell*, 13 AmBankruptcyRep 24, 14 OFD 364.

Estate by coverture

286. Nonjoinder of the husband in proceedings for the partition of the wife's land leaves his life estate untouched, but partition against the wife without the husband will bind her unless reversed: *Pillsbury v. Dugan*, 9 O 118.

287. Before the act of February 28, 1846, the husband on marriage acquired a legal estate in the fee simple of his wife. This was a freehold during the joint lives of himself and wife, with remainder to himself for life as tenant by the curtesy and remainder to the wife and her heirs in fee. It was the land of the husband and liable for his debts: *Canby v. Porter*, 12 O 79.

289. Upon marriage, the husband acquired an interest in the land of his wife, at common law; and accordingly until his death no right of action accrued in her favor to recover possession thereof from one who had, during such coverture, taken possession thereof unlawfully: *Westlake v. Youngstown*, 62 OS 249, 56 NE 873.

290. That a deed executed by husband and wife passes the husband's estate by coverture, even though it may be executed defectively as to the wife, see *Lessee v. Smith*, W 208.

Estoppel to deny dower

296. In case of a petition for dower, the grantee of a deceased husband, and those holding under him, are not estopped to deny that their grantor had title: *Coakley v. Perry*, 3 OS 344.

297. If a husband conveys to a stranger by deed, and the certificate of acknowledgment is defective as to the wife's release of dower so that she is not barred by such deed, the grantee under such deed who has taken possession thereunder is estopped to deny the title of the grantor; or at least he cannot defeat the claim for dower by setting up a title in a third person with which he does not connect himself: *Ward v. McIntosh*, 12 OS 231.

298. If in a proceeding in which the widow of the deceased and his mortgagee are parties, the whole dower of the widow is assigned to her in terms which are covered by the mortgage, and it is ordered in a proceeding by the administrator to sell the realty of the deceased to pay his debts, if the realty in which

dower is thus assigned be sold to pay such debts subject to such dower, the mortgagee is estopped as against the widow from claiming in a subsequent foreclosure proceeding that she has released her dower to him: *Affleck v. Snodgrass*, 8 OS 234.

[§ 2103.02.1] § 2103.021 When affidavit required to preserve dower.

Whenever "trustee," "as trustee," or "agent" follows the name of the grantee in any deed of conveyance of land recorded in this state and no other instrument containing a description of such land has been recorded in the office of the recorder of the county in which such land is situated which puts upon inquiry any person dealing with such land that a spouse of such grantee would have a dower interest in such land, a conveyance of such land by such grantee to a bona fide purchaser conveys a title free from the claims of any spouse of such grantee in such land, for dower, inchoate, or otherwise, unless such spouse, prior to the recording of such conveyance by such grantee to said purchaser, has recorded in the office of the recorder of the county in which the land is situated an affidavit describing such land and setting forth the nature of such spouse's interest in such land.

HISTORY: 129 v 339, § 1. Eff 10-17-61.

Research Aids

Preservation by affidavit:
O-Jur2d: Dower § 86

§ 2103.03 Conveyance in lieu of dower. (GC § 10502-2)

If accepted by the grantee, the conveyance of an estate or interest in real property in lieu of dower, to take effect on the death of the grantor, will bar such grantee's right of dower in the real property of the grantor. If the conveyance was made when the grantee was a minor or during the marriage, the grantee may waive title to such real property and demand dower.

When a conveyance which is intended to be in lieu of dower fails through any defect to be a bar thereto, and the widow or widower availing of such defect demands dower, the estate or interest conveyed to such widow or widower shall cease.

HISTORY: GC § 10502-2; 114 v 320 (338). Eff 10-1-53. For an analogous section, see former GC § 8608.

Comment

This section is also derived from GC § 10502-3.

Comparative Legislation

Conveyance in lieu of dower:
Ind.—Burns' Stat, § 29-1-2-3.1
Ky.—KRS, § 392.120
Mich.—MCLA, § 702.74
N.Y.—Real Property, § 197

Research Aids**Antenuptial contract:****O-Jur2d:** Dower §§ 100-102**Am-Jur2d:** Dower and Curtesy §§ 118-121**Conveyance in lieu of dower:****O-Jur2d:** Dower §§ 98, 99**Am-Jur2d:** Dower and Curtesy § 133**Postnuptial contract:****O-Jur2d:** Dower § 103**Am-Jur2d:** Dower and Curtesy §§ 122-124**Separation agreement:****O-Jur2d:** Dower § 104**Am-Jur2d:** Dower and Curtesy § 126**Law Reviews**

See explanatory article in 4 OBar 147.

Some practical aspects of antenuptial agreements under the laws of Ohio. Article by H. S. Subrin of the Akron bar. 13 CinLRev 53, 21 ClevBJ (No. 9) 139.

§ 2103.04 Eviction from premises conveyed in lieu of dower. (GC § 10502-4)

A widow or widower lawfully evicted from real property conveyed in lieu of dower, or any part thereof, shall be endowed with as much of the residue of the real property of the deceased consort as will equal that from which such widow or widower is evicted.

HISTORY: GC § 10502-4; 114 v 320 (338). Eff 10-1-53. For an analogous section, see former GC § 8610.

Research Aids**Property subject to dower:****O-Jur2d:** Dower § 33

§ 2103.05 Repealed, 136 v S 145, § 2 [GC § 10502-5; 114 v 320 (338)]. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2103.05 applicable to estates of decedents dying prior to January 1, 1976 see Appendix A herein.

Comparative Legislation**Effect of living in adultery:**

Ind.—Burns Stat, § 29-1-2-15

Ky.—KRS, § 392.090

N.Y.—Real Prop., § 196

Pa.—Purdon's Stat, Tit. 20, § 2106

[DECISIONS CONSTRUING LAW PRIOR TO SB 145 REPEAL]

1. A wife who leaves her husband and believing that he has been divorced from her marries another man and lives with him as his wife, is nevertheless living in adultery within the meaning of this section, and she is accordingly barred of her right of dower in the realty acquired by her first husband after such separation: *Brown v. Kerns*, 6 NP 68, 9 OD 112.

§ 2103.06 Lands given up by fraud. (GC § 10502-6)

If a husband or wife gives up real property by collusion or fraud, or loses it by default, the

widow or widower may recover dower therein.

HISTORY: GC § 10502-6; 114 v 320 (338). Eff 10-1-53. For an analogous section, see former GC § 8612.

Comment

In reference to the provisions of this section, Woerner says: "But her dower rights are nevertheless protected against the husband's fraudulent attempts to deprive her thereof by voluntary conveyance or collusive charges upon his lands during coverture. 'The notion,' said the court in *Thayer v. Thayer*, 14 Vt 107, 120, 'that the right of the wife to dower in the husband's lifetime is a nonentity, and not susceptible of fraud being perpetrated of it, is unsatisfactory, and, we think, unsound, and at war with the principles of justice. Though the right may be inchoate, it should be protected against the mala fide acts of the husband.' A conveyance without valuable consideration, with the intent to defeat the wife of her dower, is void, and will be set aside; and so a deed to a stranger, although he paid full consideration, if he knew that the intention was to defeat the wife's dower." Woerner on Administration, p.368.

Text Discussion

1 Anderson Fam. L. §§ 11.2-11.17

Research Aids**Fraud:****O-Jur2d:** Dower §§ 25, 82, 85**Am-Jur2d:** Dower and Curtesy §§ 128, 130**CASE NOTES AND OAG**

1. A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 OS 125, 57 NE 1095. See *Tate v. Tate*, 19 CC 532, 10 CD 321.

2. A conveyance of realty to children of a former marriage, without consideration other than love and affection, by a man engaged to be married, without disclosure of the conveyance to his intended wife whom he later marries, does not defraud her of her right of dower, provided for in RC § 2103.02. (*Ward v. Ward*, 63 OS 125, overruled; *Perlberg v. Perlberg*, 18 OS(2d) 55, 47 OO(2d) 167, 247 NE(2d) 306 (1969).)

§ 2103.07 Dower is forfeited by waste. (GC § 10502-7)

A tenant in dower in real property who commits or suffers waste thereto will forfeit that part of the property to which such waste is committed or suffered to the person having the immediate estate in reversion or remainder and will be liable in damages to such person for the waste committed or suffered thereto.

HISTORY: GC § 10502-7; 114 v 320 (338). Eff 10-1-53. For an analogous section, see former GC § 8613.

Comparative Legislation**Forfeiture for waste:**

Ill.—Rev Stat, ch 3, §§ 2-10

N.Y.—Real Prop. Actions, § 801

Research Aids**Forfeiture for waste:****O-Jur2d:** Dower § 135**Am-Jur2d:** Waste § 34

CASE NOTES AND OAG

1. The common law rule whereby cutting timber amounts to waste is not followed in Ohio to its full extent; and if timber land is set off to a widow for her dower and she cuts timber therefrom sufficient in quantity to pay the taxes and the costs of managing such property, such conduct is not waste: *Crockett v. Crockett*, 2 OS 180.

2. Appeal lies in a proceeding to enjoin the life tenant from committing waste: *Jenks v. Langdon*, 21 OS 362.

3. A forfeiture of husband's life estate will not be decreed for failure to pay off mortgages where it appears that the testatrix executed them only to save her husband from the burden of paying building association dues, and the right of forfeiture is based on a provision in the will relating to default on his part in meeting charges for maintenance, for taxes, etc.: *Bonham v. Lucas*, 7 OLR 301.

§ 2103.08 Assignment of dower. (GC § 10502-10)

Sections 5305.01 to 5305.22, inclusive, of the Revised Code apply to the assignment of the dower of a husband.

HISTORY: GC § 10502-10; 114 v 320 (339). Eff 10-1-53. See former GC §§ 8616, 12004 to 12025.

Comment

Revised Code §§ 5305.01 to 5305.22 are the sections relating to assignment of dower. With vested dower abolished, these sections on assignment of dower apply only to the right of a surviving spouse in property conveyed or encumbered by decedent

spouse during his lifetime without first obtaining the signature of the other.

Research Aids

Assignment:

O-Jur2d: §§ 113 et seq

Am-Jur2d: §§ 185 et seq

CASE NOTES AND OAG

1. As to the application of this provision, see *Brenneman v. Brenneman*, 1 NP 332, 3 OD 392.

§ 2103.09 Estate by curtesy abolished. (GC § 10502-8)

The estate by the curtesy is abolished; but sections 2103.01 to 2103.09, inclusive, of the Revised Code shall not affect vested rights nor any section of the Revised Code.

HISTORY: GC § 10502-8; 114 v 320 (339). Eff 10-1-53. For an analogous section, see former GC § 8614.

Comparative Legislation

Curtesy abolished:

Ill.—Rev Stat, ch 3, § 2-9

Ind.—Burns' Stat, § 29-1-2-11

Ky.—KRS, § 392.020

N.Y.—Real Property, § 189

Pa.—Purdon's Stat, Tit. 20, § 2105

Fla.—FSA, § 732.111

Research Aids

Curtesy:

O-Jur2d: Dower §§ 4, 5

Am-Jur2d: Dower and Curtesy §§ 2, 11-13, 27, 41-43

CHAPTER 2105: DESCENT AND DISTRIBUTION

Section

- 2105.01 No distinction between ancestral and nonancestral or real and personal property.
2105.02 Construction of "living" and "died."
2105.03 Determination of next of kin.
2105.04 Permanent leases to descend same as estates in fee.
2105.05 [Repealed.]
[2105.05.1] 2105.051 [Advancements; time of valuation.]
[2105.05.2] 2105.052 [Debt not to be charged against intestate share.]
2105.06 Statute of descent and distribution.
[2105.06.1] 2105.061 Renunciation of interest in succession.
[2105.06.2] 2105.062 [Election to receive mansion house.]
[2105.06.3] 2105.063 [Distribution of appraised personal property; certificate of transfer.]
2105.07 Escheat of personal estate.
2105.08 Application of provisions relating to escheating estates.
2105.09 Disposition of escheated lands.
2105.10 [Repealed.]
2105.11 Estate to descend equally to children of intestate.
2105.12 Descent when all descendants of equal degree of consanguinity.
2105.13 Descent when children and heirs of deceased children are living.
2105.14 Posthumous child to inherit.
2105.15 Designation of heir at law.
2105.16 Heirs of aliens may inherit; aliens may hold lands.
2105.17 [Children born out of wedlock.]
2105.18 [Illegitimate child; acknowledgment by natural father.]
2105.19 Murderer not to benefit.
2105.20 Waste by tenant for life.
2105.21 Presumption of order of death.

Forms

1 A&H Probate FORM 2105a et seq: Descent and distribution.

§ 2105.01 No distinction between ancestral and nonancestral or real and personal property. (GC § 10503-1)

In intestate succession, there shall be no difference between ancestral and nonancestral property or between real and personal property.

HISTORY: GC § 10503-1; 114 v 320 (339). **Eff** 10-1-53. See former GC § 8577.

Comment

The effect of this section is to cause all property to pass according to one common rule whatever its character and from whatever source derived.

The reasons for the distinction between ancestral and nonancestral property and between real and personal property, in intestate succession, have long since disappeared, these differences being at the present time purely arbitrary and productive of an artificial inequality.

Cross-References to Related Sections

See RC §§ 2105.02, 2105.04, 2105.07, 2105.08, 2107.13, 2107.34, 2107.44, 2107.45, 2117.07, 2121.06 which refer to § 2105.01 et seq.
See RC § 2131.02 which refers to this chapter.

Comparative Legislation

Descent and distribution:
Cal.—Probate Code, § 200

Ill.—Rev Stat, ch 3, § 2-1
Ind.—Burns' Stat, § 29-1-6-1
Ky.—KRS, § 391.010
Mich.—MCLA, § 702.80
N.Y.—EPTL, § 4-1.1
Pa.—Purdon's Stat, Tit. 20, § 2101
Fla.—FSA, § 732.101

Research Aids

Ancestral property:
O-Jur2d: Descent and Distribution § 143
Am-Jur2d: Descent and Distribution § 75 et seq

Law Review

See explanatory article in 4 OBar 227.
Equitable charges on devised realty. (Editorial note.) 4 CinLRev 467.

CASE NOTES AND OAG

See also case notes under RC § 2105.10.

1. A distinction, in Ohio, between ancestral and nonancestral real and personal property was drawn by GC §§ 8573 and 8574 (see now RC § 2105.06), in effect prior to 1932, but by virtue of this section, effective January 1, 1932, such a distinction no longer exists: *Asher v. Asher*, 87 App 227, 42 OO 454, 94 NE(2d) 582.

2. Under the provisions of this section, in intestate succession there shall be no difference between ancestral and nonancestral property: In re *Sherick*, 167 OS 151, 4 OO(2d) 141, 146 NE(2d) 727.

§ 2105.02 Construction of "living" and "died." (GC § 10503-3)

When, in sections 2105.01 to 2105.21, inclusive, of the Revised Code, a person is described as living, it means that he was living at the time of the death of the intestate from whom the estate came, and when a person is described as having died, it means that he died before such intestate.

HISTORY: GC § 10503-3; 114 v 320 (339). **Eff** 10-1-53. For an analogous section, see former GC § 8594.

Research Aids

Terms defined:
O-Jur2d: Descent and Distribution § 27

§ 2105.03 Determination of next of kin. (GC § 10503-2)

In the determination of intestate succession, next of kin shall be determined by degrees of relationship computed by the rules of civil law.

HISTORY: GC § 10503-2; 114 v 320 (339). **Eff** 10-1-53.

Comment

Under the civil law the degree of consanguinity is computed by going from the intestate to the common ancestor and from the common ancestor to the claiming heir. Under the common law rule only the degrees from the common ancestor are counted.

Comparative Legislation

Next of kin determined:
Ill.—Rev Stat, ch 3, § 2-1

Ind.—Burns' Stat., § 29-1-6-6
 Mich.—MCLA, § 702.84
 N.Y.—EPTL, § 2-1.1
 Pa.—Purdon's Stat., Tit. 20, § 2103
 Fla.—FSA, § 732.103

Research Aids

Degrees of kinship:
 O-Jur2d: Descent and Distribution §§ 100-104
 Am-Jur2d: Descent and Distribution § 48
 Next of kin defined:
 O-Jur2d: Descent and Distribution §§ 19-21
 Am-Jur2d: Descent and Distribution § 43

Law Reviews

Browsing among the later probate authorities.
 Address by Harry L. Deibel of the Cleveland bar.
 22 OBar (No. 17) 243.

CASE NOTES AND OAG

1. In *Weisflock v. Sigling*, 116 OS 435, 156 NE 905, referring to the case of *Clayton v. Drake*, the court said:

"The case of *Clayton v. Drake*, 17 OS 367, does not apply, for the reason that the relationship there was not the same as in the instant case, and the statute at that time did not contain the words here under consideration, to wit, 'and their legal representatives.' In that case, involving the descent of ancestral property under what is now GC § 8573 (see now RC § 2105.06), the question for determination was between great-uncles and great-aunts on one side and the descendants of great-uncles and great-aunts on the other, and it was held that, there being no words of representation in the statute (51 v 500), at the time of the intestate's death, 'the next of kin to the intestate of the blood of the ancestor from whom the estate came' were the great-uncles and -aunts; and the descendants of deceased great-uncles and -aunts were excluded. While that case holds that 'The rule of the civil law is the common law of this country in the computation of degrees of kindred,' yet the statutes of descent and distribution control the descent of property in this state, and it is held in *Schroth v. Noble*, 91 OS 438, 110 NE 1067, that:

"The 'next of kin' as used in that statute (GC § 8574, par. 6 [see now RC § 2105.06, par. (F)] refers to those persons who take intestate property under the statutes of descent and distribution (*Steel v. Kurtz*, 28 OS 191, approved and followed); that each paragraph of GC § 8574 (see now RC § 2105.06) must be read in connection with all the other paragraphs for the purpose of determining who are next of kin of the blood of the intestate.

"Applying this principle, par. 6 of GC § 8574 [see now RC § 2105.06, par. (F)] is construed to mean that the estate passes to the living next of kin and the legal representatives of deceased next of kin of the same class as the living next of kin.

"Finding that *Michael Sigling* is of the class next of kin to and of the blood of the intestate living at the time of the death of said J. L. Seitz, and that there are no legal representatives of deceased members of that class who would be entitled to share with him in such inheritance under par. 6 of GC § 8574 [see now RC § 2105.06, par. (F)], it follows that the courts below were right in sustaining the demurrer of said *Michael Sigling* to the amended petition, and their judgment in so doing is affirmed."

2. It has been held that aunts and uncles of the deceased and their representatives are the next of kin of the decedent instead of his grandparents: *Ampey v. Hirsch*, 20 NP(NS) 1.

3. The phrase "nearest of kin" when employed in a last will and testament, in the absence of language

in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the statutes of descent and distribution, and in the order and proportion therein provided: *Godfrey v. Eppe*, 100 OS 447, 126 NE 886.

5. This section and GC §§ 10503-4 and 10503-5 (RC §§ 2105.06 and 2105.10) are in pari materia and should be considered together in construing the term "brothers and sisters" as used in GC § 10503-5 (RC § 2105.10): *Oldiges v. Osborne*, 11 OO 506 (PC).

6. The provisions of this section, relating to intestate succession, and defining, for such purpose, the term "next of kin," have no application in the determination of the right to appointment as administrator of a decedent's estate: *In re Fields*, 44 OLA 284 (App); *In re Applegate*, 61 OLA 277, 100 NE(2d) 322.

§ 2105.04 Permanent leases to descend same as estates in fee. (GC § 10503-11)

Permanent leasehold estates, renewable forever, are subject to sections 2105.01 to 2105.21, inclusive, of the Revised Code.

HISTORY: GC § 10503-11; 114 v 320 (341). Eff 10-1-53. For an analogous section, see former GC § 8597.

Text Discussion

2 *Anderson Fam. L.* §§ 11.2-11.17

Research Aids

O-Jur2d: Dower § 37; Estates § 61; Executors & Admin. § 151
 Am-Jur2d: Dower and Curtesy § 80

Law Reviews

Construction of statute of dower in conjunction with statute regulating descent of permanent leaseholds. (Editorial note.) 1 *CinLRev* 93.

Widow's right of dower in perpetual leasehold estate; merger of legal and equitable interests in same person. (Case note.) 1 *OSLJ* 308.

CASE NOTES AND OAG

1. For a discussion of the history of legislation on the subject of permanent leaseholds in Ohio, and the different views expressed thereunder, see *Taylor v. DeBus*, 31 OS 468.

2. They have been said since the enactment of this statute and GC § 11655 (RC § 2329.01) to be estates in fee simple: *Loring v. Melendy*, 11 O 355; *Ellison v. Foster*, 19 OD(NP) 849, 6 OLR 666; *McLean v. Rocky*, 3 McLean 230, *FedCas* No.11586, 2 OFD 270.

3. A permanent leasehold estate, renewable forever, is not a fee simple although under the Ohio statutes it has many of the incidents thereof. The fee simple remains in the lessor, his heirs, devisees or assigns: *Rawson v. Brown*, 104 OS 537, 136 NE 209, 20 OLR 44 [affirming *Brown v. Rawson*, 15 App 289, which, on appeal, rendered similar decree as 23 NP(NS) 105, 31 OD 447]; *Rawson v. Brown*, 104 OS 548, 136 NE 213 [affirming *Brown v. Rawson*, 15 App 289, which, on appeal, rendered similar decree as 23 NP(NS) 105, 31 OD 447].

§ 2105.05 Repealed, 136 v S 466, § 2 (114 v 320 (343, 344)). Eff 5-26-76.

Cross-References to Related Sections

As to debts owed decedent, see also RC § 2105.05.2

Comparative Legislation**Advancement:**

- Cal.—Probate Code, § 1050
- Ill.—Rev Stat, ch 3, § 2-5
- Ind.—Burns' Stat, § 29-1-2-10
- Ky.—KRS, § 391.140
- Mich.—MCLA, § 702.87
- N.Y.—EPTL, § 2-1.5
- Pa.—Purdon's Stat, Tit. 20, § 2109
- Fla.—FSA, § 733.806

Research Aids**Advancements:**

- O-Jur2d: Advancements §§ 1 et seq
- Am-Jur2d: Advancements §§ 1 et seq

ALR

Presumption and burden of proof with respect to advancement. 31 ALR2d 1036.

Will charging distributee's share with advancement to or debt owing by him as invoking doctrine of hotchpot. 165 ALR 899.

CASE NOTES AND OAC**[DECISIONS UNDER FORMER SECTION]****INDEX**

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Scope and construction

1. An earlier form of this statute provided for advancements of realty, but not for advancements of personalty: *Putnam v. Putnam*, 18 O 347; *Myers v. Warner*, 18 O 519; see *Miller v. Wilson*, 15 O 108.

2. If a testator has devised and bequeathed a part of his property by will, the statute on the subject of advancements applies, nevertheless, to that part of his property as to which he died intestate: *Dittoe v. Cluney*, 22 OS 436.

3. The statutory provision as to advancements in the descent and distribution of estates can have no just application in a case where it is apparent that the testator, who, by his will, had distributed property in different amounts among his children, with the manifest intention of disposing of all his estate, unexpectedly, by the omission of a residuary clause in his will,

died intestate as to the residuum of his estate: *Needles v. Needles*, 7 OS 432.

4. As between collateral heirs, neither the common law nor the statutes of Ohio recognize advancements: *Stewart v. Yeazell*, 4 App 82, 21 CC(NS) 357, 25 CD 318.

5. For deduction of advancements, see also *Westwater v. Guitner*, 18 NP(NS) 209.

6. It is said that this section makes provision for deduction from the shares of the heirs and distributees in case of intestacy, and that a debt is not provided for therein: *Woodruff v. Snowden*, 7 NP 520, 10 OD 123.

7. See, however, case notes to GC §§ 10503-4 and 10503-21 (RC §§ 2105.06 and 2105.05) for deduction of debts due from heirs, distributees, devisees and legatees to the estate of the ancestor or the testator.

8. Where a father conveyed real estate to his son at the price of one thousand two hundred dollars, and took from the son his note for two hundred dollars, payable to the father with interest, and for the remaining one thousand dollars took from the son a receipt in the following form, viz.: "October the 19th, 1859. Received of B. O. (the father) one thousand dollars for the use without interest received by me, D. O." (the son). It was held that the amount mentioned in the receipt will not be considered an advancement from father to son: *Overholser v. Wright*, 17 OS 157.

9. If trustees are authorized to deliver part of the trust property to the beneficiaries, such transaction does not create a debt; and the amount thus advanced does not bear interest even though in the will creating a trust it is called a loan: *Hosmer v. Sturges*, 31 OS 657.

10. The advancements should be charged against the interest of each of the children and not recovered into the estate and redistributed: *Albrecht v. Fischer*, 14 App 195.

11. In the administration of an estate, the administrator is entitled to set off against the distributive share of an incompetent child the amount paid from the estate of the father for such child's support in a state institution: *Herring v. Herring*, 108 App 28, 9 OO(2d) 99, 160 NE(2d) 558.

12. An agreement between the heirs and devisees after the death of the ancestor, whereby they agree to regard certain notes given to him for value by his children or his daughters' husbands as advancements, will be given full effect between the parties to such agreement; and the widow of the ancestor will not be entitled to receive a distributive share out of such notes: *Young v. Roberts*, 7 CC 105, 3 CD 685 [affirmed, without report, 54 OS 622].

13. Debts due from a child to a parent are said by the operation of law and the implied consent of the heirs to be converted into advancements upon the death of the ancestor leaving a personal estate: *Tobias v. Richardson*, 5 CC(NS) 74, 16 CD 81 [affirmed, without report, 72 OS 626].

—When inheritance greater or less than advancement

18. A testator devised certain realty to his son and the rest of his estate to his wife, "allowing her to make such distribution of my estate as she in her discretion may deem best and most advisable among my children," naming them, then followed a provision showing the testator intended a substantially equal distribution of the property among his named children. The widow survived the testator and during her lifetime conveyed to some of the children who were named in the will parcels of the realty as well for their respective shares thereof; but she died without having distributed the remaining parcels. It was

held that equity would require that the entire estate be apportioned equally among all the children named; the partial distribution made, together with the devise made to the son heretofore referred to, to stand as advancements and to be accounted for as such, but not beyond the amount of the equal portion of the party so advanced: *Stableton v. Ellison*, 21 OS 527.

19. Advancements are to be considered as a part of the estate of the parent who made such advancements so far as regards the division and distribution thereof; and an advancement received is to be taken by each child towards his or her share. If the amount equals or exceeds the amount of the share, such child shall be excluded from any further portion, but shall not be required to refund; and if less, such child shall be entitled to as much more as shall be a full share: *Moore v. Freeman*, 50 OS 592, 35 NE 502.

20. In the partition of the lands of an intestate among his children and the children of a deceased son, the portion which the latter inherit should be charged with an advancement made to their father by such intestate: *Parsons v. Parsons*, 52 OS 470, 40 NE 165.

21. The child to whom an advancement is made is not personally liable to the estate of his parent for such advancement; and the only method of adjusting such advancement is to distribute to such child his proportionate share of his parent's estate less the amount of such advancement: *Dow v. Dow*, 3 NP (NS) 125, 15 OD 576.

—When estate is entirely real or personal

27. The indebtedness of the heir to the ancestor is to be deducted from his interest in the estate: *Skinner v. Lehman*, 6 O 430; *Keever v. Hunter*, 62 OS 616, 57 NE 454 [see also *Dorman Grocery v. Young*, 64 OS 580]; *Lambright v. Lambright*, 74 OS 198, 78 NE 265; *Tobias v. Richardson*, 5 CC(NS) 74, 15 CD 81 [affirmed, without opinion, 72 OS 626]; *Lockwood v. Whiteley*, 23 CC(NS) 241, 34 CD 219; *In re Ellis*, 5 NP 207, 5 OD 330. See also *Martin v. Martin*, 56 OS 333, 46 NE 981.

28. It is said that judgment and execution is necessary as to realty: *Woodruff v. Snowden*, 7 NP 520, 10 OD 123 [reversed in part, *Woodruff v. Woodruff*, 4 CC(NS) 616, 13 CD 408].

29. If the devisee dies before testator, but the devise is prevented from lapsing by the provisions of GC § 10581 (see now RC § 2107.52), and such property by virtue of this section passes to the children of such devisee, they take subject to his indebtedness to the estate of the testator: *Baker v. Carpenter*, 69 OS 15, 68 NE 577.

30. Debts due from a child to a parent are said by the operation of law and the implied consent of the heirs to be converted into advancements upon the death of the ancestor leaving a personal estate: *Tobias v. Richardson*, 5 CC(NS) 74, 16 CD 81 [affirmed, without report, 72 OS 626].

31. The consideration named in a deed may be explained by showing the actual transaction and the value agreed upon; and for this purpose the written receipt given by the son to the father of a certain amount of money to apply on the son's interest in the father's estate was competent: *Shehy v. Cunningham*, 81 OS 289, 90 NE 805, 25 LRA(NS) 1194 [affirming 10 CC(NS) 311, 20 CD 212, which overruled *Cowden v. Cowden*, 7 CC(NS) 277, 18 CD 71].

32. The child to whom an advancement is made is not personally liable to the estate of his parent for such advancement; and the only method of adjusting such advancement is to distribute to such child his proportionate share of his parent's estate less the amount of such advancement: *Dow v. Dow*, 3 NP (NS) 125, 15 OD 576.

Definition of advancements

37. Gifts made by a husband during his lifetime to his wife are not advancements as defined by GC § 10503-19 (RC § 2105.05): *In re Morton*, 6 OO 343 (PC).

38. An advancement is a gift made by an ancestor to an heir to take effect at once, whereby a part or all of the estate which would pass to such heir under the statutes of descent and distribution is transferred to such heir during the lifetime of such ancestor: *Woodruff v. Snowden*, 7 NP 520, 10 OD 123 [reversed in part, *Woodruff v. Woodruff*, 4 CC(NS) 616, 13 CD 408].

39. An advancement is gratuitous, irrevocable and imposes no personal obligation upon the heir: *Woodruff v. Snowden*, 7 NP 520, 10 OD 123 [reversed in part, *Woodruff v. Woodruff*, 4 CC(NS) 616, 13 CD 408]; *Dow v. Dow*, 3 NP(NS) 125, 15 OD 576.

40. An advancement is an irrevocable gift by a parent to a child in anticipation of the child's future share of the parent's estate, and is to be taken into account upon distribution. Its nature and effect are controlled by the statutes of descent, distribution and advancements: *Moore v. Freeman*, 50 OS 592, 35 NE 502.

41. The sums received by children as advancements are irrevocable gifts and cannot be charged with interest, even though the testator took interest-bearing notes from some of the children for the sums given: *Albrecht v. Fischer*, 14 App 195.

Intent

47. If the parties regard money as an advancement effect may be given thereto: *Tobias v. Richardson*, 5 CC(NS) 74, 16 CD 81 [affirmed, without report, 72 OS 626].

48. The intention of the party controls in determining whether a transfer of property or money from a parent to a child is an advancement or a gift absolute in character and not intended as an advancement: *Burbeck v. Spollen*, 6 DecRep 1118, 10 AML Rec 491.

49. The intention of the party controls in determining whether a payment of money or a transfer of personal property by a parent to a child is an unconditional gift, or whether it creates a debt from the child to the parent, or whether it is an advancement: *Fels v. Fels*, 1 CC 420, 1 CD 235.

50. When a testator clearly expresses the intention that his property shall pass to his children equally, subject to charges against them in his book of advancements, parol evidence is not competent to show that an advancement charged by him in such book was not made: *Younce v. Flory*, 77 OS 71, 83 NE 305.

Presumption

55. If a parent purchases land or property from a stranger, pays the purchase price therefor himself, and has the conveyance therefor made to his child as grantee, it will be presumed that such conveyance is an advancement: *Tremper v. Barton*, 18 O 418; *Dittoe v. Cluney*, 22 OS 436; *VanZant v. Davis*, 6 OS 52. This presumption, however, is a prima facie presumption only and may be rebutted: *Tremper v. Barton*, 18 O 418.

56. If the consideration expressed in a deed is love and affection, or if the son admits that the conveyance was gratuitous, although a valuable consideration is expressed in the deed, and the presumption is that such conveyance was an advancement, the burden is upon the grantee to rebut such presumption: *Shehy v. Cunningham*, 81 OS 289, 90 NE 805, 25 LRA(NS) 1194 [affirming 10 CC(NS) 311, 20 CD 212,

which overruled *Cowden v. Cowden*, 7 CC(NS) 277, 18 CD 71].

56.1 In father's action against son on notes which father had paid as surety, son's proof by clear and convincing evidence that amount so paid constituted advancement would relieve son from liability, notwithstanding fact that father still retained possession of the notes: *Klass v. Klass*, 27 App 459, 161 NE 406.

57. Where a son executed a note in favor of his mother and paid interest thereon, there is a presumption that it was a loan: *Hicks v. Hicks*, 9 CC(NS) 413, 19 CD 628 [affirming 4 NP(NS) 25, 16 OD 509; and affirmed, without opinion, 76 OS 575].

58. A sum of money has to be treated as an advancement and not as a gift, if a receipt is taken showing that such payment is on account of the future interests of the party to whom it is made in the estate of the party who makes such payment: *Ferris v. Goodin*, 19 CC(NS) 477, 26 CD 110.

59. A receipt which purports to be on account of the future interest of the person to whom the money is paid in the estate of the person who paid it cannot be varied by parol evidence, although it may be set aside for fraud or mistake: *Ferris v. Goodin*, 19 CC(NS) 477, 26 CD 110.

60. Where a will states certain advances to have been made, the will is conclusive as to the fact of such advances and the amount thereof: *Farmer v. Cope*, 55 OS 695, 48 NE 1112.

61. Presumably transfers of money from father to son are irrevocable gifts, either never to be accounted for or intended as advancements: *Storey v. Storey*, 214 Fed 973, 131 CCA 269, 12 OLR 195, 59 Bull 363 [for later opinion in same case, see 13 OLR 581].

Special contract

66. By agreement between a parent and his daughter, property transferred by such parent to the daughter's husband may be regarded as an advancement to her: *Ditoe v. Cluney*, 22 OS 436.

67. The fact that the daughter has consented to such an arrangement may be shown by an express agreement on her part or by the surrounding circumstances of the whole case: *Ditoe v. Cluney*, 22 OS 436.

68. A father conveyed certain realty to his daughter's husband for a consideration of seventeen thousand dollars, five thousand dollars of which was released to the grantee by way of advancement to his wife; and with the consent of the wife the deed was made to her husband. Subsequently her husband reconveyed such property to her father for eighteen thousand dollars, taking the father's notes for a part of such purchase price. On the death of the husband his wife brought suit against his administrator to recover such advancement. It was held that she had no right to maintain such action: *Stump v. Stump*, 26 OS 169.

69. Where D, the husband of S, receives from W, the father of S, money and property as advancements for S upon her share of the estate of W, D holds the same for S; and, upon the death of W, when the amount of her distributive share is ascertained and ready for payment, S has a right to compel D to account for and pay to her such money and property, or she may demand and collect her share in full of the administrator: *Stayner v. Bower*, 42 OS 314.

70. In such case, when S elects to sue the administrator, and compels him to pay her the distributive share in full, including the amount of such advancements, the administrator, by operation of law, is subrogated to the rights and remedies of S against D as to such advancement: *Stayner v. Bower*, 42 OS 314.

71. Heirs of the grantee in a deed of conveyance

between brothers, purporting upon the face thereof to be in the nature of an advancement, who upon the death of the grantor are in possession of the property conveyed and continue thereafter to hold possession under the deed, are estopped to deny the validity of the stipulation of said deed in respect to advancements: *Stewart v. Yeazell*, 4 App 82, 21 CC(NS) 357, 25 CD 318.

Power to make advancements

76. A parent has power to make an advancement to his child as long as such advancement is not in fraud of the creditors of the parent; and if the parent retains property sufficient to pay all of his indebtedness, the transaction is prima facie free from fraud: *Miller v. Wilson*, 15 O 108.

77. A person indebted conveys his property, by way of gift or advancement, among his children. His two sons, in part consideration of the portion conveyed to them, agreed to pay his debts. In a suit by a judgment creditor, whose debts accrued before the division, to subject the lands so conveyed to the payment of his judgment, the land conveyed to the sons ought to be first subjected: *Swihart v. Shaum*, 24 OS 432.

78. The judgment, in the absence of fraud or collusion in obtaining it, is conclusive evidence both as to the fact and the amount of indebtedness, not only as between the parties to the judgment, but as between and against the parties to whom the judgment debtor had conveyed the property sought to be subjected to its payment; and this conclusive effect of the judgment is not affected by the fact that it was recovered after the conveyance of the property: *Swihart v. Shaum*, 24 OS 432.

79. A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein: *Ward v. Ward*, 63 OS 125, 57 NE 1095, 81 AmSt 621, 51 LRA 858.

[§ 2105.05.1] § 2105.051 [Advancements; time of valuation.]

When a person dies, property that he gave during his lifetime to an heir shall be treated as an advancement against the heir's share of the estate only if declared in a contemporaneous writing by the decedent, or acknowledged in writing by the heir to be an advancement. For this purpose, property advanced is valued as of the time the heir came into possession or enjoyment of the property, or as of the time of death of the decedent, whichever occurs first. If the heir does not survive the decedent, the property shall not be taken into account in computing the intestate share to be received by the heir's issue, unless the declaration or acknowledgment provides otherwise.

HISTORY: 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Forms

1 A&H Probate FORM 2105.05.1a et seq

Research Aids

Advancement by inter vivos gift:

O-Jur2d Advancements § 26

Am-Jur2d: Advancements § 71 et seq

[§ 2105.05.2] § 2105.052 [Debt not to be charged against intestate share.]

Any debt owed to a decedent shall not be charged against the intestate share of any person except the debtor. If the debtor fails to survive decedent, the debt shall not be taken into account in computing the intestate share of the debtor's issue.

HISTORY: 136 v S 145. EF 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Research Aids

Hotchpot:

O-Jur2d: Advancements § 23

§ 2105.06 Statute of descent and distribution.

When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one child or his lineal descendants surviving, the first ^{sixty} ~~thirty~~ thousand dollars if the spouse is the natural or adoptive parent of the child, or the first ^{ten} ~~thirty~~ thousand dollars if the spouse is not the natural or adoptive parent of the child, plus ^{one-half} ~~one-half~~ of the balance of the intestate estate to the spouse and the remainder to the child or his lineal descendants, per stirpes;

(C) If there is a spouse and more than one child or their lineal descendants surviving, the first ^{ten} ~~thirty~~ thousand dollars, if the spouse is the natural or adoptive parent of one of the children, or the first ten thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

(D) If there are no children or their lineal descendants, then the whole to the surviving spouse;

(E) If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;

(F) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the

brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(G) If there are no brothers or sisters or their lineal descendants, one half to the paternal grandparents of the intestate equally, or to the survivor of them, and one half of the maternal grandparent of the intestate equally, or to the survivor of them;

(H) If there is no paternal grandparents or no maternal grandparent, one half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;

(I) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(J) If there are no stepchildren or their lineal descendants, escheat to the state.

HISTORY: GC § 10503-4; 114 v 320 (339); 116 v 385; 128 v 155 (EF 11-9-59); 136 v S 145 (EF 1-1-76); 136 v S 466. EF 5-26-76.

See former GC §§ 8573, 8574, 8575, 8576, and 8578 reprinted below.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2105.06 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2105.06 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Comment

This single section on descent and distribution includes all property, real and personal, ancestral and nonancestral.

To take the place of vested dower which under the act of 1931 was abolished, the surviving spouse under the above section receives an outright one-third of the estate when there is more than one child and one-half when there is only one child.

Other features of the section are as follows:

(a) The term "lineal descendants" has been used throughout instead of "legal representatives."

(b) The spouse is given one-half if there is but one child and one-third if there are two or more children.

(c) Where there are no children or their lineal descendants surviving, a share goes to the surviving parent or parents.

(d) The statute makes no distinction between brothers and sisters of the whole or half blood of the intestate.

(e) Inheritance by next of kin is prior to stepchildren and stepchildren are prior to escheat.

Subsection 7 of GC § 10503-4 [subsection (G) of this section] as amended, effective January 1, 1932, formerly provided as follows: "If there be no such brothers or sisters or their lineal descendants, the property in the estate shall pass to the grandparents of the intestate equally, or to the survivor or survivors of such grandparents." By virtue of the terms of subsection 7 as now amended, one-half of the estate goes to the paternal grandparents of the intestate equally, or to the survivor of them, and one-half of the estate to the maternal grandparents of the intestate equally, or to the survivor of them.

Subsection 8 of GC § 10503-4 [subsection (H) of this section] as amended, effective January 1, 1932, formerly provided as follows: "If there be no grandparent or grandparents, then to the lineal descendants, if any, of such grandparent or grandparents, per stirpes; if none, then to the next of kin of the intestate, per stirpes. There shall be no representation among next of kin."

General Code § 10503-4, as last amended in 1935, provided that if there are no paternal grandparents, or no maternal grandparents, then one-half of estate goes to the lineal descendants of the paternal grandparents, and one-half of estate goes to the lineal descendants of the maternal grandparents, per stirpes.

In other words, these subsections as amended last, are "half and half" statutes, giving half to the paternal grandparents, and half to the maternal grandparents, or to their lineal descendants, respectively. These amendments to subsections 7 and 8 [subsections (G) and (H)] abrogate the rule laid down in *Oakley v. Davey*, 49 App 113, 1 OO 144, 195 NE 406, wherein the court of appeals of Cuyahoga county held that under these subsections, as effective January 1, 1932, there is nothing in either subsection 7 or 8 of GC § 10503-4 [subsection (G) or (H) of this section] indicating an intention that an estate shall be divided equally between the paternal and maternal branches, and that the phrase "per stirpes" as used in subsection 8 of GC § 10503-4 [subsection (H) of this section] modifies the word "descendants." In this case, a motion to certify the record was overruled in the supreme court. It is doubtful whether any good purpose was accomplished by the above amendments to subsections 7 and 8 [subsections (G) and (H)].

Senate Bill 156 (128 v 155), which amended this section (RC § 2105.06) in 1959, substituted the words "provided by law" for "provided in chapter 2105 of the Revised Code" in the first paragraph.

Cross-References to Related Sections

Adopted child, legal rights, RC § 3107.13.

Advancements considered part of estate, RC § 2105.05.

Capacity of illegitimate children to inherit, RC § 2105.17.

Descent to an alien, RC § 2105.16.

Distribution of sum received as damages for death by lynching, RC § 3761.04.

See RC § 2103.02, 2105.06.1 to 2105.06.3, 2107.39, 2107.43, 2107.73, 2113.23 which refer to this section.

See RC § 2121.02 which refers to § 2105.06 et seq

Comparative Legislation

Distribution — intestate:

Cal.—Probate Code, § 201

Ill.—Rev Stat, ch 3, § 2-1

Ind.—Burns' Stat, § 29-1-2-1

Ky.—KRS, § 391.010

Mich.—MCLA, §§ 702.50, 702.80

N.Y.—EPTL, § 4-1.1

Pa.—Purdon's Stat, Tit. 20, § 2104

Fla.—FSA, § 732.101

Text Discussion

1 Anderson Fam L. §§ 3.3, 14.4

Research Aids

Brothers and sisters intestate share:

O-Jur2d: Descent and Distribution §§ 132-134

Am-Jur2d: Descent and Distribution § 58

Children's share:

O-Jur2d: Descent and Distribution §§ 122-124

Am-Jur2d: Descent and Distribution § 54

Descent, distribution and estate of inheritance defined:

O-Jur2d: Descent and Distribution §§ 4-7

Am-Jur2d: Descent and Distribution § 1

Descent of partnership property:

O-Jur2d: Descent and Distribution § 79

Escheat:

O-Jur2d: Escheat § 4; Descent and Distribution § 9

Am-Jur2d: Escheat § 11

Grandparents intestate share:

O-Jur2d: Descent and Distribution §§ 135-140

Am-Jur2d: Descent and Distribution § 56

Intestate share of first cousins:

O-Jur2d: Descent and Distribution §§ 137-140

Am-Jur2d: Descent and Distribution § 60

Intestate share of next of kin:

O-Jur2d: Descent and Distribution §§ 90, 96-116

Am-Jur2d: Descent and Distribution §§ 41-53

Intestate share of stepchildren:

O-Jur2d: Descent and Distribution § 141

Am-Jur2d: Descent and Distribution § 55

Intestate share of uncles and aunts:

O-Jur2d: Descent and Distribution § 137

Am-Jur2d: Descent and Distribution § 59

Parents intestate share:

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Am-Jur2d: Descent and Distribution §§ 108 et seq

ALR

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1. In its technical sense, the term "heirs" embraces those persons who take the estate of an intestate under the statute of descent and distribution, and in the event such statute designates the widow, she takes as an heir: *Holt v. Miller*, 133 OS 418, 11 OO 85, 14 NE(2d) 409 [affirming 11 OO 357].

2. Under par. 8 of this section [now par. (H)], the lineal descendants are designated as the roots, and the phrase "of such grandparents" is descriptive only: *Snodgrass v. Bedell*, 134 OS 311, 12 OO 103, 16 NE (2d) 463.

4. If an estate of such deceased husband consists wholly or in part of real estate, and his widow, as relict, elects not to take under his will but under the statute of descent and distribution, she takes her quantitative share in such real estate as an estate of inheritance, subject to sale, if necessary, to pay the debts of the estate of her deceased husband: *Barlow v. Winters Nat. Bank & Co.*, 145 OS 270, 30 OO 484, 61 NE(2d) 603 [reversing 27 OO 187 (PC)].

5. In case the relict of a deceased husband takes title to any such real estate by reason of such election, she is entitled to the rentals from her share of such real estate from the date of the death of her husband: *Barlow v. Winters Nat. Bank & Co.*, 145 OS 270, 30 OO 484, 61 NE(2d) 603 [reversing 27 OO 187 (PC)].

5.1 Intestate succession to personal property is governed by the law of the deceased owner's domicile: *Howard v. Reynolds*, 30 OS(2d) 214, 59 OO(2d) 228, 283 NE(2d) 629.

6. Where the terms of a will provide for a bequest or devise to a named person, per stirpes, without expressly designating the class of persons who are to take in the event that the named person does not survive the testatrix, and it is clear from the will taken as a whole, read in light of the circumstances surrounding the execution of the will, that a secondary gift was intended, then it will be assumed that a secondary gift is intended to go to the heirs at law of the named person as determined by the statutes of descent and distribution: *Richland Trust Co. v. Becvar*, 44 OS(2d) 219, 73 OO(2d) 512, 339 NE(2d) 830 (1975).

7. The word "descendant" should be construed to include all those to whom an estate descends, whether in a direct or collateral line from the intestate: *Oakley v. Davey*, 49 App 113, 1 OO 144, 195 NE 406 [reversing *Davey v. Climo*, 30 NP(NS) 457].

8. The phrase "per stirpes" as used in par. 8 of this section [now par. (H)] modifies the word "descendants" and not the words "grandparent or grandparents": *Oakley v. Davey*, 49 App 113, 1 OO 144, 195 NE 406 [reversing *Davey v. Climo*, 30 NP(NS) 457].

9. There is nothing in either par. 7 or 8 [now par. (G) or (H)] of this section indicating an intention that an estate should be divided equally between the paternal and maternal branches: *Oakley v. Davey*, 49 App 113, 1 OO 144, 195 NE 406 [reversing *Davey v. Climo*, 30 NP(NS) 457].

10. In construing bequests to the descendants of named persons who are dead, the roots are not the named persons, but the descendants, then in being,

nearest in consanguinity to the named persons; thus par. 8 of this section [now par. (H)] designates the descendants as the roots, the term "of such grandparent or grandparents" being descriptive only, and passes the estate not to the grandparents, but to their lineal descendants, as a class, with the right of representation: *Oakley v. Davey*, 49 App 113, 1 OO 144, 195 NE 406 [reversing *Davey v. Climo*, 30 NP(NS) 457].

11. Where the mother of decedent's father had married three times and left lineal descendants from each marriage, all of such lineal descendants, by virtue of the provisions of par. 8 of this section [now par. (H)], were entitled to share in the estate of the decedent whether their ancestor was the first, second, or third husband of the decedent's grandmother: *Shepard v. Wilson*, 61 App 191, 14 OO 282, 22 NE (2d) 568.

12. In determining who shall inherit property inherited from a deceased spouse, in the absence of brothers and sisters of either or both spouses, due regard must be had for the provisions of this section: *Ritter v. Ritter*, 62 App 488, 14 OO 375, 24 NE(2d) 603.

13. Real estate which has been purchased and paid for solely by a wife, and title thereto taken jointly with her husband, but he having thereafter immediately conveyed his interest to her, passes, upon the wife's death intestate after her husband's decease, to her next of kin, under this section: *Speidel v. Schaller*, 73 App 141, 28 OO 252, 55 NE(2d) 346.

13.1 The word "children," as it appears in the substitute beneficiary clause of a group life insurance policy, is to be construed to mean all offspring, regardless of whether they are born in or out of wedlock: *Butcher v. Pollard*, 32 OApp(2d) 1, 61 OO(2d) 1, 288 NE(2d) 204 (1972).

13.2 The words "child" or "children" appearing in RC § 2105.06, the statute of descent and distribution means all children, both legitimate and illegitimate: *Green v. Woodard*, 40 OApp(2d) 101, 69 OO(2d) 130, 318 NE(2d) 397 (1974).

13.3 An heir designated by virtue of RC § 2105.15 is an heir under the statute of descent and distribution: *Witten v. Landrum*, 41 OApp(2d) 65, 70 OO(2d) 61, 322 NE(2d) 146 (1974).

14. In the law applicable to the descent and distribution of property, the term "brothers and sisters" in the absence of statutory provisions limiting the use and application of the term, includes half-brothers and half-sisters: *Oldiges v. Osborne*, 11 OO 506 (PC).

15. The words "such one-half" in par. 8 of this section [now par. (H)], refer to each one-half of the estate which is set apart by the previous subsection to each set of grandparents; and such one-half, so set apart, is carried down through the lineal descendants of each set of grandparents: *Ryan v. Dixon*, 12 OO 185, 24 NE(2d) 603 (PC).

16. Where the heirs of the decedent consist of one uncle on the maternal side, and three uncles, one aunt and nine children of a deceased uncle on the paternal side, one-half of the estate will go to the one uncle on the maternal side, he being the only lineal descendant of the maternal grandparents, and the other one-half will be divided in five equal parts, one part to go to each of the three uncles and the one aunt, and the fifth part to the children of the deceased uncle, they being the only lineal descendants of the paternal grandparents: *Ryan v. Dixon*, 12 OO 185, 24 NE(2d) 603 (PC).

17. Paragraph 9 of this section [now par. (I)] by its very language excludes stepchildren as next of kin: *In re Gorman*, 15 OO 253 (PC).

18. Under this section, it was not the purpose of

the legislature to create a new and heretofore unrecognized class of heirs or next of kin in the persons of stepchildren and their lineal descendants, and it did not place the state of Ohio within the category of an heir or next of kin: *State ex rel Rich v. Page*, 20 OO 155, 6 OSupp 104 (CP).

19. Before relatives can be considered heirs, all the persons mentioned under par. 1, 2, 3, 4 and 5 of this section [now par. (A), (B), (C), (D) and (E)] must be eliminated: *Rea v. Fornan*, 26 OO 485, 46 NE(2d) 649 (App) [appeal dismissed, 140 OS 546].

20. When a man predeceases a cousin, and leaves no descendants but does leave an adopted daughter, that daughter takes, under the statutes of descent, this section and GC § 10512-19 (RC § 3107.10), the share in realty which the adoptive father would have inherited from the cousin had the adoptive father survived the cousin: *Frame v. Shaffer*, 27 OO 346, 13 OSupp 72 (CP).

21. Only those who are actual next of kin, and not representatives of former living persons who may have been next of kin, are the persons who benefit by par. 8 of this section [now par. (H)], and the concluding sentence thereof: *In re Morris*, 29 OO 173, 12 OSupp 170, 39 OLA 187 (PC).

22. This section as amended provides for an equal division between the lineal descendants of each set of paternal and maternal grandparents, and no distinction is made between those of the half blood and those of the whole blood: *Sheeler v. Burkhart*, 45 OO 415, 101 NE(2d) 401 (PC).

23. The provisions of this section are controlling only "except as otherwise provided by law": *Stocker v. Tranter*, 31 NP(NS) 467.

33. This statute is in pari materia with the adoption statute, so where the words "brothers and sisters" are used, it is clear that such phrase is intended to include brothers and sisters by adoption: *National Bank v. Hancock*, 85 App 1, 40 OO 30, 88 NE(2d) 67.

34. Under this section and GC § 10512-19 (RC § 3107.10) an adopted child is entitled to inherit not only from an adopting parent, but also through such adopting parent from a deceased sister of the adopting parent: *White v. Meyer*, 66 App 549, 20 OO 38, 37 NE(2d) 546, discussed in 20 OO 250.

35. The proper manner by which to compute the one-third interest of a widow under par. 3 of this section [now par. (C)] is to be arrived at by adding the appraised value of the specifically devised real estate to the amount of cash remaining after having converted the remainder of the estate into money and after having deducted therefrom the debts, funeral expenses, costs of administration, allowance to widow for year's support and the twenty per cent allowance under GC § 10509-54 (RC § 2115.13): *In re Thoroman*, 76 App 309, 32 OO 16, 62 NE(2d) 530.

36. A surviving spouse of nonresident decedent who had property in Massachusetts, and who was survived by wife and father, could not maintain petition for determination of value for the purpose of enabling her to hold such property as the owner thereof, where the spouse was not entitled to all the personalty in the commonwealth under the laws of Ohio, which was the state of the decedent's residence: *Hite v. Hite*, 17 NE(2d) 176 (Mass).

46. Where a person dies intestate without issue, and without parents or a parent surviving, leaving a surviving spouse, possessed of property which was devised by a former spouse who died without issue, such surviving spouse takes in such property that estate which is given to her in subdiv. 4 [now par. (D)] of this section, which consists of the entire net estate: *Hammel v. Hammel*, 2 OO 73 (PC).

47. Where the heirs of the intestate consist of

lineal descendants of both the paternal and the maternal grandparents, even though such heirs are on an equal degree of consanguinity to the intestate, the estate will be divided in halves, in accordance with this section: *Reimer v. Finnegan*, 32 OO 391 (PC); *In re Stephenson*, 48 OLA 624 (PC).

48. By the repeal of former GC § 8576, and the enactment of par. 9 of this section [now par. (I)] in its place, the legislature intended that stepchildren should inherit irrespective of the dissolution of the marriage by divorce: *In re McGraff*, 38 OO 187 (PC).

49. Where the intestate's maternal grandmother had been married twice and had left lineal descendants from each marriage, and there were no kin more closely related to the decedent within the terms of par. 8 of this section [now par. (H)], the lineal descendants of both marriages are entitled to share in the estate of such decedent: *In re Stephenson*, 48 OLA 624 (PC).

50. Where a testator gives the residue of his estate to his heirs in accordance with the laws and statutes of descent and distribution of Ohio in effect at the time of his decease, he clearly intends that said residue should be distributed to those individuals who would be entitled to the same in the event he should die intestate: *Shook v. McConnell*, 43 OO 403, 97 NE(2d) 111 (PC).

55. Property exempt from administration of husband's estate and the year's allowance to the widow constitute a debt against the deceased's estate, and on the widow's dying intestate such assets pass according to this section, and are not affected by GC § 10503-5 (RC § 2105.10): *Russell v. Roberts*, 54 App 441, 8 OO 196, 7 NE(2d) 811.

56. Property passing from a deceased husband to his widow by virtue of the widow's election not to take under the will does not pass to the widow by descent and, upon the widow's decease intestate and without issue, the property descends as her own under the provisions of this section, and not under the provisions of the half and half statute, GC § 10503-5 (RC § 2105.10): *Ellsworth v. Hale*, 66 App 108, 19 OO 361, 32 NE(2d) 32, discussed in 20 OO 107.

62. The distributive share of a surviving spouse must be based on this section, as construed by GC § 10504-55 (RC § 2107.39): *In re Balliett*, 18 OLA 41.

63. Under former GC § 8573 (see now RC § 2105-06) the son of a deceased nephew of the testator was held to take as "next of kin" under a will devising property "to the next of my kin, to them as they would take under statute of descent and distribution," where the testator died leaving no issue or surviving spouse: *Jobe v. Shaffer*, 25 OLA 649.

64. In determining heirs under a residuary clause in a will leaving the residue to the next of kin and heirs under the laws of descent, where there are no persons or classes of persons within the first seven paragraphs of this section, and the deceased left surviving him no paternal or maternal grandparents or their lineal descendants, the estate goes to the "next of kin," that is, the nearest of kindred to the deceased who are most nearly related by blood; where there is only one relative bearing a relationship of five degrees or less, such relative is his only next of kin: *In re Morris*, 29 OO 173, 12 OSupp 170 (PC); 39 OLA 187 (PC).

70. According to the general rules of interpreting statutes of descent and distribution, descendants of the nearest degree of consanguinity, however remote, take in their own right such shares as would come to them if all of the descendants of the same degree with the testator were living, and those of a more remote degree take per stirpes, or by representation, the shares of their deceased ancestors of the degree of consanguinity represented by living members: *Oak-*

ley v. Davey, 49 App 113, 1 OO 144, 195 NE 406 [reversing *Davey v. Climo*, 30 NP(NS) 457].

71. GC § 10503-7 (RC § 2105.12), and the case law thereunder, are controlled by the new and special provisions contained in this section; hence, where there are no grandparents, the lineal descendants of such grandparents take per stirpes and not per capita, the grandparents being the stock or root: *Shearer v. Gastman*, 31 NP(NS) 219.

72. Under the provisions of this section and GC §§ 10503-7, 10503-8 and 10503-9 (RC §§ 2105.12 and 2105.13), which must be read in pari materia, nephews and nieces of a decedent who left no other nearer of kin surviving, take per capita, and the descendants of deceased nephews and nieces take per stirpes: *Stocker v. Tranter*, 31 NP(NS) 467; *Wetherill v. Cummins*, 24 OO 489, 9 OSupp 217 (PC).

73. In the enactment of subdivision 8 of GC § 10503-4 [RC § 2105.06, paragraph (H)], the general assembly clearly intended to divide an estate between the two sides of a family only so long as there were surviving maternal or paternal grandparents or their lineal descendants; that, where there were no grandparents or their lineal descendants on one side, the one half should go to the surviving grandparents or their lineal descendants on the other side; and that the next of kin should inherit only where there were no surviving grandparents or their lineal descendants on either side: *In re Kelly*, 165 OS 259, 59 OO 354, 135 NE(2d) 378.

74. Where a testator leaves all or a part of his estate "per stirpes among my heirs at law, according to the laws of descent and distribution now in force in the state of Ohio, which heirs at law shall be determined and distribution made as though my death had occurred at the time of the final termination of the trust hereby created," and where the law in effect at the testator's death is the same as the law in effect at the time the will was executed, the testator has expressed an intent that his "heirs at law" shall be determined as of the time of the termination of the trust but by the law in effect at the time the will was executed: *Kraemer v. Hook*, 168 OS 221, 6 OO(2d) 11, 152 NE(2d) 430.

77. An illegitimate child, whose mother subsequently marries a man, not the child's father, is a stepchild of such man for the purpose of determining the descent and distribution of property under subdivision (I) of this section: *Kest v. Lewis*, 169 OS 317, 8 OO(2d) 317, 159 NE(2d) 449.

78. Where will devised life estate to wife with provision that "all of my full blood and all of the half blood relatives shall share alike in the remainder, if any," and on death of testator only wife and cousins survived, the latter, upon the death of the wife, succeed to the title of devised real property per stirpes and not by equal distribution between the lineal descendants of the maternal and paternal branches: *Parrett v. Paul*, 115 App 488, 21 OO 134, 185 NE(2d) 798.

82. The laws of descent are mere arbitrary rules for the transmission of property, enacted by the legislature, and cannot be modified by courts by reason of equitable consideration: *Campbell v. Musart Society*, 72 OLA 46, 131 NE(2d) 279 (PC).

83. Even though an adoptive mother has perpetrated a fraud by adopting a child and using the child's estate for its support, thus neglecting the principal duty of a parent to support such child, such action alone is not enough to invalidate an otherwise legal adoption or to change the plan provided under the laws of descent and distribution: *Vodrey v. Quigley*, 74 OLA 29, 139 NE(2d) 108 (PC).

84. Where an adopted child's adoptive mother and adoptive grandparents predecease her leaving no lineal descendants surviving, the adoptive next of kin are the heirs of such child: *Vodrey v. Quigley*, 74 OLA 29, 139 NE(2d) 108 (PC).

85. Under RC § 2105.06(H) (former subdivision 8 of GC § 10503-4), a subsection of the statute of descent and distribution, before it is required that an estate be divided into equal halves and descend to the heirs of both branches of the family, at least one grandparent must survive, or not surviving must leave lineal descendants and where both do not survive and both do not leave lineal descendants **there is no division of the estate and the entire estate goes to the next of kin without representation:** *Vodrey v. Quigley*, 74 OLA 29, 139 NE(2d) 108 (PC).

86. There can be no doubt, by virtue of the provisions of this section and those of section 2103.02, that the surviving spouse is an heir for the purposes of inheritance, being subject to and having all the rights of an heir, and this status is neither enlarged nor diminished by the special relationship of husband and wife: *In re Morgan*, 89 OLA 225, 185 NE(2d) 822 (PC).

87. Ohio follows the common law rule that a child conceived during the existence of a lawful marital relation is presumed to be the legitimate issue of the marriage: *Gray v. Richardson*, 474 F(2d) 1370 (1973).

FORMER LAWS

The text of former GC § 8573 (repealed, 114 v 320, § 1), together with annotations thereto, is reprinted below:

Sec. 8573. Order of descent of real estate, title of which came from an ancestor. When a person dies intestate, having title or right to any real estate or inheritance in this state, which title came to such intestate by descent, devise or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred in the following course:

1. To the children of such intestate, or their legal representatives.

2. If there are no children or their legal representatives living, the estate shall pass to and vest in the husband or wife, relict of such intestate, during his or her natural life.

3. If such intestate leave no husband or wife, relict of himself or herself, or at the death of such relict, the estate shall pass to and vest in the parents of such intestate and the survivor of such parents during the life of such parents and such survivor of them. If there are no such parents or upon the death of both of such parents, the estate shall pass to and vest in the brothers and sisters of the intestate who are of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or half blood of the intestate.

4. If there are no brothers or sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and the estate came by deed of gift from an ancestor who is living, the estate shall ascend to such ancestor.

5. If the ancestor from whom the estate came is deceased, the estate shall pass to and vest in the children of the ancestor from whom the estate came, or their legal representatives; if there are no children of the ancestor from whom the estate came, or their legal representatives, the estate shall pass to and vest in the husband or wife, relict of such ancestor, if a parent of the decedent. If there is no such husband or wife, the estate shall pass to, and

vest in the brothers and sisters of such ancestors, or their legal representatives; and for want of such brothers and sisters, or their legal representatives, to the brothers and sisters of the half blood of the intestate, or their legal representatives, though such brothers and sisters are not of the blood of the ancestor from whom the estate came.

6. If there are no such half brothers and sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestors from whom the estate came, or their legal representatives. (RC § 4158; S&S 304; S&C 501; 62 v 32, § 1; 110 v 13.)

DECISIONS UNDER FORMER GC § 8573

Constitutionality

1. Since the heirs of a living ancestor have no vested right in their ancestor's property, the legislature may change the statutes of descent and distribution during the lifetime of such ancestor, **either to the benefit or the detriment of certain classes of heirs:** *Gilpin v. Williams*, 25 OS 283; *Pollock v. Speidel*, 27 OS 86; *Caruthers v. Tarvin*, 8 DecRep 344, 7 Bull 127; *Tarvin v. Broughton*, 8 DecRep 451, 8 Bull 21; see also *Mathews v. Krisher*, 59 OS 562, 53 NE 52.

Scope

6. For a general discussion and construction of the statutes of descent and distribution, see *Jenks v. Langdon*, 21 OS 362.

Dying intestate

21. Where a person dies testate he is presumed to have intended to dispose of his whole estate unless the contrary clearly appears from the will: *Punch v. Clayton*, 10 App 145.

23. If the owner of a fee in realty devises a life estate and makes no other provision with reference to such realty, his heirs take a vested interest, subject to such life estate: *Groppengeiser v. Walter*, 19 CC 579, 10 CD 672; *Goff v. Moore*, 3 App 170, 20 CC(NS) 224, 26 CD 587 [on appeal from 11 NP(NS) 543, 24 OD 552; affirmed, *Gregg v. Keener*, 91 OS 406].

24. If a testator leaves a life estate to his wife with power of sale, and such power of sale is not exercised, and no provision is made for the remainder after such life interest, he dies intestate as to such remainder: *Armstrong v. Armstrong*, 11 CC(NS) 474, 20 CD 261.

25. The fact that a devisee under a will is limited to a life estate does not exclude him, as heir, from any further interest which might come by reason of intestacy: *Chaffin v. Dixon*, 13 App 1, 31 OCA 97, 417 [motion to certify record overruled, *Dixon v. Chaffin*, 18 OLR 44, 65 Bull 217].

Having title or right

33. Realty of which a railway takes wrongful possession descends to the heir of the owner, although the right of action for damages accruing during the life of the owner passes to his executor: *Lawrence R. Co. v. O'Harra*, 50 OS 667, 36 NE 14.

34. If possession is taken with consent of the owner, and under a special contract, on the death of the owner, his personal representative and not his heir is entitled to recover: *State ex rel McCullough v. Moffitt*, 13 CC(NS) 152, 23 CD 238 [affirmed, without opinion, 82 OS 433].

42. If a mortgagee dies after condition is broken, the naked legal title in the mortgaged realty, together with the right of possession, passes to the heirs of

the mortgagee in trust for the owner of the notes: *Stockwell v. Gambell*, 16 CC(NS) 427, 31 CD 600 [affirmed, without opinion, *Wilson v. Stockwell*, 78 OS 394].

45. Land devised to three brothers subject to the life estate of their mother vests the estate in the brothers immediately upon the death of the testator, so that if one of the brothers dies before the life estate is terminated the estate of the deceased passes to his widow, there being no issue, under GC § 8573, subdivision 5 (see now RC § 2105.06): *Hammond v. Hammond*, 29 OCA 85, 35 CD 587 [motion to certify record overruled, 16 OLR 307, 63 Bull 351].

Real estate or inheritance

53. The interest of a deceased partner in real estate purchased with partnership assets, and managed and used by the partnership as partnership property, the title to which is taken in the individual names of the several partners, in the absence of a partnership agreement to the contrary, passes to his heirs or devisees, unless needed to pay partnership obligations: *Weitz v. Weitz*, 15 App 134.

—Illegitimate children

For the capacity of illegitimate children to inherit, see RC §§ 2105.17 and 2105.18.

165. An agreement of marriage in praesenti when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move, establishes a valid marriage at common law, and a child of such marriage is legitimate and may inherit from the father: *Umbenhower v. Labus*, 85 OS 238, 97 NE 832 [affirming *Umbenhour v. Umbenhour*, 12 CC(NS) 289, 21 CD 317].

166. A bastard at common law was *filius nullius*, and therefore kin to nobody, and had no ancestor from whom any inheritable blood could be derived. The only inheritable right a bastard has to take property is made so by statute: *Owens v. Humbart*, 5 App 312, 25 CC(NS) 522, 27 CD 307, 61 Bull 259 (Ed).

167. A child is rendered legitimate by the fact that his parents intermarried before the birth of such child, although the mother was pregnant when such marriage took place, if the husband knows of the fact of such pregnancy; and a subsequent decree of divorce, rendered before the birth of such child, does not render such child illegitimate. Such child may maintain an action to contest the will of his father: *Wilson v. Wilson*, 8 App 258, 28 OCA 309, 29 CD 393, 63 Bull 49 (Ed).

—Meaning of “heirs” in will

179. The word “heirs,” when used as a word of limitation in a will, has, *prima facie*, its technical legal meaning of those who would inherit in case of intestacy: *King v. Beck*, 12 O 390 [reversed, 15 O 559]; *Townsend v. Townsend*, 25 OS 477; *Weston v. Weston*, 38 OS 473; *Chaffin v. Dixon*, 13 App 1, 31 OCA 97, 417 [motion to certify record overruled, *Dixon v. Chaffin*, 18 OLR 44, 65 Bull 217]; *Todd v. Todd*, 6 CC(NS) 105, 17 CD 224; *Barlow v. Otsott*, 25 CC(NS) 347, 35 CD 267; *Wilson v. Allaman*, 27 OCA 282, 29 CD 147 [affirming 20 NP(NS) 129]; *Gillis v. Long*, 8 NP(NS) 1; *Reif v. Ulmer*, 9 NP(NS) 234. See also *Stearns v. Brandeberry*, 9 App 300.

180. The context may, however, show that such term has a different meaning: *Collier v. Collier*, 3 OS 369; *Richey v. Johnson*, 30 OS 288; *Jones v. Lloyd*, 33 OS 572; *Durfee v. McNeil*, 58 OS 238, 50 NE 721; *Cultice v. Mills*, 97 OS 112, 119 NE 200 [affirming *Mills v. Mills*, 20 NP(NS) 501, 28 OD 382]; *Stewart v. Powers*, 9 CC 143, 6 CD 101; *Todd v.*

Todd, 6 CC(NS) 105, 17 CD 224; *Clifford v. Foster*, 10 NP(NS) 446.

181. A devise making grandchildren “equal heirs” with testator’s children gives to such grandchildren the same share as to the children: *Moon v. Stewart*, 87 OS 349, 101 NE 344, 45 LRA(NS) 48, *AnnCas* 1914A, 104 [affirming *Moon v. Harness*, 15 CC(NS) 139, 23 CD 337].

182. In a will which devised one-half of an estate to the lawful heirs of the testator and one-half to the lawful heirs of his wife, after the death of his only son without issue, and which contained specific provisions as to the disposition of the shares of his sister (if she should survive the testator) and of the sister and brother of his wife, the persons included in the designation “lawful heirs” to whom “my estate shall go,” are to be ascertained as of the date of the death of the testator or his wife respectively, per stirpes, the representatives of deceased brothers and sisters to take the share that would have gone to their ancestor if living, except where the will itself otherwise provides: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43; which was on appeal from 13 NP(NS) 1].

183. The context may show that “heirs” means “children”: *Bunnell v. Evans*, 26 OS 409; *Cultice v. Mills*, 97 OS 112, 119 NE 200 [affirming *Mills v. Mills*, 20 NP(NS) 501, 28 OD 382].

184. Under a will devising to son the use of land which should become his in fee after twenty years after testator’s death, remainder during said twenty years to pass to son’s heirs, the land was devised to son in fee, subject to be divested; and upon the son’s death within the twenty years, his widow took a life estate only (GC § 8573 [see now RC § 2105.06]): *Billman v. Billman*, 25 App 242.

185. Where a testator has used the words “issue,” “children” and “heirs” technically, accurately and understandingly, a bequest to a trustee in trust for the period of ten years for the use and benefit of the children of testator, naming them, with a direction “that my trustees shall pay the same one-eighth part thereof to my son F. A., and his heirs” and a similar provision as to each of the other children, will be construed as a gift to F. A. and the other children of testator absolutely, subject only to the provisions of the trust, and the words “and his heirs” will be construed as words descriptive of the estate and not as designating another class of beneficiaries: *Union Sav. Bank & Co. v. Alter*, 103 OS 188, 132 NE 834.

186. A devise to the “heirs” of testator’s mother, who had died before the will was made, means to those who were her heirs at testator’s death: *Ohio Sav. Bank & Co. v. Clark*, 7 App 6, 28 OCA 1, 63 Bull 9 (Ed) [motion to certify record overruled, *Wolcott v. Ohio Sav. Bank & Co.*, 61 Bull 191].

187. Under a bequest of the residue to be equally divided between the living heirs of testator and those of his wife, share and share alike, the phrase “share and share alike” qualifies the provision for each set of heirs, and the distribution among each set of heirs of the half so devised is to be as of the date of the death of the widow, and to be per capita and not per stirpes: *Stearns v. Brandeberry*, 9 App 300, 29 OCA 349.

188. The word “heirs” where used by a testator having living children will be regarded as synonymous with children: *Kuester v. Yeoman*, 14 CC(NS) 264, sub nomine, *Kuster v. Yeoman*, 22 CD 476, 56 Bull 337 (Ed) [affirmed, without opinion, *Yeoman v. Kuester*, 88 OS 592].

189. The fact that the word “heirs” is used with reference to one who has left children, is not of itself

sufficient to show that the word "heirs" is used to mean children: *Barlow v. Otsstott*, 25 CC(NS) 347, 35 CD 287.

190. The word "heir" is popularly used of one to whom property goes either by descent or by will: *Hessenmueller v. Sirilo*, 23 CC(NS) 313, 34 CD 256.

191. A gift of the proceeds of the sale of realty to the "heirs" of a deceased brother of the testator passes in part to the widow of such deceased brother: *Wilson v. Allaman*, 27 OCA 282, 29 CD 147 [affirming 20 NP(NS) 129; the court of appeals based its decision upon the opinion of the court of common pleas].

—Contract to make will, etc.

For descent to an alien under our present statute, see RC § 2105.16.

197. Husband and wife cannot make a binding contract concerning an expectancy which is neither a vested nor a contingent interest; such as reciprocal releases of inheritance by each in the other's estate: *McGee v. Sigmund*, 109 OS 375, 142 NE 676.

198. While a written contract by which one agrees that a certain person shall inherit from him as if such person was his legitimate child, does not bind the promisor to leave any property at his death, and while it possibly does not prevent him from conveying his property gratuitously during his lifetime, or devising it to another by his last will, such contract is broken by the death of the promisor intestate and without making any provision, by deed or will, to perform such contract; and one to whom such property descends may be held in equity as trustee for the promisee: *Snyder v. Shuttleworth*, 5 App 137, 25 CC(NS) 545, 27 CD 234.

199. For the effect of an oral contract to devise realty, etc., see *Shahan v. Swan*, 48 OS 25, 26 NE 222, 29 AmSt 517 [reversing *Swan v. Shahan*, 1 CC 216, 1 CD 119].

Course of descent—tenancy in common

207. Husband and wife to whom property is transferred take as tenants in common, and the fact that they are husband and wife does not in any way affect the nature of their interest: *Wilson v. Fleming*, 13 O 68.

208. The law of Ohio now recognizes estates in common. Co-parcenary as a separate estate does not exist: *Tabler v. Wiseman*, 2 OS 207.

—Representation

213. In the absence of specific statutory provision therefor, such as the use of the words "or their legal representatives," or words of similar import, the doctrine of representation does not apply under our Ohio statutes; and the children of members of a class who have died prior to the death of the ancestor do not take in the absence of such specific statutory provisions: *Clayton v. Drake*, 17 OS 367.

214. The common law rule as to descent per capita and per stirpes is not affected by the statute of descent and distribution: *Ewers v. Follin*, 9 OS 327.

216. Those who take by right of representation take subject to the indebtedness of their deceased parent to the estate of the ancestor from whom they claimed descent: *Martin v. Martin*, 56 OS 333, 46 NE 981; *Tharp v. United States Fidelity & Co.*, 2 App 28, 21 CC(NS) 321, 25 CD 416. [See now, however, RC § 2105.05.2]

217. If a grandchild is adopted by its grandfather, and takes by descent as an adopted child, it does not also take by right of representation of its deceased parent: *Smith v. Carver* (supreme court, without report), 36 Bull 189, 1 OSU 489.

—To whom property descends under statute

222. In Ohio the title to real property cannot be in abeyance: *Gilpin v. Williams*, 25 OS 283; *Knisely v. Young*, 15 CC(NS) 49, 23 CD 439.

223. The expectancy of an heir during the life of his ancestor cannot be conveyed to a stranger or re-leased to the ancestor: *Needles v. Needles*, 7 OS 432; *Hart v. Gregg*, 32 OS 502; *Ferenbaugh v. Ferenbaugh*, 104 OS 556, 136 NE 213; *Thiessen v. Moore*, 105 OS 401, 137 NE 906, 20 OLR 166 [affirming in part and reversing in part, 14 App 460].

225. Upon the death of the holder of realty, intestate, the legal title thereto passes to his heirs, subject to the right of the administrator to have such lands sold for the payment of the debts of the decedent, under GC § 10774 (see now RC § 2127.02) et seq: *Overturf v. Dugan*, 29 OS 230; *Piatt v. St. Clair*, 6 O 227; *Douglass v. Massie*, 16 O 271.

226. A devise in a will to a daughter "to be her full share and interest in all my estate" does not bar such devisee from her share of property not disposed of by the will: *Leopold v. Weaver*, 9 App 379, 29 OCA 567 [motion to certify record overruled, *Weaver v. Leopold*, 16 OLR 465, 64 Bull 40].

227. A widow is not an "heir per stirpes" of her deceased husband: *Robbins v. Pigg*, 29 OCA 153, 35 CD 682 [motion to certify record overruled, *Pigg v. Robbins*, 16 OLR 80, 63 Bull 196].

228. The principle of representation requires property to descend in the same way that it would have passed if the deceased ancestor of the representatives to whom such title is to descend had lived long enough to arrest such title: *Ampey v. Hirsch*, 20 NP (NS) 1, 27 OD 410.

—Next of kin

256. A lapsed legacy passes as intestate property if there is no residuary clause, even though a bequest had been given to the next of kin as his full share of testator's estate: *Leopold v. Weaver*, 9 App 379, 29 OCA 567 [motion to certify record overruled, *Weaver v. Leopold*, 16 OLR 465, 64 Bull 40].

257. The widow is not the next of kin of an adopted child: *In re Raspold*, 6 NP(NS) 172, 18 OD 396.

260. For the meaning of "nearest of kin" in a will, see *Godfrey v. Epple*, 100 OS 447, 126 NE 886, 11 ALR 317.

—Legal representatives

266. If a testator devises property to his sister and she dies before testator, leaving her husband surviving, her interest under the will lapses and does not pass to her husband: *Hess v. American Bible Soc.*, 26 CC(NS) 439, 28 CD 172 [citing *Norwood v. Mills*, 3 OD(NP) 356].

Law controlling

272. Descent is governed by the law of the place where the land is situated: *Jones v. Robinson*, 27 OS 171; *Jennings v. Jennings*, 21 OS 56.

Vesting of estate and interest of heir

286. A testator devised certain lands to his daughter for life, with remainder after his death to her children, then unborn, forever, without otherwise disposing of the inheritance. It was held that the reversion in fee descended to and vested in the heirs of the testator at his death, subject, however, to divest in the event that the devisee for life should die, leaving children surviving her: *Gilpin v. Williams*, 25 OS 283.

288. The interest of beneficiaries to whom executory interests are given, which interests are to pass to

the issue of such beneficiaries if such beneficiaries die before testator's widow, is said to be even more remote than the interest of heirs by descent during the lifetime of their ancestor: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

—Lien of debts of ancestor

See also case notes under RC §§ 2127.02, 2127.07.

296. The owners of the fee in land subject to sale by the executor to pay the debts of the estate have an interest in the subject of an action to recover damages for wrongful destruction of the market value of the premises, and in obtaining the relief demanded; and they may be joined with the executor as parties plaintiff under the provisions of GC § 11254 (RC § 2307.18). The amount recovered will be apportioned by the court among the different plaintiffs: *Clark v. McClain Fire Brick Co.*, 100 OS 110, 125 NE 877.

298. Taxes upon real estate accruing after the death of the owner are a personal debt of the heirs, and where they have been paid by an administrator, he is entitled to retain the amount from funds in his hands belonging to the heirs, since the taxes are a lien upon the realty, and the administrator who has obtained an order for the sale of such realty to pay the debts of the decedent has a lien thereon: *Warner v. York*, 16 CC(NS) 369, 31 CD 535 [affirmed, without opinion, *York v. Warner*, 75 OS 595].

—Lien of debts of heir to ancestor

See now RC § 2105.05.2.

303. The indebtedness of the heir to the ancestor is to be deducted from his interest in the estate: *Skinner v. Lehman*, 6 O 430; *Keever v. Hunter*, 62 OS 616, 57 NE 454; *Lambright v. Lambright*, 74 OS 198, 78 NE 265; *Tobias v. Richardson*, 5 CC(NS) 74, 15 CD 81 [affirmed, without opinion, 72 OS 626]; *Lockwood v. Whitlesey*, 23 CC(NS) 241, 34 CD 219; *In re Ellis*, 5 NP 207, 5 OD 330. See also *Martin v. Martin*, 56 OS 333, 46 NE 981.

304. Debts owing by a devisee to testator are to be deducted even if such devisee dies before testator, and lapse is prevented only by GC § 10581 (see now RC § 2107.52): *Baker v. Carpenter*, 69 OS 15, 68 NE 577.

305. If testator devises to his sons A and B in fee, subject to C's life estate, with a gift over to the children of either who may die before C, a debt due from A to testator cannot be deducted from the share of A's children, if A dies before C: *Rings v. Borton*, 108 OS 280, 140 NE 515.

306. A debt due from heir to ancestor has priority over a mortgage given by such heir to another creditor: *Woodruff v. Woodruff*, 3 CC(NS) 616, 13 CD 408 [reversing in part, *Woodruff v. Snowden*, 7 NP 520, 10 OD 123].

307. When the distributive share of a debtor heir is less than the amount which he owes to the estate, an action to quiet title may be maintained by the other heirs to the real estate, to remove any cloud upon the title through the claim of the debtor heir or anyone claiming under him: *Lockwood v. Whitlesey* 23 CC(NS) 241, 34 CD 219.

—Debt of ancestor to heir

For advancements, see RC § 2105.05.1.

313. Under a provision in a will requiring the executor to reject all claims presented by testator's children and providing that if one of such children should recover upon a claim against the estate, such claim should be deducted from his share, and the amount recovered by an assignee of one of such children must

be deducted from the share of the assignor: *Scheets v. Hunter*, 56 OS 761, 46 NE 1116; sub nomine, *Sheets v. Hunter*, 37 Bull 283.

Pleading and evidence

318. Where a person mysteriously disappears and is not heard from, a legal presumption of his death does not arise until seven years from the date of his disappearance, and in the absence of any proof showing his death the property of an ancestor dying within the seven-year period will be presumed to have descended to such absent heir: *Young v. Young*, 10 App 351, 29 OCA 524 [motion to certify record overruled, 16 OLR 61, 63 Bull 184].

The text of former GC § 8574 (repealed, 114 v 320, § 1), together with annotations thereto, is reprinted below:

Sec. 8574. Order of descent when estate came by purchase. If the estate came not by descent, devise, or deed of gift, it shall descend and pass as follows:

1. To the children of the intestate and their legal representatives.

2. If there are no children, or their legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.

3. If such intestate leaves no husband or wife, relict of himself or herself, the estate shall pass to the parents of such intestate and the survivor of such parents during the life of such parents and such survivor of them. If there are no such parents, or on the death of both of such parents, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.

4. If there are no brothers or sisters of the intestate of the whole blood, or their legal representatives, the estate shall pass to the brothers and sisters of the half blood, and their legal representatives.

5. If there are no children, husband or wife, relict of such intestate and no brothers or sisters of the intestate, or their legal representatives, at the time of the death of such intestate, the estate shall ascend to the father and mother equally; if one of them be dead, then to the other.

6. If the father and mother are dead, the estate shall pass to the next of kin, and their legal representative, to and of the blood of the intestate. (RS § 4159; S&S 305; S&C 502; 62 v 32, § 2; 108 v PtI 69; 110 v 13, 14.)

DECISIONS UNDER FORMER GC § 8574

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Scope and effect

1. This section is construed with GC §§ 8573, 8577, 8578 and 8579 (see now RC §§ 2105.06, 2105.01, 2105.10, 2105.07): *Stembel v. Martin*, 50 OS 495, 35 NE 208.

3. This section must be construed together with GC §§ 8581, 8582 and 8583 (see now RC §§ 2105.12, 2105.13): *Treat v. Bessey*, 1 App 125, 21 CC(NS) 241, 25 CD 366.

5. The statute of descents operates upon all intestate property, and the course which it indicates can be changed only by a testamentary disposition: *Mathews v. Krisher*, 59 OS 562, 53 NE 52 [followed,

Oglesbee v. Miller, 111 OS 426].

6. This section provides for the descent of all realty which did not come to the intestate by descent, devise or deed of gift from an ancestor, for which provision is made by GC § 8573 (see now RC § 2105.06): *Hostetler v. Peters*, 94 OS 17, 113 NE 656 [following *Brower v. Hunt*, 18 OS 311].

7. At common law an heir was one who would inherit realty by right of blood; but modern statutes have enlarged the meaning of the word and it may, under provisions such as those of this section, include persons who are not of the blood of the intestate: *Cultice v. Mills*, 97 OS 112, 119 NE 200 [affirming judgment of court of appeals, which, on appeal, reached same conclusion as *Mills v. Mills*, 20 NP (NS) 501, 28 OD 382].

8. Will devising property to testator's wife for life and "at her death principal to revert to my children or their next nearest heirs" held to manifest an intention that title to property should not vest in children at his death; and hence neither the daughter who died before the widow nor her husband who survived the widow ever acquired any interest in the property; "next nearest heirs" referred solely to testator's children: *Wells v. Gatch*, 21 App 140, 152 NE 772.

9. A inherited real estate from his wife under GC § 8574 (see now RC § 2105.06), and mortgaged the same and died intestate, seized of same, leaving personal estate sufficient to pay all his debts, including said mortgage; held, that said mortgage should be paid from the personal estate: *Medina County Nat. Bank v. Foreman*, 27 App 400, 161 NE 366.

Husband or wife relict—descent under statute

14. A widow having elected to take under the law, the gross amount which she will receive will be determined upon final distribution of the estate on the basis of her allowance and the net estate after payment of debts: *In re Balliett*, 18 OLA 41.

—Devise in lieu of distributive share, etc.

16. Where a testator, after making specific bequests, devises the residuum of his estate to his wife and by codicil devises to her a life estate in after-acquired property, without disposing of the remainder upon the termination of the life estate, the remainder passes to the wife under the residuary clause of the original will: *Spriggs v. Fenner*, 10 App 89.

17. It is said that at common law the widow is not endowed of any part of the personal estate of her husband; and that her right to a portion of the personal estate of her husband arises entirely by statute, has no existence apart from statute, and is not subject to any equitable interpretation: *Seney v. Schroth*, 25 CC (NS) 185, 35 CD 239.

—Contract as to descent

20. A husband and wife living together cannot alter their legal relations by a postnuptial agreement, contracting away the dower rights and distributive share provided for each of them under GC § 7995 (RC § 3103.01) et seq: *DuBois v. Coen*, 100 OS 17, 125 NE 121.

Brothers and sisters of whole blood and legal representatives

22. In partition suit, in which defendants claimed plaintiff was illegitimate and not of whole blood of deceased sister, and that defendants, as representatives of whole blood, were entitled under former GC § 8574 (see now RC § 2105.06) to take property sought to be partitioned, burden was on defendants to prove

illegitimacy of plaintiff, where it was admitted plaintiff was born during lawful wedlock: *Harris v. Seabury*, 30 App 42, 164 NE 121.

23. A testator who provides, "all the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio," intends that the residue of his estate shall be distributed the same as the personal property of an intestate would be distributed, and where such testator left surviving him two nephews and one niece and children of two other nieces, the residue of his estate will be divided into five parts of which the two nephews and the niece will each get one-fifth, and each set of children of the deceased nieces one-fifth to be equally divided among them: *Elliott v. Shaw*, 15 NP (NS) 81, 23 OD 662, sub nomine, *Lee v. Elliott*, 58 Bull 321 (Ed.).

Next of kin

25. The phrase "next of kin" as used in this section refers to those persons who take intestate property under the statutes of descent and distribution: *Schroth v. Noble*, 91 OS 438, 110 NE 1067 [approving and following *Steel v. Kurtz*, 28 OS 191].

26. Each paragraph of this section must be read in connection with all other paragraphs for the purpose of determining who are next of kin of the blood of the intestate: *Schroth v. Noble*, 91 OS 438, 110 NE 1067.

27. The phrase "nearest of kin" when employed in a last will and testament, in the absence of language in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the statutes of descent and distribution, and in the order and proportion therein provided: *Godfrey v. Eppe*, 100 OS 447, 126 NE 886, 11 ALR 317.

29. Under 1925 war risk insurance act, all unpaid insurance becomes assets of estate of insured on his death, and, in absence of will, passes to his heirs like other personalty: *Ferneau v. Unckrich*, 45 App 531, 187 NE 580, 39 OLR 220.

30. Upon the death of the beneficiary of a policy of war risk insurance, the fund representing the unpaid installments of such insurance must be paid to the estate of the insured soldier and, in case of his intestacy, distributed according to the law of descent and distribution in force at the date of his death: *Sharp v. Edgar*, 39 OLR 165 (App) [affirming *Edgar v. Gray*, 31 NP(NS) 164].

The text of former GC § 8575 (repealed, 114 v 320, § 1), together with annotations thereto, is reprinted below:

Sec. 8575. When real estate to pass to husband or wife; when to next of kin. When a person dies intestate, having title or right to any real estate or inheritance, as provided in section eighty-five hundred and seventy-three, and leaves husband or wife, relict of himself or herself and there is no person who, under the provisions of that section, would be entitled to inherit it, or an estate therein, save and except such husband or wife, relict of such intestate, then the estate shall pass to and vest in the husband or wife of the intestate as an estate of inheritance. If there is no such person, and no husband or wife relict of the intestate, then the estate shall pass to and vest in the next of kin of the intestate, though not of the blood of the ancestor from whom the estate came. (RS § 4160; S&S 306; 59 v 50, § 3.)

DECISIONS UNDER FORMER GC § 8575

1. As to the power of the legislature to add addi-

tional classes prior to escheat, and to make such legislation retroactive as against the state, see *Lewis v. Eutsler*, 4 OS 355.

2. This section provides only for cases in which there is a failure of persons who could take under GC §§ 8573 and 8574 (see now RC § 2105.06), and it with its amendments provides additional classes of persons who may take before property will escheat: *Lathrop v. Young*, 25 OS 451.

3. This section is to be construed with GC §§ 8573, 8574 and 8577 (see now RC §§ 2105.06, 2105.01, 2105.10): *Ellis v. Ellis*, 3 CC 186, 2 CD 105.

The text of former GC § 8576 (repealed, 114 v 320, § 1), together with annotations thereto, is reprinted below:

Sec. 8576. When real estate to pass to children of former husband or wife; when to escheat. When a person dies intestate, having title or right to any real estate or inheritance, whether by descent, devise, or deed of gift from an ancestor, or acquired, and there is no person entitled to inherit it under the next three preceding sections, then the estate shall pass to and vest in the children of any deceased husband or husbands, wife or wives, of the intestate, whose marriage with the intestate was not annulled prior to his, her, or their death, or their legal representatives. If there are no children, or their legal representatives, living, then the estate shall pass to the brothers and sisters of any such husband or wife, or their legal representatives; if there are no brothers and sisters, nor their legal representatives, the estate shall pass to the next of kin of such intestate; and if there are none such, then the estate shall escheat and be vested in the state of Ohio. (RS § 4161; S&S 306; S&C 502: 59 v 50, § 3.)

DECISIONS UNDER FORMER GC § 8576

1. Former GC § 8576 (repealed, 114 v 320) does not relate to personal property: *Center v. Kramer*, 112 OS 269, 147 NE 602.

The text of former GC § 8578 (repealed, 114 v 320, § 1), together with annotations thereto, is reprinted below:

Sec. 8578. Distribution of personal estates. When a person dies intestate and leaves personal property, it shall be distributed in the order and manner following; saving, however, such rights as a widow or widower may have to any part of such personal property:

1. To the children of the intestate or their legal representatives.

2. If there are no children or their legal representatives, to the husband or wife relict of such intestate.

3. If such intestate leaves no husband or wife relict of himself or herself, one-half of such personal property shall be distributed to the father and mother of such intestate equally, or if one of them be dead then the entire one-half to the other; and one-half of such personal property shall be distributed to the brothers and sisters of the intestate of the whole blood or their legal representatives, or if there be no brothers or sisters of the whole blood or their legal representatives, then to the brothers and sisters of the half blood or their legal representatives. If such intestate leaves no parent surviving him, all of such personal property shall be distributed to such brothers and sisters of the whole blood or their legal representatives, or if there be no brothers or sisters of the whole blood or their legal representatives, then to the brothers and sisters of the half blood or their legal representatives.

4. If there are no children, husband or wife relict of such intestate, and no brothers or sisters of the intestate, whether of the whole or half blood or their legal representatives, such personal property shall be distributed to the father and mother equally, or if one of them be dead, then to the other.

5. If the father and mother are dead, such personal property shall be distributed to the next of kin or their legal representatives of the blood of the intestate.

The term "legal representative" as used herein shall be given the same meaning as under section 8574 of the General Code. (RS § 4163; S&S 307; S&C 502; 59 v 50, § 4; 84 v 132, 134; 86 v 86; 87 v 66; 111 v 32.)

DECISIONS UNDER FORMER GC § 8578

Proceeds of sale of realty

1. Realty which by these terms of testator's will is to be converted into money and distributed in that form, is personal property, and not realty: *Ferguson v. Stuart*, 14 O 140.

2. Such conversion does not make realty into personalty for the benefit of a surviving spouse who elects not to take under the will: *Geiger v. Bitzer*, 80 OS 65, 88 NE 134, 22 LRA(NS) 285 [overruling *Hutchings v. Davis*, 68 OS 160, which reversed *In re Davis*, 21 CC 720, 12 CD 29].

Refusal to take under will

10. The husband has absolute dominion over his personal property during his lifetime; and he may deprive his wife of her distributive interest in the same by a bona fide gift inter vivos. The fact that this gift was made in order to prevent his wife from receiving a distributive share of such personal property does not amount to a fraud upon her rights: *Brodt v. Rannels*, 7 NP 79, 9 OD 503.

Interest of surviving spouse

20. A gift of personal property by husband or wife, which is made to defraud the surviving spouse of the share of such personal estate which is given by law, and which is so made as to secure the use and control of such property to the donor during life, is fraudulent as against the claims of the surviving spouse and will be set aside: *Ambler v. Boone*, 3 App 87, 19 CC(NS) 281, 24 CD 512, 59 Bull 159 (Ed.).

Course of descent

30. The personal estate of an adopted child who dies intestate and leaves its natural mother, its adopting parents and children of the adopting parents surviving, was held in *Upson v. Noble*, 35 OS 655, to pass to the natural mother.

31. If the widow of an employee dies before an award has been made from the state insurance fund, her right is not destroyed thereby, but it passes to her legal representative in the absence of other dependents: *Industrial Comm. v. Dell*, 104 OS 389, 135 NE 669, 34 ALR 422; *Whitmore v. Industrial Comm.*, 105 OS 295, 136 NE 910.

32. A bequest to A in case he should die leaving a child or children, such child or children to take A's share, refers to A's death before that of testator. If A dies after testator, and before such bequest has been paid, it should be paid to his executor: *Phillips v. Cole*, 11 App 431, 30 OCA 49.

[§ 2105.06.1] § 2105.061 Renunciation of interest in succession.

Any competent adult entitled to receive any

right, title, or interest in any property through intestate succession as provided by section 2105.06 of the Revised Code, may renounce such interest by filing a written statement of renunciation with the probate court within sixty days after notice of the hearing on inventory of the intestate's property has been given as required by section 2115.16 of the Revised Code. Any property renounced pursuant to this section shall be distributed as provided by law as if such competent adult had predeceased such decedent.

HISTORY: 129 v 545, § 1. **EF** 10-6-61.

Forms

1 A&H Probate FORM 2105.06.1a et seq.

1 A&H Probate FORM 2113.61a et seq: Transfer of real estate

Research Aids

O-Jur2d: Descent and Distribution § 20

Am-Jur2d: Descent and Distribution §§ 171-174

Law Review

Disclaimers as a postmortem estate planning device. Editorial. 37 CinLRev 567.

The disposition of trust, probate and related property interests. John H. Butala, Jr. 17 WestResLRev 639.

CASE NOTES AND OAC

1. The probate court has exclusive jurisdiction of an action to rescind a renunciation which has been properly filed with it: *Wolfrum v. Wolfrum*, 2 OS (2d) 237, 31 OO(2d) 501, 208 NE(2d) 537.

2. Cancellation by the probate court of a written renunciation of an interest in property through intestate succession, which was filed in that court under the provisions of this section, is governed by general equitable procedures and principles, as in an equitable action for rescission or cancellation of a written instrument by reason of the mistake of the person executing the instrument: *In re Wolfrum*, 120 App 379, 29 OO(2d) 244, 202 NE(2d) 631.

3. A devisee may disclaim the gift, and his creditors cannot charge it. Any unequivocal act of disclaimer, as by answer in a suit, will estop him: *Wallace v. McMicken*, 3 DecRep 174, 4 Gaz 165, 13 DecRep 345, 2 D 564.

4. The Ohio legislature has not enacted any statute recognizing the renunciation of nonprobate property such as joint tenancy with the right of survivorship: *Krakoff v. United States*, 439 F(2d) 1023, 58 OO(2d) 381, 31 OMisc 255 [see also 431 F(2d) 847, 57 OO(2d) 324].

[§ 2105.06.2] § 2105.062 [Election to receive mansion house.]

(A) The surviving spouse may elect to receive, as part of his share of the intestate estate under section 2105.06 of the Revised Code, the entire interest of the decedent spouse in the mansion house. The interest of the decedent spouse in the mansion house is valued at the appraised value with the deduction of that portion of all liens on the mansion house, existing at the time of death and attributable to the decedent's interest in the mansion house.

(B) The election pursuant to division (A) of this section shall be made at or before the time a final account is rendered.

(C) If the spouse makes an election pursuant to division (A) of this section, the administrator or executor shall file an application for a certificate of transfer as provided for in section 2113.61 of the Revised Code. The application shall also contain an inventory of the property that the spouse is entitled to receive under section 2105.06 of the Revised Code. If the value of the property the spouse is entitled to receive is equal to or greater than the value of the mansion house, the court shall issue the certificate of transfer.

(D) As used in this section, the mansion house includes the parcel of land on which the house is situated and, at the option of the surviving spouse, the household goods contained within the house and the lots or farm land adjacent to the house and used in conjunction with it as the home of the decedent.

HISTORY: 136 v S 145 (EF 1-1-76); 136 v S 466. **EF** 5-26-76.

For text of RC § 2105.06.2 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Cross-References to Related Sections

See RC § 2105.06.3 which refers to this section.

Forms

1 A&H Probate FORM 2105.06.2a et seq.

[§ 2105.06.3] § 2105.063 [Disposition of appraised personal property; certificate of transfer.]

Subject to the right of the surviving spouse to elect to receive the mansion house pursuant to section 2105.062 [2105.06.2] of the Revised Code, the specific monetary share payable to a surviving spouse under division (B) or (C) of section 2105.06 of the Revised Code shall be paid out of the tangible and intangible personal property in the estate to the extent that the personal property is available for distribution. The personal property distributed to the surviving spouse, other than cash, shall be valued at the appraised value.

Before tangible and intangible personal property is transferred to the surviving spouse in payment or part payment of the specific monetary share, the administrator or executor shall file an application that includes an inventory of the personal property intended to be distributed in kind to the surviving spouse, together with a statement of the appraised value of each item of personal property included. The court shall examine the application and make a finding of the amount of personal property to be distributed to the surviving spouse, and shall order that the personal property be distributed to the surviving spouse. The court concurrently shall make a finding of the amount of money that remains due and payable to the surviving spouse in satisfaction of the specific monetary share to which the surviving spouse is entitled under division (B) or (C) of section 2105.06 of the Revised Code. Any amount that

remains due and payable shall be a charge on the title to any real property in the estate but the charge does not bear interest. This charge may be conveyed or released in the same manner as any other interest in real estate and may be enforced by foreclosure or any other appropriate remedy.

Except any real property the surviving spouse elects to receive under section 2105.062 [2105.06.2] of the Revised Code, the title to real property in the estate shall descend and pass in parcenary to those persons entitled to it under division (B) or (C) of section 2105.06 of the Revised Code, subject to the monetary charge of the surviving spouse. The administrator or executor shall file an application for a certificate of transfer as provided in section 2113.61 of the Revised Code. The application shall include a statement of the amount in money that remains due and payable to the surviving spouse as found by the court. The certificate of transfer ordered by the court shall recite that the title to the real property described in the certificate is subject to the charge in favor of the surviving spouse, and shall recite the value in dollars of the charge on the title to the real property included in the certificate of transfer.

HISTORY: 136 v S 466. **Eff** 5-26-76.

Forms

1 A&H Probate FORM 2105.06.3a et seq.

§ 2105.07 Escheat of personal estate. (GC § 10503-24)

When, under sections 2105.01 to 2105.21, inclusive, of the Revised Code, personal property escheats to the state, the prosecuting attorney of the county in which letters of administration are granted upon such estate shall collect and pay it over to the county treasurer. Such estate shall be applied exclusively to the support of the common schools of the county in which collected.

HISTORY: GC § 10503-24; 114 v 320 (344). **Eff** 10-1-53. For an analogous section, see former GC § 8579.

Research Aids

Disposition of escheated property:

O-Jur2d: Escheat § 8

Am-Jur2d: Escheat § 40 et seq

Escheat generally:

O-Jur2d: Escheat § 1 et seq

Am-Jur2d: Escheat § 1 et seq

Forms

1 A&H Probate FORM 2105.07a et seq.

ALR

Escheat of personal property of intestate domiciled or resident in another state. 50 ALR2d 1375.

CASE NOTES AND OAG

1. A person died intestate leaving personal property only, and leaving no spouse relict, no heirs at law or next of kin. It was held that such personal estate is vested in the state under former GC § 8579 (see now RC § 2105.07). (Children of the deceased wife by a former marriage claimed the property): *Center v. Kramer*, 112 OS 269, 147 NE 602.

2. It is clear from this section that it is only when property is held in the hands of an administrator of the estate of a person who dies leaving no heirs or next of kin and leaving no stepchildren or their lineal descendants, that the prosecuting attorney is authorized to collect such person's property, on behalf of the state: *State ex rel Rich v. Page*, 20 OO 155, 6 OSupp 104 (CP).

3. Distribution of escheated personal property to schools of a county, collected under former GC § 8579 (analogous to this section), is to be made as provided for the state common school fund under GC § 7600 (see now RC § 3315.32), as said section stands, when the money is paid into the county treasury: 1915 OAG vol.1, p.76.

4. Money received from escheated personal property should be credited to the contingent fund of the school district, when received under GC § 7603 (repealed, 120 v 475): 1915 OAG vol.1, p.76.

5. There is no provision of law authorizing the payment of interest by the county treasurer on funds paid to him as escheated but subsequently claimed by an heir: 1934 OAG No.2257.

6. Where the residue of the funds have been paid into the general fund of the county and it be made to appear to the satisfaction of the probate court that there is a living heir of the decedent, the court may, pursuant to GC § 11634 (RC § 2325.04) et seq, vacate the former order and order the funds paid to the heir: 1934 OAG No.2257.

7. Former GC § 8579 (see now RC § 2105.07) did not cause the title to a decedent's personal property to escheat to the state, when there was a living heir at the time of the demise, even though he may be unknown to the administrator at the time of the closing of the administration proceedings: 1934 OAG No. 2257.

§ 2105.08 Application of provisions relating to escheating estates. (GC § 10503-25)

Sections 2105.01 to 2105.21, inclusive, of the Revised Code apply to any escheating estate of which possession has not been taken, or which has not been collected by the proper officers of the state or those acting under their authority. Right or claim of the state thereto is hereby relinquished to the person who would have been entitled thereto had such sections been in force when the intestate died.

HISTORY: GC § 10503-25; 114 v 320 (344). **Eff** 10-1-53. For an analogous section, see former GC § 8596.

Forms

1 A&H Probate FORM 2105.07a, 2105.09a et seq: Escheated property

Research Aids

O-Jur2d: Escheat § 11

§ 2105.09 Disposition of escheated lands.

(A) The county auditor, unless he acts pursuant to division (C) of this section, shall take possession of real property escheated to the state that is located in his county and outside the incorporated area of a city. The auditor shall take possession in the name of the state and sell the property at public auction, at the county seat of the county, to the highest bidder, after having

given thirty days' notice of the intended sale in some newspaper printed within the county.

On the application of the auditor, the court of common pleas shall appoint three disinterested freeholders of the county to appraise the real property. The freeholders shall be governed by the same rule as appraisers in sheriffs' or administrators' sales. The auditors shall sell the property at not less than two thirds of its appraised value and may sell it for cash, or for one third cash and the balance in equal annual payments, the deferred payments to be amply secured. Upon payment of the whole consideration, the auditor shall execute a deed to the purchaser, in the name and on behalf of the state. The proceeds of the sale shall be paid by the auditor to the county treasurer.

The treasurer shall pay the proceeds, not exceeding six hundred dollars in any case, to the regularly organized agricultural society within the county. The excess of the proceeds, or the whole thereof if there is no regularly organized agricultural society within the county, shall be paid to the treasurer of state for the use of the state agricultural fund.

(B) The legislative authority of a city within which are lands escheated to the state, unless it acts pursuant to division (C) of this section, shall take possession of the lands for the city, and the title to the lands shall vest in the city. The city shall use the premises primarily for health, welfare, or recreational purposes, or may lease them at such prices and for such purposes as it deems proper. With the approval of the commissioner of tax equalization, the city may sell the lands or any undivided interest in the lands, in the same manner as is provided in the sale of land not needed for any municipal purposes; provided that the net proceeds from the rent or sale of the premises shall be devoted to health, welfare, or recreational purposes.

(C) As an alternative to the procedure prescribed in divisions (A) and (B) of this section, the county auditor, or if the real property is located within the incorporated area of a city, the legislative authority of that city by an affirmative vote of at least a majority of its members, may request the probate court to direct the administrator or executor of the estate that contains the escheated property to commence an action in the probate court for authority to sell the real property in the manner provided in Chapter 2127. of the Revised Code. The proceeds from the sale of real property that is located outside the incorporated area of a city shall be distributed by the court in the same manner as the proceeds are distributed under division (A) of this section. The proceeds from the sale of real property that is located within the incorporated area of a city shall be distributed by the court in the same manner as the proceeds are distributed under division (B) of this section.

HISTORY: GC §§ 10503:26—10503:29; 114 v 320 (344); 122 v 256; 136 v H 1098 (EF 8-6-76); 136 v H 920. EF 10-11-76.

For analogous sections, see former GC §§ 8599 to 8602.

Comparative Legislation

Sale of estates which have escheated to state:

Ill.—Rev Stat, ch 49, § 2

Ind.—Burns' Stat, § 29-1-17-12

Ky.—KRS, § 393.030

Mich.—MCLA, § 567.57

Pa.—Purdon's Stat, Tit. 20, § 2112

Fla.—FSA, § 733.816

Forms

1 A&H Probate FORM 2105.09a et seq.

Research Aids

Disposition of escheated property:

O-Jur2d: Escheat § 8 et seq

Am-Jur2d: Escheat § 40 et seq

Property within cities:

O-Jur2d: Escheat § 10

CASE NOTES AND OAG

1. The legislature may relinquish the rights of the state in escheated land; and may provide that the same shall pass to persons who would not have been heirs of the intestate under former legislation; or it may provide that such lands will pass to such public instrumentality as it may choose: *Lewis v. Eutsler*, 4 OS 354.

§ **2105.10** Repealed, 136 v S 145, § 2 [GC § 10503-5; 114 v 320; 116 v 385; 119 v 394]. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2105.10 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Half and half statute:

Ind.—Burns' Stat, § 29-1-2-1

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145

REPEAL]

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See also, in case notes to RC § 2105.06, decisions under former GC §§ 8573, 8574.

1. Where a husband and wife have each deposited money in a common fund in a financial institution with a stipulation that it is payable to either or the survivor, such funds, upon the death of the husband, pass to the surviving wife by virtue of the contract and not "by deed of gift" and, upon the death of the latter intestate, the distribution thereof is not governed and controlled by this section, commonly known as the half and half statute: *Berberick v. Courtade*, 137 OS 297, 18 OO 50, 28 NE(2d) 636.

2. The distributive share from the estate of a deceased spouse, taken in lieu of dower (GC § 10502-1 [RC § 2103.02]) and by presumed election to take under the statute of descent and distribution, does not pass to the estate of the relict by "descent" so as to be distributed, in case the relict dies intestate and without issue, under the "half and half" statute, this section: *Miller v. Miller*, 49 App 220, 3 OO 170, 197 NE 134 [affirmed, 129 OS 230].

3. Where the relict of a deceased spouse dies intestate without issue, possessed of property which came to such relict from her deceased spouse by descent, such property will descend partially to the heirs of the deceased spouse from and not through the relict of the deceased spouse pursuant to this section: *Caldwell v. Tax Comm.*, 52 App 124, 6 OO 246, 3 NE(2d) 543.

4. The phrase "except for the intestate share of the surviving spouse, if any, of such relict" in this section, refers to the share a surviving spouse would take under the conditions set forth in the various paragraphs of GC § 10503-4 (RC § 2105.06): *Russell v. Roberts*, 54 App 441, 8 OO 196, 7 NE(2d) 811.

5. In determining the intestate succession, "next of kin" as used in this section is computed by the rules of civil law, and in this respect the term "ancestor" is not limited to the ancestor from whom the estate came, but is used in a broader sense to include progenitor or progenitors, such as father and mother. The distinction between ancestral and nonancestral property was abolished with the adoption of the new probate code: *Russell v. Roberts*, 54 App 411, 8 OO 196, 7 NE(2d) 811.

6. To permit the next of kin of a deceased spouse to inherit property under this section, the so-called "half and half" statute, from the estate of such decedent's surviving spouse, who inherited property from the deceased spouse and who died without any lineal descendants or a surviving spouse, it must be the identical property that was inherited from such former deceased spouse: *Knauss v. Knauss*, 58 App 183, 12 OO 72, 16 NE(2d) 483.

7. Cousins are entitled to represent their deceased parents and inherit the share they would have inherited had they survived, notwithstanding surviving uncles and aunts of the intestate; and this rule applies although the property inherited came to the intestate from a deceased spouse: *Ritter v. Ritter*, 62 App 488, 14 OO 375, 24 NE(2d) 603.

8. By the use of the phrase "next of kin" in this section, the legislature did not intend to create an entirely different order of descent for property inherited from a deceased spouse, but only intended to provide for its equal division between the families of the deceased and surviving spouses: *Ritter v. Ritter*, 62 App 488, 14 OO 375, 24 NE(2d) 603.

9. Where, during her lifetime, a widow transferred

the title to bonds, received from her deceased husband, to the treasurer of the political subdivision issuing them, agreeing to accept refunding bonds therefor, such refunding bonds, having been delivered after her death to the administrator of her estate, pass to her next of kin, under provisions of GC § 10503-4 (RC § 2105.06), the contract right to the refunding bonds not being the "identical" property coming from the deceased husband within the meaning of this section: *Speidel v. Schaller*, 73 App 141, 28 OO 252, 55 NE(2d) 346.

10. A promissory note given by a surviving partner to the relict of his deceased partner in payment for the latter's interest in the partnership, is not identical property of such deceased coming to the relict and, at the death of the relict, does not pass, under this section (116 v 389), one-half to the heirs of the relict and one-half to the heirs of the deceased partner: *Snyder v. Rowe*, 73 App 518, 29 OO 166, 57 NE(2d) 153.

11. Money, received by a husband from the estate of his deceased wife and placed in a bank savings account in the husband's name, is, upon the husband's death, distributable to his heirs only, the money in the account not being the "identical" property so received by the husband, within the meaning of that word as used in this section: *Kolthoff v. Kolthoff*, 79 App 427, 35 OO 226, 74 NE(2d) 394.

12. A husband executed and delivered a deed to his wife conveying to her a life estate in a tract of real estate owned by him. Thereafter he died intestate, leaving his widow and one daughter, his only child and heir at law. The widow and the daughter entered into a written contract wherein, among other things, and for an adequate consideration, it was agreed that the daughter should "execute and deliver a full release and acquittance to the said Laura E. DeLay of her entire interest in said estate." Laura E. DeLay was the widow. She did not remarry and died intestate without issue. Upon the death of the original owner, one-half of the property so deeded vested in fee simple in the widow, and in it the daughter then had no interest and had nothing which she could convey. That one-half interest passed directly upon the death of the widow to the daughter from the widow under this section, and the title to that undivided one-half was then, and is, vested in the daughter: *Roberts v. Jones*, 86 App 328, 41 OO 372, 91 NE(2d) 817.

12.1 The term "identical property," as used in GC § 10503-5 (RC § 2105.10), and as applied to "real estate," means the corpus of the property and not the value or interest therein, and the corpus is determined by the legal title thereto: *McMillan v. Krantz*, 94 App 9, 51 OO 253, 114 NE(2d) 289.

12.2 Where a testator devises real estate in fee simple to a wife or husband relict, and the relict makes improvements thereon or leases the same but does not alter the chain of title, the corpus is not changed, and the property remains the "identical property" and passes as such under GC § 10503-5 (RC § 2105.10): *McMillan v. Krantz*, 94 App 9, 51 OO 253, 114 NE(2d) 289.

13. The legislature in the enactment of the "half and half" statute (this section) did not intend to give to the surviving spouse any lesser estate than is ordinarily given under the general statute of descent and distribution: *Hammel v. Hammel*, 2 OO 73 (PC).

14. Where a surviving spouse, who received real estate and bank deposits and other moneys from her deceased husband, sold the real estate and invested the proceeds, as well as the bank deposits and other moneys, in bonds which she possessed at the time of her death, and she died intestate and without issue,

such bonds are not "property coming to her from her deceased husband," within the meaning of this section, regardless of the time when same were acquired by the widow: *Cowan v. Campbell*, 7 OO 445 (PC).

16. The term "brothers and sisters," as used in this section, includes brothers and sisters of the half blood as well as the whole blood: *Oldiges v. Osborne*, 11 OO 506 (PC).

17. The word "descent," as used in the half and half statute (this section), signifies the succession of intestate property: *Fee v. Linthicum*, 11 OO 568 (CP).

18. The property passing under this section is divided into two equal parts, half going to the relatives of the relict spouse and half to the relatives of the spouse from whom the property came: *Schwaigert v. Vitzhum*, 12 OO 114 (PC).

19. Each one-half is to be treated separately and distinct from the other, and the way in which the one-half is to be distributed to the brothers and sisters, or the next of kin of deceased brothers and sisters of the spouse from whom the estate came, is not affected by the degree of relationship to the intestate relict of those entitled to the other half; the converse is also true: *Schwaigert v. Vitzhum*, 12 OO 114 (PC).

20. Where an executor paid a sum of money to a testator's widow by a check drawn on his personal account, in which account he had deposited estate's funds, and the widow deposited sum in savings account together with other funds of her own, savings account did not come within operation of this section upon death of widow intestate: *In re Hartzell*, 26 OO 466 (PC).

21. The net income from the estate of a deceased husband after the death of the wife relict is not subject to the provisions of this section, but descends to her next of kin: *Linton v. Williams*, 25 OLA 659.

22. Where property passing to the widow from the estate of her deceased husband was in the form of checks drawn against one bank which were then deposited to her account in another, this section is inapplicable, upon her death, since the account in the second bank is not the "identical" property which passed from the husband's estate: *Smith v. Unterburger*, 86 App 237, 41 OO 135, 85 NE(2d) 304.

22.1 The expectation of an heir presumptive is not a vested right, and the laws of descent may be changed at the pleasure of the legislature as to all the estate not already vested; hence, where the property of a spouse relict is included in and governed by the provisions of this section, enacted as an amendment to GC § 8577 (see now RC §§ 2105.01, 2105.10), prior to her death, the authority of the later section is not avoided by reason of the fact that, because of her taking under the law rather than under her husband's will, the provisions of GC § 8577 (see now RC §§ 2105.01, 2105.10) would have no application: *In re Allen*, 31 NP(NS) 151.

22.2 Property purchased by the relict with the property, or proceeds of property, received from a deceased consort is not identical property within meaning of this section: *National Bank of Lima v. Allen*, 65 OLA 27, 104 NE(2d) 469 (PC).

23. Ordinarily, shares of stock received as a stock dividend are, within the meaning of this section, part of the "identical . . . personal property" which had theretofore been the shares of stock upon which such stock dividend had been declared: *Millar v. Mountcastle*, 161 OS 409, 53 OO 333, 119 NE(2d) 626.

24. Although property purchased or acquired from the proceeds of other property is not the "identical . . . property" as such other property within the meaning of this section, a strict literal meaning will not be ascribed to the words "identical . . . property"

as used in that statute: *Millar v. Mountcastle*, 161 OS 409, 53 OO 333, 119 NE(2d) 626.

25. A mere change in the evidence of ownership of property does not require the conclusion that such property is not the identical property which it was before such change: *Millar v. Mountcastle*, 161 OS 409, 53 OO 333, 119 NE(2d) 626.

26. Under this section where a relict spouse dies intestate without having remarried, leaving no surviving spouse or surviving issue and possessed of identical property which came to her under the will of her predeceased spouse, the son and only lineal descendant of the predeceased spouse takes from the relict spouse, his stepmother, and not through her and from the predeceased spouse, his father: *In re Sherick*, 167 OS 151, 4 OO(2d) 141, 146 NE(2d) 727.

27. One who takes under the half-and-half statute takes as an heir of the relict or surviving spouse and as such, under the provisions of RC § 2714.02, is a necessary party in an action to contest the will of such relict: *Kluever v. Cleveland Trust Co.*, 173 OS 177, 18 OO(2d) 461, 180 NE(2d) 579.

28. One who would inherit, via the half and half statute, under an unprobated will has standing to contest a probated will: *Wical v. Bernard*, 26 OS(2d) 55, 55 OO(2d) 66, 269 NE(2d) 45.

29. Where testator died, bequeathing government bonds to his wife, which bonds matured during the widow's lifetime and were surrendered by her for a new issue of bonds, the bonds thus received in exchange by the widow and the bonds bequeathed to her by her husband are not such "identical" property as to come within the meaning of this section: *Knauss v. Knauss*, 58 App 183, 12 OO 72, 16 NE(2d) 483.

30. The provisions of this section are inapplicable where testatrix devised real estate to her husband for life and after his death to her grandson, and the husband having elected not to take under the will, subsequently died intestate: *Fee v. Linthicum*, 11 OO 568 (CP).

31. The fact that the will of the wife relict directs the executor to convert to cash the property of her deceased spouse does not constitute a change in the property by her, and this section is consequently applicable to property of the husband's estate undistributed until after the wife's death: *Linton v. Williams*, 25 OLA 659.

32. Where a person dies leaving no children or lineal descendants, and no parent, and his attempted will is set aside, his surviving spouse becomes immediately and absolutely the owner of shares of stock, free of any interest or right whatsoever of collateral heirs of decedent who had assigned their interest in the estate to the surviving spouse: *Gabriel v. Southard*, 29 OLA 369.

33. Where United States war savings bonds purchased by a husband out of his separate funds are issued to the purchaser and his wife as co-owners, and, upon the death of the husband, pass to the wife as surviving co-owner under the provisions of the bonds and the regulations of the United States treasury department, the descent of such bonds, upon the death of the wife possessed thereof, is not governed by this section, the so-called half-and-half statute: *Lambert v. Lambert*, 95 App 187, 53 OO 128, 118 NE(2d) 545.

34. Under such circumstances such bonds descend in accordance with GC § 10503-4 (RC § 2105.06), and where the wife dies intestate leaving no heirs or next of kin, such bonds escheat to the state of Ohio: *Lambert v. Lambert*, 95 App 187, 53 OO 128, 118 NE(2d) 545.

35. Under the provisions of this section when the relict of a deceased husband or wife (1) dies intestate as to his or her whole estate, or any part thereof; (2) dies without issue; (3) is possessed of identical property which came to such relict from his or her deceased spouse by deed or gift, devise, bequest or descent, or by virtue of an election to take under the statute of descent and distribution; such property passes one-half to the line of descent of the spouse who first died: *Muckerheide v. Zink*, 1 OApp(2d) 76, 30 OO(2d) 103, 202 NE(2d) 725.

36. The word "children" appearing in RC § 2105.10, the half and half statute, means all children, both legitimate and illegitimate: *Green v. Woodard*, 40 OApp(2d) 101, 69 OO(2d) 130, 318 NE(2d) 397 (1974).

37. The acts of a guardian of an insane widow, the sole heir at law of her intestate husband, in converting assets from his estate into money and reinvesting same, not being required by law and not being approved by the court, are not for the benefit of the ward's estate, and therefore, under this section, the deceased husband's next of kin are, upon the widow's death intestate, entitled to share equally with the widow's next of kin in such reinvested portion of her estate which came to her by descent from her husband: *In re Brown*, 72 App 289, 27 OO 133, 51 NE (2d) 657.

39. Where a husband had a contract of deposit with a savings society or a bank which contract after his death was cancelled and the funds transferred into a new account with such savings society or bank in the name of his wife a new contract was created, the "identical" property left by the husband ceased to exist and a new property came into being, and when such wife died intestate the contract which she owned was not the "identical" property which she had received from her husband and thus did not pass under the half and half statute: *Surso v. Lucak*, 68 OLA 252, 113 NE(2d) 388 (App).

43. Where mortgaged real estate is devised by a decedent to his surviving spouse, who pays the mortgage debt out of her personal funds and later dies intestate and without issue, such payment was a voluntary one, neither the surviving spouse nor her estate can be subrogated to the rights of the mortgagee, and under this section such real estate passes to the children of the devisor, or to the next of kin of deceased children, free of such claim. In such case the children or next of kin of deceased children inherit from the last surviving spouse and not from the decedent from whom the property was devised: *Ratchford v. Fravel*, 4 OO 197 (PC).

49. Where stocks and bonds are part of an intestate widow's estate, and there is no evidence that such personalty had been given by the deceased husband to the widow by deed or gift or otherwise, their next of kin share such property equally, under provisions of this section, any effective transfer of title satisfying the requirement of "deed of gift" of such statute, and there being, in the absence of evidence to the contrary, a presumption of "gift": *Speidel v. Schaller*, 73 App 141, 28 OO 252, 55 NE(2d) 346.

54. When the relict of a deceased husband dies intestate and without issue, the proceeds of the husband's insurance policy of which she was beneficiary, the proceeds from the partition sale representing her interest in the property, and the widow's exemption and the year's allowance granted by GC §§ 10509-54 and 10509-74 (RC §§ 2115.13, 2117.20), do not pass to the estate of the relict by "descent" so as to be distributed under the "half and half" statute, this section: *Miller v. Miller*, 49 App 220, 3 OO 170, 197 NE 134 [affirmed, 129 OS 230].

55. In construing this section, and the meaning of

the words "except for the intestate share of the surviving spouse," this section and GC §§ 10503-4 and 10504-61 (RC §§ 2105.06, 2107.42) must be construed together in order to give full effect and a reasonable interpretation to all such provisions: *Hammel v. Hammel*, 2 OO 73 (PC).

56. Since the "half-and-half" statute and the statute relating to the disposition of property of a person dying intestate are part of the chapter of descent and distribution neither section has priority over the other and both sections must be considered (RC §§ 2105.06, 2105.10): *Bussell v. Cline*, 10 OO(2d) 481, 161 NE(2d) 655 (CP).

57. Where the surviving spouse died intestate within two weeks of the date of death of her deceased spouse, without having remarried and without issue, seized of the identical property which was conveyed to her by her deceased spouse nearly four years prior to his death, the half and half statute, rather than the simultaneous death statute (RC § 2105.21), is applicable: *Battista v. Feihl*, 23 OO (2d) 252, 191 NE(2d) 597 (PC).

58. Where the real estate which the relict spouse possessed at her death did not come to her from her deceased spouse, but came to her from a third person, and the devise made by the wife to her husband lapsed because he predeceased her, the property will not be distributed under the provisions of this section: *Muckerheide v. Zink*, 30 OO(2d) 512, 206 NE (2d) 436 (PC).

59. The term "identical property," as used in this section, and as applied to "real estate," means the corpus of the property and not the value of interest therein: *Slisz v. Slisz*, 32 OO(2d) 329, 3 OMisc 93, 207 NE(2d) 807 (PC).

60. Where the decedent had received by devise from a deceased spouse an undivided one-half interest in real property in which the decedent had been a purchaser of the other undivided one-half interest, and later conveyed an undivided one-half interest therein to the spouse who survived him, one-half of the undivided one-half interest which the decedent owned at his death passes under this section: *Slisz v. Slisz*, 32 OO(2d) 329, 3 OMisc 93, 207 NE(2d) 807 (PC).

61. Where a widow preferred to take property devised to her rather than to sell part of it and, as executrix, pay to herself as an individual her claims against her husband's estate, she thereby waived such claims, and upon her death such claims are not a lien against property passing pursuant to the "half-and-half" statute to a child of her deceased husband: *Chupp v. Tomas*, 36 OO(2d) 317, 7 OMisc 204, 216 NE(2d) 658 (PC).

62. When a relict of a deceased husband or wife dies intestate and without surviving issue or spouse, possessed of identical real estate which came to such relict from the deceased spouse by devise, such real estate shall pass to and vest in the children of the deceased spouse from whom such real estate came: *Chupp v. Tomas*, 36 OO(2d) 317, 7 OMisc 204, 216 NE(2d) 658 (PC).

63. It is the corpus or title which determines whether property is the identical property which comes to a relict from a deceased spouse within the meaning of this section, and the fact that such relict tore down existing structures and erected new ones on real property does not change the identity of property within the meaning of this section relating to the descent of identical property: *In re Duswald*, 87 OLA 412, 180 NE(2d) 307 (PC).

64. Where a deceased spouse has bequeathed 1,350 five-dollar par value shares of corporate stock in his relict, and thereafter the corporation amends its articles of incorporation so as to increase the author-

ized number of its five-dollar par value shares from 250,000 to 750,000 and pursuant to appropriate corporate action distributes to each shareholder certificates for two additional shares of five-dollar par value stock for each share theretofore held so that the relict receives a stock dividend of 2,700 five-dollar par value shares on the 1,350 shares which she had theretofore held, the total of 4,050 of such shares thereafter held by the relict is, within the meaning of this section, the identical personal property received from her deceased spouse: *Millar v. Mountcastle*, 161 OS 409, 53 OO 333, 119 NE(2d) 626.

DECISIONS UNDER FORMER GC § 8577

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Relict

1. The words "relict of a deceased husband or wife," as used in this section, are used to designate the relationship to a former married pair of the survivor of a marriage union; and such relationship is not destroyed or changed by the subsequent marriage of such survivor: *Spitler v. Heeter*, 42 OS 100.

Property and title of relict thereto—descent

6. The relict of a deceased husband or wife, who leaves a will bequeathing a life estate only, permitting the fee to go where the statute sends it, dies intestate as to the real estate inherited from such deceased husband or wife, and in consequence the title to such real estate passes under the provisions of this section and not under GC § 8574 (see now RC § 2105.06): *Goff v. Moore*, 3 App 170, 20 CC(NS) 224, 26 CD 587 [on appeal from 11 NP(NS) 543, 24 OD 552; and affirmed, *Gregg v. Keener*, 91 OS 406].

7. Devisee, under devise requiring payment of legacies made lien on devised property, took property by devise and not by purchase though paying legacies: *Will v. Will*, 36 App 15, 172 NE 669.

9. For a case where property should be partitioned among the parties under former GC § 8577 (see now RC §§ 2105.01, 2105.10) as property which came to a wife from her husband, see *Hilty v. Gilbert*, 115 OS 134, 152 NE 299.

10. Where the property in a lapsed devise came to testator from a former deceased wife, within GC § 8577 (see now RC §§ 2105.01, 2105.10), and the testator dies without issue, and there are no children of such deceased husband or wife, such property descends under GC § 8577 (see now RC §§ 2105.01, 2105.10): *Foreman v. Medina County Nat. Bank*, 119 OS 17, 162 NE 42.

11. A made a will giving all of his property to his wife; ten years later the wife died, and two years thereafter A died without revoking said will; held, that A died "intestate" within GC § 8577 (see now RC §§ 2105.01, 2105.10): *Medina County Nat. Bank v. Foreman*, 27 App 400, 161 NE 366.

12. A wife who by the death of her husband without issue became the owner in fee of an entire parcel, previously jointly owned by purchase, subsequently deeded one-half of parcel to her second husband, without designating which half, and later died without issue; it must be inferred that she died the owner of the half acquired from first husband, the descent of which will be controlled by GC § 8577 (see now RC §§ 2105.01, 2105.10): *Babjak v. Ivanik*, 27 NP (NS) 477.

13. When corporate stock, which is bequeathed to a relict by her deceased spouse, is surrendered by the relict to the corporation issuing it, for which, upon merger with another corporation, new stock is issued, such stock is not distributable, upon the death of the relict intestate and without issue, in accordance with the provisions of former GC § 8577 (see now RC §§ 2105.01, 2105.10): *Murphy v. Niehus*, 50 App 299, 4 OO 42, 198 NE 197.

—Deed of gift

18. The recital of pecuniary consideration in deed from ancestor to heir cannot be varied or explained for the purpose of changing line of descent of property conveyed: *Lee v. Fike*, 28 App 283, 162 NE 682.

19. The expression in a deed from husband to wife "of valuable consideration" is conclusive as to the character of the property for the purpose of this section; and the line of descent cannot be changed by showing by oral evidence that the deed was in fact a gift: *Ossman v. Schmitz*, 4 CC(NS) 502, 14 CD 709; see also *Nave v. Marshall*, 6 NP 488, 9 OD 415.

20. Where a husband conveys real estate to a trustee to hold for the benefit of the wife of the grantor and the trustee upon the same date and for a nominal consideration conveys the property to the wife without describing himself as trustee, the property so conveyed to the wife is acquired by her by purchase and not by deed of gift: *Lower v. Gardner*, 22 CC(NS) 385, 33 CD 623.

22. Land which is conveyed by a husband to his wife through a trustee descends as land coming by purchase: *Sullivan v. Corrigan*, 6 NP(NS) 606, 18 OD 832.

23. If a husband conveys realty to his wife by deed of gift, and she dies without children or their representatives, and such realty descends to him under GC § 8574 (see now RC § 2105.06), such realty is either not subject to the provisions of this section, or if subject thereto, is nevertheless encumbered by the lien of the husband's debts: *Gosling v. Rupp*, 7 NP 185, 6 OD 345.

—Legal and equitable interests

28. The rule which prevails as to real property, that descent follows the legal title, does not apply to personal property; and, where the owner of personal property, intending and desiring that it shall descend, upon the death of such owner, according to the provisions of this section, mingles the same in a common fund with property which is specifically within the terms of this section, and makes a partial distribution in accordance with such intention and desire, such fund is impressed with a trust that it shall so descend, and upon the death of the owner, such fund will descend according to the provisions of this section: *Bruer v. Johnson*, 64 OS 7, 59 NE 741.

29. In construing this section, the rights of the parties involved are to be determined by the legal title and their legal status, and not by principles of equity. The surviving spouse takes an absolute interest and not an interest as trustee; and, accordingly, may change the character of the property so as to prevent its descent from being controlled by this section: *Digby v. Digby*, 5 CC(NS) 130, 16 CD 417.

30. Money received by a widow for the sale of oil from land derived by her from her deceased husband, is not identical with the land, and upon distribution after her death is not to be controlled by the provisions of this section: *Digby v. Digby*, 5 CC(NS) 130, 16 CD 417. Contra: That the proceeds of personal property follow the same course of descent under this section that the original personal property would have followed: *In re McDermott*, 13 OD(NP) 390.

—Insurance

36. If insurance is taken out by the husband for the use and benefit of his wife and children by her, upon the death of the wife, after the death of the husband, but before payment of the insurance, there being no surviving living issue of the marriage, the insurance belongs to the next of kin of the wife, to the exclusion of children of the husband by a former marriage: *Lounsberry v. Richardson*, 1 OSU 470, 36 Bull 59.

37. Life insurance effected by a husband for the benefit of his wife does not pass by deed of gift to her; and the descent of the proceeds thereof is accordingly not controlled by this section: *Richardson v. Michener*, 11 DecRep 830, 30 Bull 120.

Course of descent from relict

42. Property which passes from one spouse to another under GC § 8574 (see now RC § 2105.06) is not ancestral property in the hands of the survivor: *Brower v. Hunt*, 18 OS 311; *Gazlay v. Gosling*, 25 CC(NS) 185, 35 CD 239.

43. If a husband or wife dies intestate, and without issue, seized of nonancestral real estate or of personal property, such property descends to the relict of such husband or wife under GC § 8574 (see now RC § 2105.06); and if, on the death of such relict without issue and intestate, seized of such property, it descends under this section half to the brothers and sisters of the whole blood of the former deceased husband or wife, or their representatives, if there be such, and the other half to the brothers and sisters of the deceased relict, or their representatives, in the like order. Such has been the course of descent in such cases since the supplementary act of April 11, 1877 (74 v 81): *Stembel v. Martin*, 50 OS 495, 35 NE 208 [reversing *Stone v. Doster*, 7 CC 8, 3 CD 637, and affirming *Martin v. Falconer*, 5 CC 584, 3 CD 286].

44. If, on the death of the relict, there are no brothers or sisters of her deceased husband or their legal representatives, property which she received from her deceased husband by deed of gift, devise, bequest or descent, descends to her surviving brothers and sisters to the exclusion of the more remote relation of the husband: *Ellis v. Ellis*, 3 CC 186, 2 CD 105.

45. A wife without children died leaving a will whereby she devised the income of her real estate for five years to her husband and provided that at the end of the five years said real estate should become his in absolute ownership. The husband died within the five years. It was held that said real estate descended to the heirs of the husband: *Holmden v. Craig*, 16 CC(NS) 157, 31 CD 461 [affirmed, without opinion, 83 OS 483].

46. If a widow dies leaving property which came to her from her deceased husband, one-half thereof is to be paid to the brother of such deceased husband in accordance with the provisions of this section, and the rest is to be paid to the next of kin of the wife, in accordance with the provisions of GC § 8574 (see now RC § 2105.06), as thus defined; since GC § 8576 (repealed, 114 v 320) by its terms applies only where there is no person entitled to inherit it under GC § 8574 (see now RC § 2105.06): *Champlin v. Walsh*, 26 CC(NS) 460, sub nomine, *Champlain v. Walsh*, 27 CD 534.

47. Property which passes to a surviving spouse by reason of refusal to take under the will is not subject to this section: *Seney v. Schroth*, 25 CC(NS) 185, 35 CD 239.

48. Personal property which did not come to a widow by deed of gift, devise or bequest or under

the provisions of GC § 8574 (see now RC § 2105.06), does not pass on distribution of her estate, under GC § 8577 (see now RC §§ 2105.01, 2105.10): *Paul v. Brown*, 29 OCA 396, 35 CD 610 [motion to certify record overruled, 16 OLR 344, 63 Bull 438].

49. In the statutes of descent, the words "legal representatives" generally mean "lineal descendants"; but under GC § 8577 (see now RC §§ 2105.01, 2105.10), in order to effectuate the intent of the legislature, the words have the meaning of "heirs at law" or "next of kin" of such brothers and sisters: *Larkins v. Routson*, 115 OS 639, 155 NE 227.

50. Where husband and wife die intestate, the property going to their brothers and sisters, under former GC § 8577 (see now RC §§ 2105.01, 2105.10), should not be held to be confused and commingled by application of former GC § 8581 (see now RC § 2105.12) providing for descent at the death of such brothers and sisters: *MacMahon v. MacMahon*, 3 OLA 668.

51. The term "legal representatives" is said to be an indefinite term, and to include lineal descendants of the brothers and sisters referred to, but not the collateral representatives, such as uncles, aunts or cousins: *Thomas v. Lett*, 4 NP 393, 6 OD 429.

52. The real estate of a deceased wife upon her death without issue, who has title to such real estate from a former deceased husband, passes to and descends, under this section, one-half to the brothers and sisters of such wife and one-half to the brothers and sisters of the deceased husband, subject to the dower interest of the second surviving husband. Such surviving husband does not receive a life estate under GC § 8574 (see now RC § 2105.06): *Fay v. Scott*, 14 NP(NS) 241, 23 OD 464.

54. Under this section the heirs of the husband have no equities superior to those of the heirs of the wife: *Marshall v. Bash*, 17 NP(NS) 428, 26 OD 446.

55. If a deceased spouse owns an undivided interest in ancestral realty, and has purchased another undivided interest therein, a quitclaim to the surviving spouse by the heirs of the deceased spouse, which does not describe the share for which such quitclaim is given, does not estop the grantors from claiming by descent in such ancestral interest on the death, intestate, of such surviving spouse: *Newton v. Harris*, 21 NP(NS) 329, 29 OD 251.

56. Money deposited by an employee in a savings department conducted by his employer, out of his earnings, which he makes payable to his wife on his death, passes to her by gift; and on her death intestate, such fund is to be divided between her brother and sisters and his: *Burke v. Walthebillig*, 24 NP(NS) 277.

57. Where a person acquired title to realty under GC § 8574 (see now RC § 2105.06), died intestate and seized of said realty, an heir designated under GC § 8598 (see now RC § 2105.15) inherits; and the deceased cannot be said to have died "without issue": *Cochrel v. Robinson*, 113 OS 526, 149 NE 871.

58. General Code § 8577 (see now RC §§ 2105.01, 2105.10) governs and controls the disposition of only such property as had come to intestate from a former deceased husband or wife; property thereafter acquired by purchase, though with proceeds of property which had come from former deceased husband or wife, is not within that section or distributable in accordance therewith: *Guear v. Stechschulte*, 119 OS 1, 162 NE 46.

59. General Code § 8577 (see now RC §§ 2105.01, 2105.10) applies only to the identical property which comes to an intestate from a former deceased husband or wife, and does not apply to property purchased with proceeds, or increase or accumulations

thereof: *Wilson v. Eccles*, 119 OS 184, 162 NE 797.

60. The real estate in a lapsed devise, which came to testatrix by devise from her deceased husband, descends under GC § 8577 (see now RC §§ 2105.01, 2105.10) (the testatrix having left no issue) half to brothers and sisters of testatrix, and half to brothers and sisters of deceased husband: *Bishop v. Jones*, 29 OLR 48.

61. Personal property received by wife upon death of husband descended, at her death, one-half to her next of kin and one-half to husband's (GC § 8577 [see now RC §§ 2105.01, 2105.10]); GC § 8578 (see now RC § 2105.06) is inapplicable, even when the property had been turned into money by administrator of husband: *Halterman v. Wilt*, 34 App 150, 170 NE 176.

63. Sister of deceased husband who had title by purchase has interest in property only in event widow died intestate, without children or their legal representatives, and in possession of identical property which came to widow from husband (GC § 8577 [see now RC §§ 2105.01, 2105.10]): *Berndt v. Lusher*, 40 App 172, 178 NE 14.

64. A child, legally adopted, is within the meaning of the word "issue" in GC § 8577 (see now RC §§ 2105.01, 2105.10): *Miller v. Shepard*, 29 App 22, 162 NE 788.

65. Realty devised to husband by second wife, on husband's death intestate without issue, held to descend to surviving child of deceased second wife by former husband (GC § 8577 [see now RC §§ 2105.01, 2105.10]): *McColm v. Orebaugh*, 40 App 238, 178 NE 280.

66. Term "issue" in statute providing for distribution of property when relict of deceased husband or wife dies intestate and without issue, possessed of property received from deceased spouse, includes issue of other marriages: *Garver v. Garver*, 45 App 22, 184 NE 761.

§ 2105.11 Estate to descend equally to children of intestate. (GC § 10503-6)

When a person dies intestate leaving children and none of the children of such intestate have died leaving children or their lineal descendants, such estate shall descend to the children of such intestate, living at the time of his death, in equal proportions.

HISTORY: GC § 10503-6; 114 v 320 (340). Eff 10-1-53. For an analogous section, see former GC § 8580.

Comparative Legislation

Descent of property to children, no surviving spouse:

- Cal.—Probate Code, § 204
- Ill.—Rev Stat, ch 3, § 2-1
- Ind.—Burns' Stat, § 29-1-2-1
- Mich.—MCLA, § 702.80
- N.Y.—EPTL, § 4-1.1
- Pa.—Purdon's Stat, Tit. 20, § 2103
- Fla.—FSA, § 732.103

Research Aids

- O-Jur2d: Descent and Distribution § 124
- Am-Jur2d: Descent and Distribution § 54

§ 2105.12 Descent when all descendants of equal degree of consanguinity. (GC § 10503-7)

When all the descendants of an intestate, in a direct line of descent, are on an equal degree of consanguinity to the intestate, the estate shall pass to such persons in equal parts, however

remote from the intestate such equal and common degree of consanguinity may be.

HISTORY: GC § 10503-7; 114 v 320 (341). Eff 10-1-53. For an analogous section, see former GC § 8581.

Comparative Legislation

- Equal degree of consanguinity:
 - Cal.—Probate Code, § 252
 - Ind.—Burns' Stat, § 29-1-2-1
 - Ky.—KRS, § 391.040
 - N.Y.—EPTL, § 4-1.1
 - Pa.—Purdon's Stat, Tit. 20, § 2104
 - Fla.—FSA, § 732.104

Research Aids

- O-Jur2d: Descent and Distribution §§ 114, 124, 133
- Am-Jur2d: Descent and Distribution §§ 64-67

ALR

Right of remote kin equally related to the intestate but belonging to different stocks, to distribution per capita rather than per stirpes where nearer next of kin survive. 140 ALR 1141.

Law Reviews

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CASE NOTES AND OAG

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- Per capita and per stirpes, 1-3, 8, 13, 15, 18, 19
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- Scope and construction, 5, 6, 7, 18

1. This section, and the case law thereunder, are controlled by the new and special provisions contained in GC § 10503-4 (RC § 2105.06); hence, where there are no grandparents, the lineal descendants of such grandparents take per stirpes and not per capita, the grandparents being the stock or root: *Shearer v. Gasstman*, 31 NP(NS) 219.

2. Under the provisions of this section and GC §§ 10503-4, 10503-8 and 10503-9 (RC §§ 2105.06 and 2105.13), which must be read in pari materia, nephews and nieces of a decedent who left no other nearer of kin surviving, take per capita, and the descendants of deceased nephews and nieces take per stirpes: *Stocker v. Tranter*, 31 NP(NS) 467; *Schwaigert v. Vitzhum*, 26 OLA 442.

3. The rule with reference to distribution per capita and per stirpes which obtained in Ohio at common law and equity prior to this statute was not changed thereby: *Ewers v. Follin*, 9 OS 326; *Dutoit v. Doyle*, 16 OS 400; *Parsons v. Parsons*, 52 OS 470, 40 NE 165.

5. This section applies to collateral heirs as well as to lineal descendants: *Ewers v. Follin*, 9 OS 327; *Goff v. Disbennet*, 14 CC(NS) 557, 23 CD 234.

6. This section provides that when all the descendants of an intestate are of an equal degree of consanguinity they take equally: *Snodgrass v. Bedell*, 134 OS 311, 12 OO 103, 16 NE(2d) 463.

7. Since the amendment of GC § 10503-4 (RC § 2105.06) is so irreconcilably in conflict with this section that the two sections cannot be harmonized in order to effect the purpose of the amendment, the amendment operates as an implied repeal of this sec-

tion to the extent of the irreconcilable inconsistency: *Ryan v. Dixon*, 12 OO 185 (PC).

8. Property which passed by devise to be distributed among all heirs of testator or some other person is to be distributed per stirpes in the absence of words showing a contrary intention: *Eichenlaub v. Heschang*, 5 NP(NS) 367, 18 OD 47.

9. A will giving property to life tenant, with remainder at her death to issue of her body then living, required distribution per stirpes among living children and children of deceased child (former GC § 8581 [see now RC § 2105.12] et seq): *Watson v. Watson*, 34 App 311, 171 NE 257.

10. The language of the will may show a contrary intention, as where testator directs that certain property be divided equally among the heirs, in which case a distribution per capita is to be required: *Huston v. Crook*, 38 OS 328; *McKelvey v. McKelvey*, 43 OS 213, 1 NE 594; *Mooney v. Purpus*, 70 OS 57, 70 NE 894.

11. Under a provision in a will, "I give and devise to the children of A, and the children of B, and C, all said children being my grandchildren, the following real estate, to-wit: [Description of property], to have and to hold the same for the said grandchildren, their heirs and assigns forever," a distribution per capita, rather than a distribution per stirpes, will be presumed to have been intended by the testator, since the law favors equality rather than inequality; and if A has two children and B and C have twelve children, each of such grandchildren will take one-fourteenth of the estate: *Broermann v. Kessling*, 6 App 7, 28 OCA 321, 30 CD 103.

12. Where husband and wife die intestate, the property going to their brothers and sisters, under former GC § 8577 (see now RC §§ 2105.01, 2105.10), should not be held to be confused and commingled by application of former GC § 8581 (see now RC § 2105.12) providing for descent at the death of such brothers and sisters: *MacMahon v. MacMahon*, 3 OLA 668.

13. Where the heirs of the intestate consist of lineal descendants of both the paternal and maternal grandparents, even though such heirs are on an equal degree of consanguinity to the intestate, the estate will be divided in halves, in accordance with RC § 2105.06: *Reimer v. Finnegan*, 32 OO 391, (PC); *In re Stephenson*, 48 OLA 624 (PC).

15. Where an intestate leaves property acquired by purchase, with no heirs except nephews and nieces, children of different brothers and sisters, title is cast upon such nephews and nieces as a class, and they therefore take per capita and not per stirpes: *Goff v. Disbennet*, 14 CC(NS) 557, 23 CD 234.

18. Under former GC § 8581 (see now RC § 2105.12) all descendants must be in a direct line of descent and of an equal degree of consanguinity. Hence this section is not applicable to nephews and nieces; and they take per stirpes, if children of different brothers and sisters: *Newton v. Harris*, 21 NP(NS) 329, 29 OD 251 [heirs of wife, inheriting on death of husband, under former GC § 8577 (see now RC §§ 2105.01, 2105.10)].

19. Under former GC § 8581 (see now RC § 2105.12), where devise reverted, title vested in deceased's then heirs, and not as representatives of heirs living at time of her death, and being of equal consanguinity, they take per capita: *Harvard College v. Jewett*, 11 F(2d) 119.

§ 2105.13 Descent when children and heirs of deceased children are living. (GC §§ 10503-8, 10503-9)

If some of the children of an intestate are living and others are dead, the estate shall descend to the children who are living and to the lineal descendants of such children as are dead, so that each child who is living will inherit the share to which he would have been entitled if all the children of the intestate were living, and the lineal descendants of the deceased child will inherit equal parts of that portion of the estate to which such deceased child would be entitled if he were living.

This section shall apply in all cases in which the descendants of the intestate, not more remote than lineal descendants of grandparents, entitled to share in the estate, are of unequal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity will take the share to which they would have been entitled, had all the descendants in the same degree of consanguinity with them who died leaving issue, been living.

HISTORY: GC §§ 10503-8, 10503-9; 114 v 320 (341); 116 v 385 (389) § 1. **EF** 10-1-53.

For analogous sections, see former GC §§ 8582, 8583.

Research Aids

Different degrees:

Children and descendants:

O-Jur2d: Descent and Distribution § 124

Am-Jur2d: Descent and Distribution § 56

Generally:

O-Jur2d: Descent and Distribution § 115

Grandparents and descendants:

O-Jur2d: Descent and Distribution §§ 137-140

Am-Jur2d: Descent and Distribution §§ 56, 59, 60

Next of kin:

O-Jur2d: Descent and Distribution § 116

Am-Jur2d: Descent and Distribution § 68

Parents and descendants:

O-Jur2d: Descent and Distribution §§ 132-134

Am-Jur2d: Descent and Distribution § 58

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O-Jur2d: Descent and Distribution §§ 108-116

Am-Jur2d: Descent and Distribution §§ 64-68

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See also case notes under RC § 2105.12.

1. This 'section, together with former GC §§ 8581, 8583 (see now RC §§ 2105.12, 2105.13) and former GC § 8584 (re-enacted as GC § 10503-10, repealed in 123 v 202 [206]), do not change the rules with reference to distribution or representation in force in Ohio: *Ewers v. Follin*, 9 OS 326; *Dutoit v. Doyle*, 16 OS 400; *Parsons v. Parsons*, 52 OS 470, 40 NE 165.

2. Under this section if the testator dies, leaving some children surviving, while other children have died before him leaving children, the surviving grandchildren, children of the predecedents, take per stirpes. Accordingly, if an owner of property dies intestate, leaving six living children, two other children hav-

ing previously died, one leaving a family of three children and the other five, these eight grandchildren are not entitled to participate equally in the partition of lands descending from the intestate, but the three of one family are entitled each to one twenty-fourth part of the premises, and the five of the other family are entitled each to the one-fortieth part only: *Dutoit v. Doyle*, 16 OS 400; see also *Stone v. Doster*, 7 CC 8, 3 CD 637 [affirmed in 50 OS 495].

3. In the partition of the lands of an intestate among his children and the children of a deceased son, the portion which the latter inherit should be charged with an advancement made to their father by such intestate: *Parsons v. Parsons*, 52 OS 470, 40 NE 165 [see now RC § 2105.05 et seq].

4. In a will which devised one-half of an estate to the lawful heirs of the testator and one-half to the lawful heirs of his wife, after the death of his only son without issue, and which contained specific provisions as to the disposition of the shares of his sister (if she should survive the testator) and of the sister and brother of his wife, the persons included in the designation "lawful heirs" to whom "my estate shall go," are to be ascertained as of the date of the death of the testator or his wife respectively per stirpes, the representatives of deceased brothers and sisters to take the share that would have gone to their ancestor if living, except where the will itself otherwise provides: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [affirming on rehearing *Miller v. Miller*, 15 CC (NS) 481, 24 CD 43; which was modified in memorandum opinion, *Wilberding v. Miller*, 88 OS 609, and was on appeal from *Miller v. Miller*, 13 NP (NS) 1].

5. Under GC § 10503-8 (RC § 2105.13), if some of the descendants of an intestate are living and others are dead, leaving children, those living take the same per capita share to which they would be entitled if all were living, and the lineal descendants of those deceased take per stirpes: *Snodgrass v. Bedell*, 134 OS 311, 12 OO 103, 16 NE(2d) 463.

6. Where those entitled to share in an estate are nieces, nephews, grandnieces and grandnephews of the intestate, the nieces and nephews take equally, per capita, according to the total number of nieces and nephews whether surviving or not, and the grandnieces and grandnephews take per stirpes or by representation the shares of their deceased parents: *Kincaid v. Cronin*, 61 App 300, 15 OO 198, 22 NE(2d) 576.

7. The only purpose of the legislature in amending GC § 10503-9 (RC § 2105.13) was to make it conform to the correction made in the amendment to subsec. 8 of GC § 10503-4 (RC § 2105.06): *Ryan v. Dixon*, 12 OO 185 (PC).

8. If realty which has descended from one spouse to another, passes on the death of the latter intestate, half to his heirs and half to hers, such relatives are not heirs of the surviving spouse, and therefore stand in unequal relationship to him, and they take per stirpes and not per capita: *Newton v. Harris*, 21 NP (NS) 329, 29 OD 251.

9. Nieces and nephews of an intestate decedent are subject to having a debt of their father, who predeceased the decedent, set off against their distributable share, when decedent has a brother and sister still living, in view of the provisions of this section, that "the lineal descendants of the deceased child will inherit equal parts of that portion of the estate to which such deceased child would be entitled if he were living": *Gruhler v. Hossapaus*, 93 OLA 71, 195 NE(2d) 387 (PC).

10. A testator who provides, "all the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio," intends that the

residue of his estate shall be distributed the same as the personal property of an intestate would be distributed; and where such testator left surviving him two nephews and one niece and children of two other nieces, the residue of his estate will be divided in five parts of which the two nephews and the niece will each get one-fifth, and each set of children of the deceased nieces one-fifth to be equally divided among them: *Elliott v. Shaw*, 15 NP(NS) 81, 23 OD 662, sub nomine, *Lee v. Elliott*, 58 Bull 321 (Ed).

§ 2105.14 Posthumous child to inherit. (GC § 10503-16)

Descendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born in the lifetime of the intestate and surviving him; but in no other case can a person inherit unless living at the time of the death of the intestate.

HISTORY: GC § 10503-16; 114 v 320 (342). Eff 10-1-53. For an analogous section, see former GC § 8595.

Comparative Legislation

Posthumous child:

- Cal.—Probate Code, § 250
- Ill.—Rev Stat, ch 3, § 2-3
- Ind.—Burns' Stat, § 29-1-2-6
- Ky.—KRS, § 391.070
- Mich.—MCLA, § 702.85
- N.Y.—EPTL, § 2-1.3
- Pa.—Purdon's Stat, Tit. 20, § 2104
- Fla.—FSA, § 732.106

Research Aids

Pretermitted heir:

- O-Jur2d: Descent and Distribution § 123
- Am-Jur2d: Descent and Distribution §§ 87-89

ALR

Statutory change of age of majority as affecting pre-existing status or right. 170 ALR 222.

§ 2105.15 Designation of heir at law. (GC § 10503-12)

A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person's acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death. Such declaration must be attested by the two disinterested persons and subscribed by the declarant. If satisfied that such declarant is of sound mind and memory and free from restraint, the judge thereupon shall enter that fact upon his journal and make a complete record of such proceedings. Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the

declarant, as if so born. A certified copy of such record will be prima-facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence. After a lapse of one year from the date of such designation, such declarant may have such designation vacated or changed by filing in said probate court an application to vacate or change such designation of heir; provided, that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration.

HISTORY: GC § 10503.12; 114 v 320 (341); 118 v 406, § 1. Eff 10-1-53. For an analogous section, see former GC § 8598.

Comment

This section was amended, effective Aug. 28, 1939, (118 v 406) by adding the last sentence.

Since, formerly, an adult could not be adopted in Ohio, a provision was made for accomplishing the same end by designating a person as heir. When this is done properly in the probate court, the person thus designated "will stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock." "The rules of inheritance will be the same, between him and the relations by blood of the declarant, as if so born." The phrase "heir at law" is also used in the statute. Cases which concern an heir so designated have arisen mainly over the interpretation of the phrases, "heir at law," "as a child born in lawful wedlock," "issue," etc.

Cross-References to Related Sections

Adoption of child, RC § 3107.01 et seq.

See RC § 2107.34 which refers to this section.

Forms

1 A&H Probate FORM 2105.15a et seq.

Outline of Procedure

Designation of heir-at-law, Leyshon No. 63-1; A&H No. 34

Research Aids

Designated heirs:

O-Jur2d: Descent and Distribution §§ 118, 223-227

Distinguished from adopted children:

O-Jur2d: Descent and Distribution § 119

ALR

Time interval contemplated by provision of will or of statute of descent and distribution with reference to death of two persons simultaneously or approximately at same time. 173 ALR 1254.

Law Reviews

Inheritance of designated heir through declarant. (Case note.) 4 OSLJ 97.

Descent and distribution; designated heir statute; statutory construction. (Case note.) 15 CinLRev 347.

The Law of Adoption in Ohio. Beverly E. Sylvester. 2 Capital ULRev 23 (1973).

Wills can be made "unbreakable." Ellis V. Rippner, 6 ClevMLRev 336.

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1. This section is constitutional, and it cannot be said that it deprives the prospective heirs of any right if they had no vested right in the property at the time of the designation: *Davis v. Laws*, 27 NP(NS) 185 [affirmed, 34 App 157, 170 NE 601].

3. In giving effect to this section, it is not essential that the declaration be made in open court, nor that it be made in any particular place. Such declaration may be made before a judge of the probate court within his county at a place other than the office of said court: *Bird v. Young*, 56 OS 210, 46 NE 819.

4. The entry which the statute requires the judge to make upon his journal and the record of the proceedings do not constitute a judgment, and it is not essential to the validity of the proceedings that the order for such entry be made by the court. It is sufficient if it be made by the judge: *Bird v. Young*, 56 OS 210, 46 NE 819.

5. One, not of the blood of the testator, who has been designated an heir under favor of this section, is not issue of the body of such testator within the meaning of former GC § 10504 (repealed, 114 v 320). Hence bequests in the will to benevolent, religious, educational or charitable purposes, are not rendered invalid, as respects such heir, by reason of the fact that the will was executed within one year of the decease of the testator: *Theobald v. Fugman*, 64 OS 473, 60 NE 606 [reversing *Fugman v. Theobald*, 3 NP 65, 4 OD 65].

6. This section does not render invalid and inoperative a provision in a will which provides "I hereby make my two granddaughters, A and B, each equal heirs with my own children": *Moon v. Stewart*, 87 OS 349, 101 NE 314, 45 LRA(NS) 48, *Ann Cas* 1914A, 104 [affirming *Moon v. Harness*, 15 CC(NS) 139, 23 CD 337].

8. Designation of an heir under former GC § 8598 (see now RC § 2105.15) gives to him rights of inheritance under the statute of descent and distribution, and the same right of property as if he were born in lawful wedlock: *Cochrel v. Robinson*, 113 OS 526, 149 NE 526; *In re Powell*, 82 OLA 549, 168 NE(2d) 27 (PC).

9. An illegitimate son, designated as heir at law by his natural father, pursuant to the provision of this section, is not authorized under GC § 12079 (RC § 2741.01) to bring an action to contest the will of the brother of the natural father, which brother died subsequent to the decease of the natural father: *Blackwell v. Bowman*, 150 OS 34, 37 OO 323, 80 NE(2d) 493, discussed in 9 OSLJ 531.

10. Under the statutes of descent and distribution, a person who has been designated and appointed by another as an heir at law, pursuant to this section, inherits from but not through his designator: *Blackwell v. Bowman*, 150 OS 34, 37 OO 323, 80 NE(2d) 493, discussed in 9 OSLJ 531; *Uhl v. Armstrong*, 78 OLA 592, 140 NE(2d) 60.

11. A designated heir dying prior to the death of his designator does not acquire the status of a child, and where the death of such designated heir occurs

prior to the execution of a last will and testament of the designator, the children of the designated heir surviving the designator do not have as heirs at law or next of kin a right of inheritance in the estate of such designator and may not maintain an action to contest his will: *Kirsheman v. Paulin*, 155 OS 137, 44 OO 134, 98 NE(2d) 26, discussed in 47 OO 303.

12. A valid designation of an heir under this section amounts to the recognition by the designator of the designee as an adopted child: *In re Gompf*, 175 OS 400, 25 OO(2d) 388, 195 NE(2d) 806.

13. The designated heir of a brother of an intestate is not an heir of such intestate, and the intestate's niece, being the nearest of kin under the statutes of descent and distribution, inherits the estate: *Southern Ohio Sav. Bank & Co. v. Boyer*, 66 App 136, 19 OO 398, 31 NE(2d) 161, discussed in 15 OBar 214.

14. An heir designated by virtue of RC § 2105.15 is an heir under the statute of descent and distribution: *Witten v. Landrum*, 41 OApp(2d) 65, 70 OO(2d) 61, 322 NE(2d) 146 (1974).

15. The only benefit conferred by RC § 2105.15 are rights of inheritance. The statute does not create any additional legal relationships: *In re Howell*, 57 OO(2d) 364, 278 NE(2d) 926 (CP).

16. A person designated as an heir of the decedent pursuant to RC § 2105.15 is not entitled to claim an exemption from Ohio estate tax under the provisions of RC § 5731.15(A)(3), as a child of the decedent: *In re Howell*, 57 OO(2d) 364, 278 NE(2d) 926 (CP).

17. A proceeding to designate an heir at law, as prescribed by this section, is ex parte, and the court's action in determining whether declarant is of sound mind and not under restraint is quasi-judicial; an expectant heir at law of such a declarant is without right to invoke the probate court's jurisdiction to set aside such designation on the ground it was not the free act of declarant, but the court, sua sponte, upon information furnished by such expectant heir, may modify or set aside its former action: *Horne v. Horne*, 16 OLA 155.

18. Neither this section, providing for designation of heirs, nor GC § 10512-9 (RC § 3107.01), relative to adoption, contemplates giving an interest either to designated heir or adopted child, in the estate of any person other than that of the declarant, or of the adopting parent. Property may flow through the adopted child or the declared heir to others in the chain of title: *Rogers v. Cromer*, 24 OLA 508.

18.1 "Heirs at law" designated in probate court under GC § 10503-12 (RC § 2105.15) are not, during the lifetime of the person who designated them, "next of kin" entitled to written notice of the time and place of hearing of an application for appointment of a guardian for such person: *Jones v. Jones*, 30 OLA 499.

19. The formal adoption provided for in this section is not necessary to constitute an heir. This may be done by will: *Moon v. Harness*, 15 CC(NS) 139, 23 CD 337 [affirmed, *Moon v. Stewart*, 87 OS 349].

20. Naming persons in a will as the daughters of the testator does not of itself make them heirs. Persons who do not come within the provisions of the statute of descent and distribution must either be designated as heirs under this section, or must be adopted under former GC § 8024 (see now RC § 3107.01) et seq. In the absence of compliance with these provisions, a devise as such must be made to such persons or they cannot take: *In re Williamson*, 5 NP 1, 6 OD 505.

21. This section authorizes the designation of an heir, but does not of itself otherwise change the course of descent: *Richardson v. Cincinnati Union*

Stockyard Co., 8 NP 213, 11 OD 367.

22. If the word "heirs" is used in a clause of the will in the sense of children, it will be presumed that it is used in the same sense in another clause; and will thus exclude an adopted child of the person to whose heirs such gift is made: *Denley v. Wheeler*, 24 NP(NS) 357.

23. A bequest to the wife of an adopted son and a legal heir of the testatrix is subject to the collateral inheritance tax: *In re Hunnewell*, 3 OLR 52.

25. To qualify under RC § 5731.09(B) for a tax exemption when the property passes to or for the use of a "person recognized by the decedent as an adopted child and designated by such decedent as an heir . . .," the successor must establish that during his minority his relationship to the decedent was similar to that of a parent and child and that he was designated as an heir by the decedent according to law, although such designation need not necessarily have occurred during the minority of such successor: *In re George*, 82 OLA 452 (PC).

§ 2105.16 Heirs of aliens may inherit; aliens may hold lands. (GC § 10503-13)

No person who is capable of inheriting shall be deprived of the inheritance by reason of any of his ancestors having been aliens. Aliens may hold, possess, and enjoy lands, tenements, and hereditaments within this state, either by descent, devise, gift, or purchase, as fully as any citizen of the United States or of this state may do.

HISTORY: GC § 10503-13; 114 v 320 (342). Eff 10-1-53. For an analogous section, see former GC § 8589.

Comparative Legislation

Rights of aliens:

Ill.—Rev Stat, ch 6, § 1

Ind.—Burns' Stat, § 32-1-7-1

Ky.—KRS, § 391.060

Mich.—MCLA, § 554.135

Pa.—Purdon's Stat, Tit. 20, § 2104

Fla.—FSA, § 732.1101

Research aids

O-Jur2d: Aliens and Citizenship § 12; Wills § 50

Am-Jur2d: Aliens and Citizens § 17; Escheat § 12

ALR

Constitutionality, construction and application of provision of state statute that makes right of alien to succeed to property of deceased person dependent upon a reciprocal right in United States citizen. 170 ALR 966.

Dower of alien widow in estate of deceased husband. 110 ALR 520.

CASE NOTES AND OAG

1. This section, permitting aliens to hold, possess and enjoy lands, is broad enough to include a claim of dower: *Falkoff v. Sugerman*, 26 NP(NS) 81.

2. A foreign nation, in the absence of a treaty with the United States, may not hold title to real estate located in the state of Ohio without the express consent of the state: 1949 OAG No. 998

§ 2105.17 [Children born out of wedlock.]

Children born out of wedlock shall be capable

of inheriting or transmitting inheritance from and to their mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, as if born in lawful wedlock.

HISTORY: GC § 10503-14; 114 v 320 (342); 136 v S 145. Eff 1-1-76.

For an analogous section, see former GC § 8590.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2105.17 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Inheritance from mother by illegitimate child:

Cal.—Probate Code, § 255

Ill.—Rev Stat, ch 3, § 2-2

Ind.—Burns' Stat, § 29-1-2-7

Ky.—KRS, § 391.090

Mich.—MCLA, § 702.81

N.Y.—EPTL, § 4-1.2

Pa.—Purdon's Stat, Tit. 20, § 2107

Fla.—FSA, § 732.108

Inheritance by mother from illegitimate child:

Cal.—Probate Code, § 256

Ill.—Rev Stat, ch 3, § 2-2

Ind.—Burns' Stat, § 29-1-2-7

Ky.—KRS, § 391.090

Mich.—MCLA, § 702.82

N.Y.—EPTL, § 4-1.2

Pa.—Purdon's Stat, Tit. 20, § 2107

Fla.—FSA, § 732.108

Text Discussion

1 Anderson Fam. L. § 3.3

Research Aids

O-Jur2d: Descent and Distribution § 96; Bastardy §§ 71 et seq

Am-Jur2d: Bastards §§ 146 et seq

ALR

Inheritance by illegitimate from mother's legitimate children. 60 ALR2d 1182.

Inheritance by illegitimate from or through mother's ancestors or collateral kindred. 97 ALR2d 1101.

Inheritance by illegitimate from mother's other illegitimate children. 7 ALR3d 677.

Law Reviews

Browsing among the later probate authorities. Address by Harry L. Deibel of the Cleveland bar. 22 OBar (No. 17) 243.

Constitutional Law — Equal Protection — Descent and Distribution — Illegitimates — Statute That Prohibits Inheritance By Illegitimate From Father Denies Equal Protection — Green v. Woodward, 40 OApp(2d) 101, 69 OO(2d) 130, 318 NE(2d) 397 (1974). Case note, 44 CinLRev 415.

Divergent points of view in the law of persons and domestic relations. (Editorial note.) 8 CinLRev 321.

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1. For a general statement with reference to inheritance by or from illegitimate children, see *Lewis v. Eutsler*, 4 OS 355.

2. An earlier form of this statute permitted illegitimate children to be "capable of inheriting or transmitting inheritance on the part of their mother in like manner as if they had been born of lawful wedlock." This statute permitted an illegitimate child to inherit from or through its mother: *Stevenson v. Sullivant*, 18 US (5 Wheat) 207, 5 LED 70.

3. If such illegitimate child survived his mother, her brother and sisters could not, under such statute, inherit from him: *Little v. Lake*, 8 O 290.

4. Subsequently the foregoing statute was amended by the addition of the words "if the mother being dead the estate of such illegitimate child shall descend to the relatives on the part of the mother as if the intestate had been legitimate." Under this statute it was held that while an inheritance might pass from an illegitimate child to her mother's relatives, such inheritance could not pass from the relatives of the mother to the illegitimate child; and that such child could not take under a will giving property to the issue of her mother nor could she inherit from her mother's brother or niece; but she could take under that part of the estate which descended to her mother as intestate property: *Gibson v. McNeely*, 11 OS 131.

5. An illegitimate child was adopted by one not its natural mother; and died intestate leaving its natural mother, its adopting parents and children of the adopting parents surviving. Under such circumstances the personal estate of such child passes to its natural mother to the exclusion of the adopting parents and their children: *Upson v. Noble*, 35 OS 655.

6. Enactment of RC § 2105.17 providing that illegitimate children can inherit from and through their mother as if born in lawful wedlock expanded and modified the word "child" or "children" appearing in RC § 2105.06, the statute of descent and distribution, to include those children. After the enactment of RC § 2105.17, the operation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States required that the words "child" or "children" include all children, both legitimate and illegitimate, whether inheriting from and through their mother or father: *Green v. Woodard*, 40 OApp(2d) 101, 69 OO(2d) 130, 318 NE(2d) 397 (1974).

7. Revised Code § 2105.17, which permits illegitimates to inherit from their mother only, is unconstitutional, and shall be construed to permit inheritance from both father and mother: *Jack v. Byers*, 73 OO(2d) 500 (CP 1975).

8. This section removes the disabilities of illegitimates in inheriting from their mother and from any others from whom the mother could inherit and should be given a liberal construction: *Porsberg v. Klein*, 39 OLA 470 (App).

9. A devise to the "issue of the body" is *prima facie* a devise to legitimate children or their descendants: *Flora v. Anderson*, 75 Fed 217, 8 OFD 660.

10. An illegitimate child can inherit both from and through his mother, either directly or collaterally: *Kest v. State*, 77 OLA 193, 4 OO(2d) 250, 146 NE(2d) 755 (PC) [affirmed 169 OS 319].

§ 2105.18 [Illegitimate child; acknowledgment by natural father.]

When a man has a child by a woman before or after the birth intermarries with her, the child is legitimate. The issue of parents whose marriage is null in law are nevertheless legitimate.

The natural father of a child may file an application in the probate court of the county in which he resides, in the county in which the child resides, or the county in which the child was born, acknowledging that the child is his, and upon consent of the mother, or if she is deceased or incompetent, or has surrendered custody, upon the consent of the person or agency having custody of the child, or of a court having jurisdiction over the child's custody, the probate court, if satisfied that the applicant is the natural father, and that establishment of the relationship is for the best interest of the child, shall enter the finding of fact upon its journal, and thereafter the child is the child of the applicant, as though born to him in lawful wedlock.

HISTORY: GC § 10503-15; 114 v 320 (342); 125 v 347 (EF 10-14-53); 136 v S 145. EF 1-1-76.

For an analogous section, see former GC § 8591.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of this section applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

General Code § 10503-15 (RC § 2105.18) provided that "when by a woman a man has one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate. The issue of parents whose marriage is null in law, shall nevertheless be legitimate."

Revised Code § 2105.18, which became effective on October 14, 1953, provides the manner in which a natural father of a child by an unmarried woman might legitimate such child when he does not intermarry with her. Revised Code § 3705.15 (GC § 1261-52a, which became effective on September 16, 1943), provides that when an illegitimate child has become a legitimate child, according to RC § 2105.18, by the intermarriage of the mother with the natural father of the child and his acknowledgment of the child as his, it is possible to secure from the department of health a new birth certificate. The legislature did not state specifically if a new birth certificate should be issued by the department of health to an illegitimate child whose birth has been legitimized under the provisions of RC § 2105.18, when the father did not intermarry with the mother of said child.

When, and if issued, under the provisions of RC § 3705.14, such certificate of birth must contain such items and information as may be required by the United States bureau of the census and such additional items and information as the public health council, by regulation, may prescribe.

Cross-References to Related Sections

New birth certificate when illegitimate child becomes legitimate, RC § 3705.15.

Written consent to adoption, RC § 3107.06.

Comparative Legislation

Legitimation of child:

- Cal.—Probate Code, § 255
- Ill.—Rev Stat, ch 3, § 2-2
- Ind.—Burns' Stat, § 29-1-2-7
- Ky.—KRS, § 391.100
- Mich.—MCLA, § 702.83
- Pa.—Purdon's Stat, Tit. 20, § 2107

Text Discussion

- 1 Anderson Fam. L. §§ 3.7-3.10, 7.7
- 2 Anderson Fam. L. § 15.27

Forms

- 1 A&H Probate FORM 2105.18a et seq.

Research Aids

Effect of legitimation:

- O-Jur2d: Bastardy § 49
- Am-Jur2d: Bastards § 57

Legitimation by acknowledgment through probate court:

- O-Jur2d: Bastardy §§ 49, 52
- Am-Jur2d: Bastards § 51

Legitimation by marriage of parents and acknowledgment of paternity:

- O-Jur2d: Bastardy §§ 49-51
- Am-Jur2d: Bastards §§ 49, 50

Legitimation where marriage null in law:

- O-Jur2d: Bastardy § 54

ALR

Legitimizing effect of intermarriage of parents as affected by father's failure to acknowledge paternity. 175 ALR 375.

Conflict of laws as to adoption as affecting descent and distribution of decedent's estate. 87 ALR2d 1240.

Conflict of laws as to legitimacy or legitimation, or as to rights of illegitimates, as affecting descent and distribution of decedent's estate. 87 ALR2d 1274.

Recognition of status created by foreign adoption or legitimation for purposes of testate or intestate distribution of decedent's estate in a jurisdiction in which such status could not have been created even in the case of one domiciled there. 153 ALR 199 (comment note).

Law Reviews

Divergent points of view in the law of persons and domestic relations. (Editorial note.) 8 CinLRev 321.

Domestic relations; legitimation of illegitimates. (Case note.) 6 OSLJ 198.

Legitimizing legitimates; effect of statutes and of presumptions. (Case note.) 7 OSLJ 86.

Legal aspects of artificial insemination. Norman Purnell, 32 OBar (No.8) 166.

The Law of Adoption in Ohio. Beverly E. Sylvester. 2 Capital ULRev 23 (1973).

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1. For a discussion of the effect of legitimation of an illegitimate child in a foreign jurisdiction as affecting its right to inherit realty in Ohio, see *obiter* in *Simpson v. Simpson*, 9 CC(NS) 137, 19 CD 503.

2. Under this section, children born of a bigamous marriage, their mother not knowing that their father was married before such second marriage, are deemed legitimate so that they may inherit from their father: *Wright v. Love*, 12 OS 619.

3. The natural father of a child cannot be held for its support, under the statutes of this state, if the mother, after the child was begotten, and during pregnancy, contracts a marriage with another man, who marries her with full knowledge of her condition. By such marriage, the man so marrying consents to stand in loco parentis to such child, and is presumed in law to be the father of the child, and this presumption is conclusive. This rule has application to proceedings under the bastardy statute, and has no relation to actions where questions of heirship and inheritance are involved: *Miller v. Anderson*, 43 OS 473, 3 NE 605, 54 AmRep 823.

4. M, an unmarried man, had a child by R, a married woman; R afterwards became divorced from her husband, and thereafter M intermarried with her and acknowledged the child as his child. It was held that the child was thereby legitimated, and upon the death of M, the child had all the rights of an heir of his body: *Ives v. McNicoll*, 59 OS 402, 53 NE 60, 69 AmSt 780, 43 LRA 772 [affirming 12 CC 297, 5 CD 555; and *McNicoll v. Ives*, 3 NP 6, 4 OD 75]; see also *Kniffin v. Schaffer*, 12 CC 753, 4 CD 62, 1 Legal News 225.

5. An agreement of marriage in praesenti when made by parties competent to contract, accompanied and followed by cohabitation as husband and wife, they being so treated and reputed in the community and circle in which they move, establishes a valid marriage at common law, and a child of such marriage is legitimate and may inherit from the father: *Umbenhower v. Labus*, 85 OS 238, 97 NE 832 [affirming *Umbenhower v. Umbenhower*, 12 CC(NS) 289, 21 CD 317].

6. Daughter of married man and paramour intermarrying and acknowledging daughter, held legitimate, regardless of date of daughter's birth, notwithstanding nullity of marriage, and daughter was aunt's "niece" and "child" of aunt's brother within aunt's will: *Clinton County Nat. Bank v. Todhunter*, 43 App 289, 183 NE 88, 37 OLR 279.

7. The term "minor" found in former GC § 1655 (see now RC §§ 2151.42, 2151.99) should receive its ordinary legal signification, and so construed embraces only minor children who are legitimate. The juvenile court acting under that section has no authority to proceed and punish the father of an illegitimate child, unless its paternity has been acknowledged after intermarriage in conformity to this section: *Creisar v. State*, 97 OS 16, 119 NE 128.

8. In order to establish legitimation of an illegitimate child, it is necessary to prove that the man who subsequently marries the mother and acknowledges the child as his, is, in fact, the father of such child: *Eichorn v. Zedaker*, 109 OS 609, 144 NE 258.

9. A declaration of a man that he is the father of an illegitimate child, born to the wife of such man before their marriage, is admissible to prove that such man is, in fact, the father of such child. His declarations that he is not the father of such child are not admissible: *Eichorn v. Zedaker*, 109 OS 609, 144 NE 258.

10. While this section requires both proof of parentage and of acknowledgment of the children by the parent after his marriage, yet if the evidence of acknowledgment before marriage is abundant, and the proof of parentage clear, slight evidence of acknowledgment on the part of the parent after marriage will be sufficient to establish the legitimacy of the child: *Stradling v. Printz*, 10 OLA 134, 11 OLA 140.

11. Where the evidence shows the marriage of the mother of a child by the defendant after the birth of the child, and the living with her and the child as husband and father and providing for their maintenance and support for a year, and the trial court found that the child was the child of the parties, there was proof of acknowledgment by the defendant: *Craner v. State*, 21 OLA 260.

12. The word "child," used in this section, is to be construed in its usual and ordinary sense, and applies to legitimate children and to children legally adopted prior to the employee's injury: *Staker v. Industrial Comm.*, 127 OS 13, 186 NE 616.

13. Under this section, "When by a woman a man has one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate. The issue of parents whose marriage is null in law, shall nevertheless be legitimate." This statute removes the stamp of illegitimacy from a child whose father acknowledges it and intermarries with its mother either before or after the birth of the child. Such issue is the legitimate child of the father within the purview of the workmen's compensation act, though the accidental death of the father occurred two weeks prior to the birth of the child: *Garner v. B. F. Goodrich Co.*, 136 OS 397, 16 OO 568, 26 NE(2d) 203.

14. A child born illegitimately is not legitimated solely because a man subsequently intermarries with the mother of the child and acknowledges the child to be his own. The man who does these things must in fact be the father of the child before it is legitimated: *Comer v. Comer*, 175 OS 313, 316, 25 OO(2d) 182, 194 NE(2d) 572.

15. A man who marries a woman while she is pregnant is presumed in law to be the father of the child, and no formal acknowledgment under RC § 2105.18 by the father is required in order for such child to inherit: *Romweber v. Martin*, 30 OS(2d) 25, 59 OO(2d) 58, 282 NE(2d) 36.

16. Where a man marries a pregnant woman who has preferred a bastardy charge against him, and later a child is born in lawful wedlock, and the putative father visits the mother and child soon after birth, and afterwards makes a bequest to said child in his last will and testament, such recognition is a sufficient acknowledgment under favor of former GC § 8591 (see now RC § 2105.18) to render such son legitimate: *LaRoche v. LaRoche*, 10 App 242, 29 OCA 113, 30 CD 519, 63 Bull 285 (Ed) [motion to certify record overruled, 16 OLR 302, 63 Bull 398].

17. In a proceeding for determination of heirship, the presumption that petitioner is the child of the first husband must be overcome by clear and convincing evidence and not by a mere preponderance: *Snyder v. McClelland*, 83 App 377, 38 OO 434, 81 NE(2d) 383.

18. An illegitimate posthumous child does not have a

right of action for the wrongful death of his reputed father: *Bonewit v. Weber*, 95 App 428, 54 OO 20, 120 NE(2d) 738.

19. There is no invidious discrimination constituting an unconstitutional denial of the equal protection of the law in the application of Ohio law denying to one who is illegitimate any right to inherit from the natural father unless the father has provided for such inheritance: *Moore v. Dague*, 46 OApp(2d) 75, 75 OO(2d) 68, 345 NE(2d) 449 (1975).

20. An illegitimate child is not entitled to a portion of the year's allowance set off to the widow, where the paternity of the child has never been legally established and the father had never entered into a marriage relation with the mother, even though the father recognized the child as his son: *In re Humbert*, 12 OO 241 (PC).

21. Where a child was born at such a period of gestation that it is uncertain whether she may be the offspring of her mother's divorced husband or another man, and the mother later marries a man who lived in immoral relation with her and who acknowledges that he is the child's father, the parties clearly come within the provisions of this section, by virtue of which he is her father and she is legitimate: *State v. Hayes*, 30 OLA 568.

22. A child born to parents prior to their marriage becomes a legitimate child of the union upon their marriage: *DeGarmo v. DeGarmo*, 56 OLA 357, 92 NE(2d) 414 (App).

23. An illegitimate who has not been legitimized per statute is not included within the term "employee's children who survive the employee" in an insurance policy: *Aetna Life Insurance Co. v. McMillan*, 89 OLA 208.

24. Where the designation by a soldier of a wife as beneficiary of his war risk insurance was void because both parties were then married to others, the recognition by the soldier of a child as his own is not sufficient to show that his designation of the child's mother as the beneficiary was intended to be in trust for the child, who could have been designated as beneficiary under war risk insurance act, § 402, and this section: *Elliot v. United States*, 271 Fed 1001.

26. The children of a man and woman who had agreed to live together as common-law husband and wife, having been acknowledged by their father to be his children, come within this section and are entitled to social security benefits: *Folsom v. Furber*, 6 OO(2d) 509, 256 F(2d) 120.

28. Children of a bigamous marriage are legitimate: *Abelt v. Zeman*, 16 OO(2d) 87, 173 NE(2d) 907 (CP).

31. The word "marriage" in the phrase "whose marriage is null in law," in this section, must be interpreted to mean a de facto marriage, a marital status, an informal marriage, or a purported marriage: *Santill v. Rossetti*, 18 OO(2d) 109, 178 NE(2d) 633 (CP).

34. Under this section providing that the issue of parents whose marriage is null in law shall nevertheless be legitimate, where a relationship exists which, but for some defect, would be a valid marriage, and a child is born as issue of the marriage, such child born of such de facto marriage is "legitimate" for the purpose of qualification for social security benefits, even though both parties knew of the woman's prior existing marriage: *Wolf v. Gardner*, 43 OO(2d) 179, 386 F(2d) 295.

35. An illegitimate child whose paternity has been established during the lifetime of the natural father is entitled to a year's allowance for support from the father's estate: *In re Estate of Holley*, 73 OO(2d) 265, 44 OMisc 78, 337 NE(2d) 675 (CP 1975).

† § 2105.19 Murderer not to benefit.

(A) No person who is convicted of or pleads guilty to a violation of or complicity in the violation of section 2903.01, 2903.02, or 2903.03 of the Revised Code shall in any way benefit by the death. All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the guilty person had predeceased the decedent.

(B) A person prohibited by division (A) of this section from benefiting by the death of another is a constructive trustee for the benefit of those entitled to any property or benefit that the person has obtained, or over which he has exerted control, because of the decedent's death. A person who purchases any such property or benefit from the constructive trustee, for value, in good faith, and without notice of the constructive trustee's disability under division (A) of this section, acquires good title, but the constructive trustee is accountable to the beneficiaries for the proceeds or value of the property or benefit.

HISTORY: 136 v H 490 (Eff 11-20-75); 136 v S 145. Eff 1-1-76.

Analogous to former RC § 2105.19 [GC § 10503-17; 114 v 320 (342)], repealed 136 v H 490, eff 11-20-75.

† This section was enacted identically in S 145 and H 490.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2105.19 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Inheritance from estate by person causing death:

Cal.—Probate Code, § 258

Ill.—Rev Stat, ch 3, § 2-6

Ind.—Burns' Stat, § 29-1-2-12

Ky.—KRS, § 381.280

Pa.—Purdon's Stat, Tit. 20, § 2106

Fla.—FSA, § 732.802

Research Aids

O-Jur2d: Descent and Distribution §§ 201-204

Am-Jur2d: Descent and Distribution §§ 94-102

ALR

Disqualification of heir who murdered intestate as affecting rights of others in respect of the intestate estate. 156 ALR 623, 161 ALR 448.

Felonious killing of ancestor as affecting intestate succession. 39 ALR2d 477.

Law Reviews

See explanatory article in 4 OBar 227.

Right of a murderer to acquire the property of his victim. (Case note.) 7 OBar (No. 47) 661; 1 OSLJ 131.

The constructive trust: a neglected remedy in Ohio. Article by Prof. Harry W. Vanneman, OSU, 10 CinLRev 366; 3 OSLJ 1.

Beneficiaries' rights in life insurance policies. Address by Virgil D. Parish. 25 OBar (No. 29) 513.

Personal property—exempt from administration—murderer's disability to take. (Case note.) 15 OSLJ 235.

Personal property—joint and survivorship bank accounts—right of survivorship. (Case note.) 18 OSLJ 117.

Trusts—tenancy by entirety—constructive trust—acquisition of property by murderer. (Case note.) 27 CinLRev 135.

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1. By reason of the provisions of this section, a husband, who has been finally adjudged guilty of murdering his wife, cannot take or receive anything which is provided for him as surviving spouse of such wife by the provisions of GC § 10509-54 (RC § 2115.13): *Bauman v. Hogue*, 160 OS 296, 52 OO 183, 116 NE(2d) 439.

1.1 Where one co-owner of joint bank account murdered the other and then committed suicide while in jail awaiting trial, the provisions of this section have no application since there was no criminal prosecution: *Shuman v. Schick*, 95 App 413, 53 OO 441, 120 NE(2d) 330.

1.2 Where plaintiff's evidence to support a petition by plaintiff as guardian of a minor ward to sell real property of such ward shows that the parents of the ward each owned an undivided one-half interest in real property, that the wife was convicted of murdering her husband but that no attempt was made under this section, to deprive her of a share in the estate of her husband who died intestate, and that, thereafter, the wife executed a quitclaim deed in which the grantee, her minor son, was designated as "Estate of . . . Ward"; such deed effectively divests the wife of all her right, title and interest in the real property and plaintiff has made a prima facie case. And it is not error for the court to overrule defendants' motion for a directed verdict at the close of plaintiff's evidence: *Alston v. Alston*, 4 OApp(2d) 270, 33 OO(2d) 311, 212 NE(2d) 65.

2. This section is inapplicable when the murderer commits suicide prior to conviction of the crime: *Harrison v. Hillegas*, 13 OO 523 (PC).

2.1 A person who as beneficiary is denied the right to recover the proceeds of an insurance policy by reason of having feloniously killed the insured, is not precluded, as widow and heir of the estate of the insured, from participating as such in the insurance proceeds after such proceeds become a part of the general assets of the estate, where she is not the sole distributee: *Winters Nat. Bank &c. Co. v. Shields*, 14 OO 438 (PC).

5. Where a conviction has not been shown, the widow is entitled to her statutory allowances and her intestate share in the net estate of her deceased husband, notwithstanding the fact that she has feloniously taken his life: *Winters Nat. Bank &c. Co. v. Shields*, 14 OO 438 (PC).

6. A son who murders his father is precluded by virtue of this section from inheriting from his father, but is entitled to the benefits of the exemption statute, GC § 10509-54 (RC § 2115.13): *Egelhoff v. Presler*, 32 OO 252 (PC).

7. A husband who has been adjudged guilty of first degree manslaughter in the death of his wife is entitled to the statutory share of a surviving spouse in his wife's estate: *Wadsworth v. Siek*, 50 OO(2d) 507, 254 NE(2d) 738 (PC).

7.1 Where a beneficiary under an insurance policy pleads guilty to manslaughter in the killing of the insured, the insurer must prove the killing was wilful and intentional in order to defeat the right of such beneficiary to the proceeds: *Travelers Ins. Co. v. Gray*, 66 OO(2d) 64, 37 OMisc 27, 306 NE(2d) 189 (1973).

8. This section, which disinherits persons finally adjudged guilty of murder in the first or second degree as to the property of the person killed, has no effect upon one never brought to trial or convicted: *Demos v. Freemas*, 26 OLA 601.

9. This section, providing that no person finally adjudged guilty of murder should be entitled to inherit any of the estate of the person killed, is not applicable in suit by administrator of the murdered person to recover from her surviving husband who killed her, the proceeds of a life insurance policy in which the husband was named beneficiary, such money never being a part of the estate of decedent: *Hennigh v. Neff*, 27 OLA 364.

10. The execution by a depositor of an authorization converting an individual account with a building and loan company into a joint and survivorship account, in accordance with GC § 9648 (RC § 1151.19), and with the acquiescence of the company, vests in the donee a present interest which is not affected by the fact that he is later convicted of procuring the murder of the donor: *Hodapp v. Oleff*, 40 OLR 209 (App).

11. This section is not intended to abrogate or delimit common law rule, but to establish by fact of conviction for murder legal status of a person so convicted with respect to receiving any benefit from death of person unlawfully killed: *Cook v. Western & Southern Life Ins. Co.*, 30 NP(NS) 247.

12. Exempt property set off to surviving spouse does not pass by intestate succession consequently, this section would not bar a convicted murderer from having such exempted property set off to him from the estate of his murdered wife: *Tyack v. Tipton*, 65 OLA 397, 115 NE(2d) 29 [contra, *Bauman v. Hogue*, supra].

§ 2105.20 Waste by tenant for life. (GC § 10503-23)

A tenant for life in real property who commits or suffers waste thereto shall forfeit that part of the property, to which such waste is committed or suffered, to the person having the immediate estate in reversion or remainder and such tenant will be liable in damages to such person for the waste committed or suffered thereto.

HISTORY: GC § 10503-23; 114 v 320 (344). Eff 10-1-53. For an analogous section, see former GC § 8593.

Research Aids

Action for waste:

O-Jur2d: Estates § 105; Waste §§ 17 et seq

Am-Jur2d: Waste §§ 11-14, 36 et seq; Estates § 101

Acts which constitute waste:

O-Jur2d: Waste §§ 9-12

Am-Jur2d: Waste §§ 15-28

Remedies for waste:

O-Jur2d: Waste §§ 13-15

Am-Jur2d: Waste §§ 29-35

Waste by life tenant:

O-Jur2d: Estates §§ 89, 101; Waste § 5

Am-Jur2d: Waste § 10; Estates § 101

Waste generally:

O-Jur2d: Waste § 1 et seq

Am-Jur2d: Waste § 1 et seq

ALR

Implication of right of life tenant to entrench upon or dispose of corpus from language relating to the extent of his dominion over the corpus, of the beneficial purpose of the provision for the life tenant. 31 ALR3d 169.

Implication of right of life tenant to entrench upon or dispose of corpus from language contemplating possible diminution or elimination of gift over. 31 ALR3d 6.

Language of will or other trust instruments as implying right to invade principal on behalf of life beneficiary. 31 ALR3d 309.

Right as between life tenant and remainderman in respect of property, estate, or securities of a wasting, consumable, or perishable nature. 109 ALR 234; 113 ALR 1193.

Right to net income received from mortgaged property held by trust estate after default, pending final disposition. 116 ALR 1354.

Right of contingent remainderman to maintain action for damages for waste. 56 ALR3d 677.

Law Reviews

Remedies for waste in Ohio. Editorial note. 17 OSLJ 326.

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1. The English rule with reference to granting dower in waste land and with reference to waste consisting of cutting timber is not followed in Ohio: *Crockett v. Crockett*, 2 OS 181.

3. In an action to enjoin waste, and for an account for waste committed, and also to recover possession, on the ground that the life estate of the tenant has been forfeited by the waste, in which action a final decree is taken to enjoin the waste and for such account, but no judgment is taken for the recovery of the land, the parties have the right of appeal, and not of a second trial: *Jenks v. Langdon*, 21 OS 362.

4. A life tenant of conventional life estate who assigns all his interest in and surrenders possession to his assignee is not liable for subsequent waste: *Howell v. Howell*, 122 OS 543, 172 NE 528.

5. Action to forfeit life estate on ground of waste is legal in character, and not appealable: *Oglesbee v. Miller*, 125 OS 223, 181 NE 26.

6. One acquiring a life estate in land before commencement of mining operations cannot operate for oil, or make oil lease thereon, without committing enjoined waste: *Fourth S. Central Trust Co. v. Woolley*, 31 App 259, 165 NE 742.

7. Common law waste as to life estates is not recognized in Ohio and is not substantive ground for equitable relief: *Gard v. Beard*, 36 App 105, 172 NE 673.

10. An action, predicated upon this section, may be maintained only by the person or persons having the immediate estate in reversion or remainder in the real property: *Cook v. Hardin County Bank*, 76 App 203, 31 OO 498, 63 NE(2d) 686.

11. The right of action for waste accrues under this section at the time the waste is committed or suffered with respect to the right to damages for that particular item of waste: *Reams v. Henney*, 88 App 409, 44 OO 196, 58 OLA 507, 97 NE(2d) 37.

12. An earlier form of this statute applied to wastes committed by a widow; and subsequently by amendment such statute was made to apply to all cases of tenancy for life: *Brenneman v. Brenneman*, 1 NP 332, 3 OD 392.

13. This section does not apply to cases where a life tenant is interposed between the estate of the tenant who commits waste and the estate in reversion or remainder: *Hatch v. Hatch*, 1 OD(NP) 271, 31 Bull 57.

14. When the grantor executed a deed conveying real property to a third person in fee simple subject to a life estate of both himself and his estranged wife, he created a reversion in himself; and if the life estate of the wife is terminated, the grantor-husband is the person having the immediate estate in reversion and he falls within the provision of this section, and the trial court did not commit error in overruling wife's demurrer to grantor's amended petition seeking a forfeiture of her life estate for waste: *Folden v. Folden*, 90 OLA 218, 188 NE(2d) 193 (App).

15. Since an action seeking a forfeiture of a life estate for waste under authority of this section is a special statutory proceeding and forfeitures, generally, are not favored by the law, the evidence must be strictly construed: *Folden v. Folden*, 90 OLA 218, 188 NE(2d) 193 (App).

§ 2105.21 Presumption of order of death.

When there is no evidence of the order in which the death of two or more persons occurred, no one of such persons shall be presumed to have died first and the estate of each shall pass and descend as though he had survived the others. When the surviving spouse or other heir at law, legatee or devisee dies within thirty days after the death of the decedent, the estate of such first decedent shall pass and descend as though he had survived such surviving spouse, or other heir at law, legatee or devisee. A beneficiary of a testamentary trust shall not be deemed to be a legatee or devisee within the meaning of this section. This section shall prevail over the right of election of a surviving spouse.

This section shall not apply in the case of wills wherein provision has been made for distribution of property different from the provisions of this section. In such case such provision of the will shall not prevail over the right of election of a surviving spouse.

HISTORY: GC § 10503-18; 114 v 320 (343); 125 v 903 (963); 125 v 411. EF 10-16-53.

Cross-References to Related Sections

See RC § 2107.41 which refers to this section.

Forms

1 A&H Probate FORM 2105.21a et seq.

Research Aids

Lapsed legacies:

O-Jur2d: Descent and Distribution § 66

Proof as to survivorship:

O-Jur2d: Death §§ 21, 22

Am-Jur2d: Death §§ 294-298

Simultaneous death:

O-Jur2d: Descent and Distribution §§ 56-59, Wills § 852

Am-Jur2d: Descent and Distribution § 103

ALR

Construction, application, and effect of uniform simultaneous death act. 20 ALR2d 235.

Time interval contemplated by provision of will or of statute of descent and distribution with reference to death of two persons simultaneously or approximately at same time. 173 ALR 1254.

Law Reviews

Notes on survivorship deeds—so-called. Article by Charles C. White of the Cleveland bar. 24 OO 119.

Survivorship deeds. Address by Clem H. Barsch of the Toledo bar. 22 OBar (No. 13) 184.

Probate code amendments. Francis J. Eberly. 14 OSJLJ 368.

The Ohio anti-lapse statute. Robert C. Bensing. 28 CinLRev 1.

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1. This section does not establish a presumption of the order of death, but merely defines the right of inheritance to property of those who die within the time and under the circumstances therein described: *Ostrander v. Preece*, 129 OS 625, 3 OO 24, 196 NE 670 [appeal dismissed, 296 US 543, 56 S Ct 151].

2. When a wife expires within three days after the death of her husband, or within thirty days from his demise if their extinction is attributable to a common accident, he is deemed to have died last and his estate passes and descends accordingly, under this section. In such circumstance there is no widow within the meaning and intent of the statute, and no year's allowance under GC § 10509-74 (RC § 2117.20), and no property not treated as assets under GC § 10509-54 (RC § 2115.13) may be claimed by her personal representative: *In re Metzger*, 140 OS 50, 23 OO 257, 42 NE(2d) 443, discussed in 26 OO 559 [contra, *In re Priest*, 79 OLA 444, 156 NE(2d) 206].

3. Revised Code § 2105.21, as enacted by the General Assembly in Amended Senate Bill No. 40 (30-day clause; 125 v. 411), is controlling and repeals RC § 2105.21 as enacted in House Bill No. 1 and Senate Bill No. 361 (3-day clause; 125 v. 903). *Henry v. Central Nat. Bank*, 16 OS(2d) 16, 45 OO(2d) 262, 242 NE(2d) 342.

4. Other evidence in case does not justify the inference that wife died first, in question of descent of property, merely because her body was colder: *Evans v. Halterman*, 31 App 175, 165 NE 869.

5. Where husband and wife are the owners of a joint and survivorship bank account and both die as the result of injuries suffered in a common accident within a period of thirty days after the date of such accident, the interest of the first decedent in the fund passes to the second decedent by virtue of the contract between them, and the provisions of this section have no application to the disposition of such fund: *In re Kessler*, 85 App 240, 40 OO 167, 85 NE(2d) 609.

5.1 A clause in a will that "in the event that my beloved wife . . . should predecease me, or we should both die as a result of a common accident, then all of my property . . . I give, devise and bequeath to my brother" does not provide for distribution different from this section which defines the right of inheritance to property where the surviving spouse dies within thirty days after the death of the decedent; and, where the surviving spouse dies two days after the death of the testator, and such deaths did not result from a common accident, this section is applicable to such estate: *Weir v. Weir*, 102 App 231, 2 OO(2d) 245, 139 NE(2d) 361.

5.2 Where one spouse dies testate, giving certain property, by her last will and testament, to the other spouse, and such surviving spouse then dies within the time limit set out in this section, the heirs at law of such deceased surviving spouse cannot inherit the property left by the spouse who dies first unless the will indicates a desire that the presumption of order of death statute (RC § 2105.21) shall not be effective with respect to such property: *Barrick v. Fligle*, 103 App 507, 4 OO(2d) 15, 146 NE(2d) 330.

5.3 The word "wills" as used in the last paragraph of this section, refers to the will of the testator only and not to both such will and the will of the surviving spouse: *Alten v. Barnecut*, 109 App 497, 12 OO(2d) 68, 168 NE(2d) 9.

5.4 Where a husband named as a devisee in the will of his spouse dies prior to the time of the death of said spouse, or the time of his death comes within the "presumption of order of death" as stated in RC § 2105.21, the devisee, not being a relative of the testatrix within the meaning of RC § 2107.52, and the will not containing a residuary clause, nor any other provision showing any other intention of the testatrix, the devise to the deceased spouse lapses and the testatrix dies intestate as to such property designated in such devise: *Muckerheide v. Zink*, 1 OApp(2d) 76, 30 OO(2d) 103, 202 NE(2d) 725.

6. This section, the presumption-of-order-of-death statute, applies only to property which passes to the surviving spouse or other heir at law under the statutes of descent and distribution or under a will, but does not apply to property in which the interest vests by contract: *Barnecut v. Barnecut*, 3 OApp(2d) 132, 32 OO(2d) 220, 209 NE(2d) 609.

7. Where a will contains a general residuary provision for disposition of all of the testator's property and a bequest of part of the residue lapses because of the death of the legatee one day after the death of the testator that part of the residue passes to the surviving residuary legatee instead of passing as intestate property: *Schuck v. Schuck*, 7 OO(2d) 198,

156 NE(2d) 351 (PC).

8. Where a wife dies within two days after the death of her husband, his estate passes under his will as though he had survived his wife; and since this section applies only to his estate, her estate passes under her will as the survivor of her husband: *Harrison v. Hillegas*, 13 OO 523 (PC).

9. Where a surviving spouse dies within three days after the death of a husband, an adopted child of both decedents, aged ten years, is entitled to a year's support under GC § 10509-74 (RC § 2117.20), and to an allowance of property not deemed assets under GC § 10509-54 (RC § 2115.13), from the estate of both decedents: *Harrison v. Hillegas*, 13 OO 523 (PC).

10. Under GC § 10503-18 (RC § 2105.21) if a husband dies as a result of an accident and his wife dies twenty-one days later as a result of the same accident, the general assets of the estate of the husband pass to his heirs, and no part of his estate passes to the estate of his wife: *In re Gilger*, 49 OO 50 (PC).

11. Under such circumstances, the general assets of the estate of the wife pass to her heirs, since this section deals only with the estate of the first decedent and does not set up a presumption as to the order of death: *In re Gilger*, 49 OO 50 (PC).

12. When a bequest once vests, the death of the legatee after that of the testator, but prior to payment or distribution of the bequest, does not cause a lapse, and in the absence of the other provisions in the will, the bequest must be distributed to the executor or administrator of the deceased legatee: *McSteen v. Barclays Bank*, 40 OO(2d) 489, 12 OMisc 29, 227 NE(2d) 280.

13. Where it is impossible to medically determine the order of death of the insured and the beneficiary, there is a presumption that their deaths were simultaneous and that neither survived the other. In such case the proceeds will be paid to the estate of the insured: *Dolence v. Central Nat. Bank*, 44 OO(2d) 361, 15 OMisc 300, 238 NE(2d) 849.

14. When a relative devisee or legatee dies within thirty days after death of decedent, leaving a widow and one child, the child takes the share of decedent's estate that her father would have received by virtue of RC §§ 2105.21 and 2107.52; *Ruble v. Waites*, 72 OO(2) 389 (PC 1975).

15. Funds in joint bank account with right of survivorship will be divided equally among estates of husband and wife killed in common accident: *In re Markiewiz*, 71 OLA 143, 129 NE(2d) 328.

16. The property exempt from administration provided by RC § 2115.13, and the years support provided by RC § 2117.20, are not intestate successions but are debts and preferred claims arising as incidents to the marriage and therefore not affected by the simultaneous death statute: *In re Priest*, 79 OLA 444 (PC).

17. The use of the words "absolutely and in fee simple" in the will of a deceased spouse do not in themselves adequately manifest a clear indication and are not sufficiently definite language of intention or desire to provide for a distribution of property different from the distribution provided for in this section, providing that where a surviving spouse dies within thirty days after the death of his or her spouse, the estate of the first decedent shall pass as though he had survived the surviving spouse, unless such deceased spouse by will makes provision for the distribution of his property different from the provision of such section: *Alten v. Barnecut*, 78 OLA 589, 153 NE(2d) 792 (CP).

18. Effect of half and half statute: *Battista v. Feihl*, 91 OLA 391, 191 NE(2d) 597.

19. By the terms of this statute, a distinction is made between deaths occurring within three days, which may have resulted from any cause, and those occurring within thirty days, where the deaths resulted from a common accident: *In re Thatcher*, 30 NP(NS) 515.

CHAPTER 2107: WILLS

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Forms

- 1 A&H Probate FORM 2107a et seq: Wills.

§ 2107.01 Definition. (GC § 10504-1)

In Chapters 2101. to 2131., inclusive, of the Revised Code, "will" includes codicils and lost, spoliated, or destroyed wills.

HISTORY: GC § 10504-1; 114 v 320 (346). **Eff 10-1-53.**
Analogous to former GC § 10502.

Cross-References to Related Sections

- See RC §§ 2107.33, 2107.57, 2107.61 which refer to § 2107.01 et seq.
See RC §§ 2131.02, 2131.10 which refer to this chapter.

Comparative Legislation

- Will, defined:
Cal.—Probate Code, § 53
Ill.—Rev Stat, ch 3, § 1-2.13
Ind.—Burns' Stat, § 29-1-5-2
Ky.—KRS, § 394.010
Mich.—MCLA, § 702.5
N.Y.—EPTL, § 1-2.18
Pa.—Purdon's Stat, Tit. 20, § 2501
Fla.—FSA, § 731.201

Research Aids

- Will defined:
O-Jur2d: Wills § 2
Am-Jur2d: Wills § 2

Law Reviews

- Presumptive revocation of lost will; effect on codicil. (Case note.) 16 CinLRev 346.
Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

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1. A written promise to pay a certain sum of money after death of the promisor, placed in the hands of the second person, with injunctions to deliver it, after his decease, is not good as a testamentary disposition: *Hamor v. Moore*, 8 OS 239. See also *In re Estate of Schierberg*, 4 OLR 53.

2. A executed, in compliance with the statutes as to execution of wills, an instrument (which, by its terms, she declared to be her will) in which she appointed an executor, "after my death to settle up all property, both personal and real," the second item being, "I hereby make my two granddaughters B and C, each equal heirs with my own children." It was held that the instrument is dispositive and devised to the two granddaughters named, each an equal share with the children of testatrix, in her estate: *Moon v. Stewart*, 87 OS 349, 101 NE 344, 45 LRA(NS) 48, AnnCas 1914A, 104 [affirming *Moon v. Harness*, 15 CC(NS) 139, 23 CD 337].

3. For the meaning of "devise," see *Wheatcraft v. Hall*, 106 OS 21, 138 NE 368.

4. A will and codicil must be construed together: *Negley v. Gard*, 20 O 310; *Collier v. Collier's Exrs.*, 3 OS 369; *Phipps v. Hope*, 16 OS 586; *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473]; *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion for order to certify record overruled, 61 Bull 152].

5. A will is an instrument in writing signed by the party making the same, or by some other person in his or her presence, and by his or her express direction, attested and subscribed to by two or more credible witnesses, and by which the party executing the same makes a disposition of his or her property, to take effect after his or her death: *Bailey v. Bailey*, 8 O 239; *Holmden v. Craig*, 16 CC(NS) 157, 31 CD 461 [affirmed, without opinion, 83 OS 483].

6. A codicil is a postscript to a will: *Clark v. Carpenter*, 14 App 278, 32 OCA 87.

7. A provision in a declaration of trust that the fund shall pass to the beneficiary if the donor dies before the beneficiary, leaving issue, is not testamentary; and the instrument need not be executed as a will: *Lamkin v. Robinson*, 16 App 440, 32 OCA 401, 35 CD 767 [affirming *Robinson v. Lamkin*, 23 NP(NS) 425, and motion to certify record overruled, *Lamkin v. Robinson*, 20 OLR 367; for an earlier opinion, see 15 CC(NS) 126, 24 CD 91, which was on appeal from 10 NP(NS) 1, 21 OD 13, and affirmed, without opinion, 88 OS 603, and *Stevens v. Robinson*, 88 OS 603].

8. In action to set aside will and codicil, court's failure to use word "codicil" in connection with word "will" in general charge held not prejudicial error, where only general exception was taken: *Adams v. Foley*, 36 App 295, 173 NE 197.

9. It is said that a written instrument in the form of a will which makes no disposition of property is not a will: *Holmden v. Craig*, 16 CC(NS) 157, 31 CD 461 [affirmed, without opinion, 83 OS 483]; *In re Williamson*, 5 NP 1, 6 OD 505.

10. An instrument, in order to be a will, must show a disposition of property: *In re Williamson*, 6 NP 79, 8 OD 47 [reversing 5 NP 1, 6 OD 505].

11. A will is a solemn disposition of one's property, to take effect after death, in which testator contemplates not only the purposes to which such property shall be devoted, but also the person or persons by whom those purposes shall be executed and carried into effect. The term "last will" has been peculiarly used to indicate this

solemn disposition: *Hall v. Hall*, 15 OD(NP) 161 [reversed by circuit court, without opinion].

12. A codicil which is not executed in accordance with the requirements concerning a will is itself invalid: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

13. At the time of testator's death one or more wills may be in existence; but only one of them can be his last will: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

14. A deposit in a savings account payable to a third person is not testamentary: *Burke v. Waldbillig*, 24 NP(NS) 277.

[EXECUTION]

§ 2107.02 Who may make will.

A person of the age of eighteen years, or over, [of] sound mind and memory, and not under restraint [,] may make a will.

HISTORY: GC § 10504-2; 114 v 320 (346); 131 v 617. Eff 8-10-65.

See former GC § 10503.

Cross-References to Related Sections

After-acquired realty, RC § 2107.50.

Construction of wills, RC § 2107.46.

Comparative Legislation

Execution of will by married woman:

Cal.—Probate Code, § 20

Ill.—Rev Stat, ch 3, § 4-1

Ind.—Burns' Stat, § 29-1-5-1

Ky.—KRS, § 394.020

Mich.—MCLA, § 702.1

N.Y.—EPTL, § 3-1.1

Pa. Purdon's Stat, Tit. 20, § 2501

Fla.—FSA, § 732.501

Requisites to make will:

Cal.—Probate Code, § 50

Ill.—Rev Stat, ch 3, § 4-1

Ind.—Burns' Stat, § 29-1-5-2

Ky.—KRS, § 394.040

Mich.—MCLA, § 702.5

N.Y.—EPTL, § 3-2.1

Pa.—Purdon's Stat, Tit. 20, § 2502

Fla.—FSA, § 732.501

Text Discussion

1 *Anderson Fam. L.* § 6.4.

OJI

Wills, § 363.01 et seq.

Research Aids

Testamentary capacity:

O-Jur2d: Wills §§ 49, 52, 79-101

Am-Jur2d: Wills § 54 et seq

O.S.B. Service Letter

Minors eighteen to twenty-one years of age—quasi adults. R. Douglas Wrightscl. Ohio Legal Center Institute Edition, May, 1968.

ALR

Validity of will drawn by layman who, in so doing, violated criminal statute forbidding such activities by one other than licensed attorneys. 18 ALR2d 918.

Law Reviews

Living testamentary dispositions and the Hawkins case. Article by Prof. F. S. Rowley (U. of C.) 3 CinLRev 361.

The Niemes case revalued: testamentary capacity standards in Ohio. Editorial note. 32 CinLRev 70.

Wills; testamentary capacity, undue influence. (Case note.) 9 OBar (No. 39) 493, 3 OSLJ 108.

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WILLS

Scope and effect

1. The right to make a will is purely statutory: *Lozier v. Lozier*, 99 OS 254, 124 NE 167 [affirming 28 OCA 177, 30 CD 300].

2. See also *Mader v. Apple*, 6 NP(NS) 592, 18 OD 801 [reversed by the circuit court without opinion, which judgment was affirmed, 80 OS 691; for later decision, without opinion, see 87 OS 464]; and *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

3. Whether the right to dispose of property by will is regarded as a natural right, inhering in the ownership of property, or as resting wholly on these ancient statutes, it is entirely clear that the right thus created is of high order, not to be denied or materially qualified except upon the clearest declaration of law to that effect: *Theobald v. Fugman*, 64 OS 473, 60 NE 606 [reversing *Fugmann v. Theobald*, 12 CD 720, which was on appeal from 3 NP 65; sub nomine, *Fugmann v. Theobald*, 4 OD(NP) 65].

4. Directions by an owner, in respect to the disposition of his property after his death, are of no validity unless made through the medium of a last will and testament: *Phipps v. Hope*, 16 OS 586.

5. This section is limited by GC § 8622 (see now RC § 2131.08), which limits the granting of estates to a life in being and one unborn generation: *Phillips v. Herron*, 55 OS 478, 45 NE 720.

6. As to early provisions in regard to the making of wills in Ohio, see *Jones v. Robinson*, 17 OS 171, and *Theobald v. Fugman*, 64 OS 473, 60 NE 606.

7. The right of disposing of property by will is given by statute: *German Mut. Ins. Co. v. Lushey*, 66 OS 233, 64 NE 120; *Sears v. Sears*, 77 OS 104, 82 NE 1067, 17 LRA(NS) 353.

9. This section, permitting a testator to bequeath his property to any person he desires, is not repealed by GC § 10564 (see now RC § 2107.34), but is limited thereby: *German Mut. Ins. Co. v. Lushey*, 20 CC 198, 11 CD 52 [affirmed, *German Mut. Ins. Co. v. Lushey*, 66 OS 233].

10. An oral contract by which a legatee agrees with the testator to hold a legacy in trust for a third person is not affected by the statute of wills: *Winder v. Scholey*, 83 OS 204, 93 NE 1098, 33 LRA(NS) 995 [affirming circuit court, which affirmed *Scholey v. Winder*, 10 NP(NS) 642, 21 OD 59].

Discretionary power of testator

15. The estate of a tenant in common cannot be affected or his right to compel partition defeated, deferred or limited by the provisions of the will of his cotenant whereby he attempts to entail his estate including the lands owned as a cotenant: *Lauer v. Green*, 99 OS 20, 121 NE 821.

16. A jury cannot set aside a will on the ground that they do not regard it as a fair and reasonable will: *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

17. A testator has the right to dispose of his property by will as he pleases, without reference to moral obligations, or to the needs or merits of the different natural objects of testator's bounty: *Sadler v. Sadler*, 23 CC(NS) 353, 27 CD 445 [motion to certify record overruled by the supreme court, 13 OLR 420, 60 Bull 432].

Nature of

23. Under the provisions of this section, an instrument which fulfills all other statutory requirements relative to the execution of wills may be probated as a valid will even though it does not dispose of property: *In re Crowe*, 17 OO 8 (PC).

27. The expressed wish of a testatrix that all of her property "shall go as the law directs with the following modifications," is a testamentary disposition of her property, and her heirs take nothing by descent: *Huber v. Carew*, 7 CC(NS) 609, 16 CD 389 [affirming 2 NP(NS) 81, 14 OD 656, and affirmed, without opinion, 74 OS 469].

30. A gift without consideration, to take effect at death, passes no title unless there is a delivery: *Flanders v. Blandy*, 45 OS 108, 12 NE 321.

31. A will is ambulatory in its nature, and takes effect only from the death of the testator: *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

32. For appointment by will of a beneficiary of a life insurance certificate, see *Dhonau v. Striebing*, 24 CC(NS) 598, 35 CD 31.

33. A deposit by A in a bank which is made payable either to A or B or to the survivor of them and which is deposited under an agreement that the bank will pay B whatever may remain at A's death, does not pass title to B. It is not a perfected gift; and while it is testamentary in its nature, it does not comply with the wills act. Accordingly, at the death of A, the title to such fund passes to A's administrator and not to B: *In re Morgan*, 28 OCA 222, 30 CD 101. certify record overruled, *Lamkin v. Robinson*, 20 OLR 367; for an earlier opinion, see 15 CC(NS) 126, 24 CD 91, which was on appeal from 10 NP(NS) 1, 21 OD 13, and affirmed, without opinion, 88 OS 603, and *Stevens v. Robinson*, 88 OS 603].

Who may make will

42. Under the act of February 10, 1810 (8 v 146), a married woman could make a will devising real estate held in her own right: *Allen v. Little*, 5 O 66.

43. A married woman may make a will: *Levi v. Earl*, 30 OS 147.

—Mental capacity

48. Mental capacity to make a will requires ability to understand the nature of the act testator is performing, the general extent of property of which he is disposing, the relation which he holds to those who have claims upon him, and to appreciate his relation to the members of his family: *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61]; *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61; *Rewell v. Warden*, 4 CC(NS) 545, 14 CD 344; *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449 [petition in error dismissed by consent, *Ross v. Caldwell*, 50 Bull 108]; *Welsh Hills Baptist Church v. Wilson*, 9 CC(NS) 611, 19 CD 391 [affirmed, without opinion, 75 OS 636]; *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110; *Wilson v. Wilson*, 14 CC(NS) 241, 22 CD 498, 56 Bull 377 (Ed) [reversing 7 NP(NS) 435, 19 OD 188]; *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534; *Stark v. Cress*, 4 App 92, 22 CC(NS) 88, 28 CD 442 [reversing *Cress v. Stark*, 14 NP(NS) 545]; *Kammann v. Kammann*, 6 App 455, 26 CC(NS) 60, 29 CD 349 [dismissed, 96 OS 600; motion to certify record overruled, 15 OLR 238, 62 Bull 309]; *Barlion v. Connor*, 9 App 72, 31 OCA 463; *Quay v. Quay*, 4 NP(NS) 529, 16 OD 435.

49. For definition of testamentary capacity, see *Ross v. Stewart*, 15 App 339, 32 OCA 217.

50. For elements of testamentary capacity, see *Brown v. Lane*, 15 App 321, 32 OCA 305 [motion

to certify record overruled, *Brown v. Lane*, 19 OLR 392].

50.1 The appointment of a guardian on the ground of physical incompetency does not imply a lack of testamentary capacity: *Roderick v. Fisher*, 97 App 95, 54 OO 264, 122 NE(2d) 475.

51. It does not require the highest degree of mental capacity to make a will: *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61; *Wilson v. Wilson*, 14 CC(NS) 241, 22 CD 498, 56 Bull 377 (Ed) [reversing 7 NP(NS) 435, 19 OD 188].

52. A testator need not be possessed of his maximum strength of mind: *Stark v. Cress*, 4 App 92, 22 CC(NS) 88 [reversing *Cress v. Stark*, 14 NP(NS) 545]; *Barlion v. Connor*, 9 App 72, 31 OCA 463; *West v. Knoppenberger*, 4 CC(NS) 305, 16 CD 168; *Rewell v. Warden*, 4 CC(NS) 545, 14 CD 344; *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449 [petition in error dismissed by consent, *Ross v. Caldwell*, 50 Bull 108]; *Gregg v. Moore*, 14 CC(NS) 570, 22 CD 534.

53. Requirement that testator shall be of sound mind and memory at time of executing will does not mean that one weakened by sickness is incapable of making a will, but only that he have sufficient memory and mental capacity to understand fully what he is doing: *Fulkerson v. Fulkerson*, 35 OLR 478 (App).

54. A person may possess testamentary capacity even though enfeebled in body and mind by age and disease; though his memory may be impaired in a degree, and his mind disturbed by hallucinations or delusions (not necessarily influencing the mind in making testamentary disposition of property); though his mind may suffer discomposure and derangement in consequence of melancholy, grief, misfortune, sickness or disease (not of a nature to deprive him of the rational faculties common to men); and although he lacks contractual capacity or capacity to transact the ordinary business of life: *West v. Knoppenberger*, 4 CC(NS) 305, 16 CD 168; *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449 [petition in error dismissed by consent, *Ross v. Caldwell*, 50 Bull 108].

55. One has sufficient mental capacity to make a valid will when he is able to enumerate his property, and remembers who are the natural objects of his bounty, and successfully conducts considerable business interests, although he may be eighty-four years old and somewhat forgetful as to minor matters: *Rewell v. Warden*, 4 CC(NS) 545, 14 CD 344.

56. If testator was able to understand the nature of business, nature and extent of his property, the names of claimants on his bounty, his relationships and his ability to choose as to disposition of his property, it is sufficient: *Phillips v. Board of Education*, 21 App 194, 153 NE 115.

57. Where testator, for twenty years after making his will, associated socially with men in general, bought lands and built and repaired houses, rented houses and collected the rents, bought bonds and sold them, and conducted a merchant tailoring business, made no bad bargains nor showed mental incapacity to cope with the men with whom he dealt, it was held that the evidence showed testamentary capacity, although testator was eccentric and excitable, occasionally became intoxicated, and during the latter years of his life allowed his business to become more or less run down: *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

58. A testator's eccentricities, peculiarities or delusions must not affect either the natural or selected objects of his bounty or interfere with his testamentary capacity to make a will: *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110.

59. A delusion on the part of a testator does not constitute mental incapacity, unless it is an insane

delusion: *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449 [petition in error dismissed by consent, *Ross v. Caldwell*, 50 Bull 108].

60. Lack of testamentary capacity is not shown by evidence of a religious conviction on the part of the testator upon the subject of foreign missions, where his delusion with reference thereto, if any existed, did not control the making of his will, but on the contrary, he disposed of his property without reference to foreign missions except and in the event of his son and only heir dying without issue: *Board of Foreign Missions v. Bevan*, 2 App 182, 17 CC(NS) 275 [sub nomine, *Presbyterian Church v. Bevan*, 24 CD 318; affirmed, without opinion, *Board of Foreign Missions v. Bevan*, 91 OS 395].

61. The requirement that a testator shall be of sound mind and memory at the time of the execution of the will, does not mean that one who has been weakened by sickness is incapable of making a will, but only that he shall then have sufficient memory and the mental capacity to understand fully what he is doing: *Stark v. Cress*, 4 App 92, 22 CC(NS) 88, 28 CD 442 [reversing *Cress v. Stark*, 14 NP(NS) 545].

62. A testator who is so lacking in mental capacity, and who is so controlled by delusion, that he cannot make a rational choice in determining the proper objects of his bounty, does not possess testamentary capacity: *Kammann v. Kammann*, 6 App 455, 26 CC(NS) 60, 29 CD 349 [dismissed, *Kammann v. Kammann*, 96 OS 600; motion to certify record overruled, 15 OLR 238, 62 Bull 309].

63. One is not incapacitated to make and execute a will merely because of advanced years or illiteracy: *Barlion v. Connor*, 9 App 72, 31 OCA 463.

64. Want of mental capacity on the part of a testator is not shown by a recital of circumstances and incidents which go no further than to indicate some physical weakness, or failure of memory, or mistake of an unimportant character, in connection with his business affairs; nor can an attack on a will be successfully maintained where the witnesses for the contestants seem to have reached the belief that the testator was incompetent to make a will because he did not make the kind of a will which they would have made or which they thought he ought to have made: *Wilson v. Wilson*, 14 CC(NS) 241, 22 CD 498, 56 Bull 377 (Ed) [reversing 7 NP(NS) 435, 19 OD 188].

65. The fact that testator was intoxicated when he returned home at night does not show that he was intoxicated when he executed his will some hours before: *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

66. The fact that the testator was afflicted with progressive locomotor ataxia and was for a number of years before his death physically unable to perform any task or to help himself in any way, is not sufficient ground for setting the will aside, where it appears that during all that time he directed in detail the operations on farms aggregating over three hundred acres, and with reference to the management of his said lands did all that could have been done by a person of a sound and active mind; and the only testimony tending to show mental incapacity was slight forgetfulness on certain occasions and failure to include in his will certain legacies which he had declared he intended to make: *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

67. An hypothetical question should not be permitted which calls for the opinion of a medical expert as to the capacity of testator to plan and express in technical language a long and complicated will. It is not necessary that testator should be able to express in apt language his wishes with reference to the creation, maintenance and operation of certain trusts. It

is sufficient if he has sufficient mind and memory to dispose of his property by will: *Walsh v. Walsh*, 18 CC(NS) 91, 32 CD 617.

68. Guardianship on the ground of intemperance does not raise the same presumption of testamentary capacity as would be the case if the guardianship rested upon the ground of insanity or imbecility: *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

69. If the evidence in a proceeding to contest a will shows that the testator was of sound mind and memory, of sufficient legal capacity and very methodical, and that the will was properly signed by testator and by the subscribing witnesses, it will be presumed in the absence of evidence to the contrary that testator knew the contents of such will before execution: *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion to certify record overruled, *Morris v. Osborne*, 61 Bull 152].

70. Declarations of a testator made either before, after, or at the time of the execution of the will are competent as evidence where the mental capacity of the testator is in issue: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

71. There is a legal presumption in favor of a will, and in favor of the mental soundness and capacity of the testator: *Beresford v. Stanley*, 6 NP 38, 9 OD 134.

72. The expressions of a man standing upon the verge of eternity, with the grave yawning before him, with every indication of dissolution, cannot be said to be those of a man of sound mind and memory, and a will made under such conditions will not be admitted to probate: *In re Burrows*, 8 NP 358, 11 OD 229.

73. It is assumed that an adjudication of insanity deprives such person of capacity to make a will: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

Undue influence

78. To invalidate a will for fraud or undue influence, it must appear that the fraud or influence complained of had some effect upon the testator in producing the very act of making his will: *Monroe v. Barclay*, 17 OS 302; *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

79. The fact that testator makes an unequal and unfair distribution of his property does not raise the presumption of undue influence: *Bahl v. Byal*, 90 OS 129, 106 NE 766.

79.1 The essential elements of undue influence are a susceptible testator, another's opportunity to exert it, the fact of improper influence exerted or attempted, and the result showing the effect of such influence: *West v. Henry*, 173 OS 498, 20 OO(2d) 119, 184 NE(2d) 200.

80. The presence of a beneficiary at the place at which a will was executed, and the fact that he gave advice to the testator with reference to such will, is not sufficient to justify a verdict setting aside the will on the ground of undue influence: *Wilson v. Wilson*, 14 CC(NS) 241, 22 CD 498, 56 Bull 377 (Ed) [reversing 7 NP(NS) 435, 19 OD 188].

81. Where a woman of fine character and delicate sensibilities executes a will, after long deliberation and the full knowledge of her children, in which contrary to her own strong desire to give the property received by her from her deceased husband to her children, she disposes of the property in accordance with a written request received from her husband, the influence so operated upon her will not be treated as undue or improper: *Wilder v. Taylor*, 14 CC(NS) 255, 23 CD 643 [affirming 10 NP(NS) 209, 24 OD 621, and reversed, without opinion, 87 OS 520].

82. The making of a change in a will, which there is reason to believe was done for reasons satisfactory to the testator, is not, where standing alone, a sufficient reason for setting the instrument aside on the ground of undue influence: *Gregg v. Moore*, 14 CC (NS) 570, 23 CD 534.

83. The relation of a ward, under guardianship for intemperance, to a person with whom she boards under an arrangement made by the guardian for her, though such person has received certain instructions from the guardian as to the care of the ward, is not the same as the relation of the ward to the guardian, and does not, of itself, raise a presumption of undue influence in an action to set aside a will under which such person is a beneficiary: *Fagan v. Welsh*, 19 CC (NS) 177, 32 CD 409.

84. The fact that a wife guides or even dominates her husband in the ordinary affairs of life, or has acquired an ascendancy over him, does not render his will made in her favor invalid: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

85. The fact that the will in question differs in some respects from prior wills is not sufficient to show an undue influence: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

86. The fact that a will is written on pieces of paper of different sizes and kinds is not sufficient to show undue influence or forgery: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

86.1 "Undue influence," which will invalidate a deed, must be such as to control mental operations of grantor, overcome his power of resistance, and oblige him to adopt the will of another, thus producing disposition of property which he would not have made freely: *Finney v. Morehouse*, 27 App 499, 161 NE 293.

86.2 Exercise of undue influence in execution of will need not be shown by direct proof, but it may be inferred from circumstances: *Raymond v. Hearon*, 30 App 184, 164 NE 644.

86.3 A daughter may legally seek her mother's preference to the exclusion of her sisters, so long as she does not go to the extent of making her mother do something she does not want to do. Such conduct, of course, is reprehensible, but it is not illegal. It does not amount to undue influence: *Meyer v. Geiger*, 34 OLA 1, 34 NE(2d) 581.

87. Undue influence over a testator on the part of his second wife is not shown by the fact that the children of the second wife fared better than the contestant, a child of the first wife, where the second wife was not herself given an undue proportion of the estate: *O'Rourke v. Kenny*, 11 NP(NS) 602, 22 OD 56.

87.1 The sole beneficiary under a purported will who procured the scrivener to draw the instrument and her own friends to witness it and who was the testator's landlady and a non-relative will be presumed to have unduly influenced the maker, if the maker is an old man who signed the instrument six days before he died in the home of the sole beneficiary away from his next of kin, while in a feeble condition: *In re Maurer*, 31 NP(NS) 247.

Knowledge of contents

93. If testator gives instructions for drawing his will and his will is drawn in accordance with such instructions, and the evidence shows that after it was written the testator looked at it "just a second or two" before he signed it, it is said that the evidence shows that testator had no knowledge of what the will contained and that a verdict sustaining such will is to be set aside: *Koch v. Meyers*, 7 App 306, 29 OCA 142, 30 CD 439.

Joint wills

98. A joint will is unknown to the testamentary law of this state, and is inconsistent with the policy of its legislation on this subject. Such a will cannot be admitted to probate as the separate will of either of the makers, although some of its provisions may be several in form and effect: *Walker v. Walker*, 14 OS 157.

99. Tenants in common of real estate, who are also owners, severally, of personal property, may dispose of same by will by uniting in a single instrument, where the bequests are severable and the instrument is not in the nature of a compact, but is, in effect, the will of each, revocable by him, and subject to probate as such several will: *Betts v. Harper*, 39 OS 639.

100. Tenants in common may dispose of the property which they own in common by a single will which is not in the nature of a contract, and in the same will they may dispose of other personal property as long as no provision is made for a legacy which can be paid only from the personal property of both testators: *Ballard v. Ballard*, 5 App 469, 26 CC(NS) 490, 27 CD 562, 62 Bull 9 (Ed).

101. Joint wills, if they are not changed or revoked during the life of either testator, will be sustained, although executed and attested jointly in one paper: *Coghlin v. Coghlin*, 4 CC(NS) 161, 16 CD 18.

102. A joint will is not created by the execution of separate and distinct wills at different times, and the making of separate and distinct codicils to such wills at the same time, by husband and wife, wherein disposition is made of the separate property and estate of each (it not appearing that the wills were in the nature of a compact), although the will of each refers to the will and to the property and estate of the other, and the disposition in both is practically identical: *Coghlin v. Coghlin*, 4 CC(NS) 161, 16 CD 18.

103. Joint or mutual wills made and executed concurrently, in compliance with a contract between parties competent and free to act, supported by a sufficient consideration, and with mutuality pervading and running through every part of both wills, are upheld: *Minor v. Minor*, 2 NP(NS) 439, 15 OD 264.

104. Where the will of a survivor to a compact to make mutual wills cannot be found after her death, its provisions will be carried out, if there is no question as to its exact contents, or as to the execution of mutual wills, or the adequacy of the consideration to the survivor: *Minor v. Minor*, 2 NP(NS) 439, 15 OD 264.

105. Twin wills made by two persons (husband and wife here) are not irrevocable unless each is the consideration for the other, and this contract appears by the most clear and satisfactory evidence. A reciprocity must pervade both wills. If a power is reserved to one party to alter or revoke, the other cannot be held: *Albery v. Sessions*, 2 NP 237, 3 OD 330.

106. A will by husband and wife where he owns all the property, and she signs merely in acceptance of its provisions, is not a joint will but a valid will of the husband: *Kunnen v. Zurline*, 13 DecRep 998, 2 CSCR 440.

Conditional wills

111. A will may be subject to a condition subsequent, such as the acceptance of a devise and of certain obligations therefor: *Scott v. Kramer*, 31 OS 295.

112. A testamentary clause in a will disposing of the testatrix's property after death, in case she does not recover, is a contingent will, and valid if recovery does not occur: *Underwood v. Rutan*, 101 OS 306, 128 NE 78.

113. Ambiguous language in a will should be con-

strued as to referring to the reason for making a will, rather than as a condition precedent to its taking effect: *McMerriman v. Schiel*, 108 OS 334, 140 NE 600.

Who can take by will

For restriction on bequest to charities, see case notes under RC § 2107.06.

For the rule against perpetuities, see case notes under RC § 2131.08.

118. The board of county commissioners of any county in Ohio may take and hold any property devised or bequeathed to it, or to its members, for any lawful purpose recognized by statute, in which the taxpayers of the whole county are interested: *Carder v. Commissioners*, 16 OS 353; *Christy v. Commissioners*, 41 OS 711.

119. Where the devise is to the county by name, without limiting the uses of the property, it vests in the board of commissioners, for the use of the county, and may be appropriated by them to any and all authorized county purposes. Such devise may have a condition annexed, requiring an annuity to be paid to the widow of the testator: *Carder v. Commissioners*, 16 OS 353.

120. A township can take by devise: *Board of Education v. Ladd*, 26 OS 210.

121. A board of education is authorized to accept a bequest to be used in the erection and maintenance of a building to be used jointly for a public library and Young Men's Christian Association: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

122. A de facto board of education may accept a bequest made to it by will for school purposes under authority of GC § 4755 (see now RC § 3313.36): *Rockwell v. Blaney*, 9 NP(NS) 495, 22 OD 107.

124. An unincorporated society is capable of receiving a bequest of personalty not amounting to a trust: *American Tract Soc. v. Atwater*, 30 OS 77.

126. Whether a gift during the world war to the chancellor of the German empire in trust for needy German soldiers is valid or not, it does not render the rest of the will invalid: *In re Schrader*, 20 NP (NS) 433, 63 Bull 95.

Interest in property

For after-acquired realty, see case notes under RC § 2107.50.

138. A will, made in May, 1811, operated as a devise of a lot, which the deviser was in possession of, at the time of making the will, on a verbal contract of purchase, and for which he subsequently took a deed in his lifetime: *Smith v. Jones*, 4 O 115.

139. A husband cannot deprive his widow of her distributive share in his estate by leaving all his property to others: *Doyle v. Doyle*, 50 OS 330, 34 NE 166.

140. Equitable estates vest and descend as legal estates: *Bolton v. Ohio Nat. Bank*, 50 OS 290, 33 NE 1115.

141. The estate of a tenant in common cannot be affected or his right to compel partition defeated, deferred or limited by the provisions of the will of his cotenant, whereby he attempts to entail his estate including the lands owned as a cotenant: *Lauer v. Green*, 99 OS 20, 121 NE 821.

142. No disposition of property can be made by will except the party has an interest therein. Where a husband provided, in his will, that his wife might dispose of the residue of his estate as she saw fit, and she made a will disposing of same, but the wife died before the husband, the husband died intestate as to

such residue: *Thomas v. Hobson*, 10 CC(NS) 351, 20 CD 214.

143. A bequest by a wife of all her property, both real and personal, to her husband, includes a policy of insurance on the life of her husband (who was still living), made payable to her, her executors, administrators and assigns: *Schlachter v. Teeppen*, 24 CC(NS) 30, 29 CD 650 [affirming *Teeppen v. Schlachter*, 18 NP(NS) 33].

144. The testator may die testate as to part of his property and intestate as to the rest: *Hess v. American Bible Soc.*, 26 CC(NS) 439, 28 CD 172 [following *Goff v. Moore*, 20 CC(NS) 224].

145. One to whom an executory interest is bequeathed, with a provision that if he dies before testator's widow it shall pass to his issue if he has any, and, if not, to the survivors, cannot bequeath such interest by will if he dies before the death of the testator's widow and before the time of distribution fixed by the will: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

Evidence—who may testify

166. Testator's attorney is competent to testify, if a subscribing witness: *Knepper v. Knepper*, 103 OS 529, 134 NE 476; *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

167. If the grounds have been laid properly for a hypothetical question, a physician who has qualified properly as an expert may give his opinion in answer to such question: *Bahl v. Byal*, 90 OS 129, 106 NE 766.

168. A nonexpert witness, even though not a subscribing witness, may give an opinion as to testator's sanity if he has first testified to the facts on which he bases his opinion: *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61].

169. The opinions of nonexpert witnesses as to the sanity of a testator are incompetent, where such witnesses do not qualify by giving the facts coming under their observation upon which their opinions are based: *Board of Foreign Missions v. Bevan*, 2 App 182, 17 CC(NS) 275, sub nomine, *Presbyterian Church v. Bevan*, 24 CD 318 [affirmed, without opinion, *Board of Foreign Missions v. Bevan*, 91 OS 395]; *Ross v. Stewart*, 15 App 339, 32 OCA 217; *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

170. In a proceeding to contest a will, a rule that communications by a client to an attorney are privileged, is not altered by the fact that the law partner of such attorney was a subscribing witness to the will: *Haley v. Dempsey*, 14 App 326 [motion to certify record overruled, *Dempsey v. Haley*, 19 OLR 155; judgment on retrial sustaining will affirmed by court of appeals; motion to certify record overruled, 21 OLR 300].

171. Nonexpert witnesses, other than subscribing witnesses to wills, are allowed to state their opinions as to the soundness of mind of a specific person only in connection with the facts upon which such opinion is based: *Board of Foreign Missions v. Bevan*, 17 CC (NS) 275 [sub nomine, *Presbyterian Church v. Bevan*, 24 CD 318; affirmed, without opinion, *Board of Foreign Missions v. Bevan*, 91 OS 395].

—Admissibility

176. A witness cannot state his opinion as to testator's capacity to make a will: *Runyan v. Price*, 15 OS 1; *Bahl v. Byal*, 90 OS 129, 106 NE 766; *Burns v. Crowe*, 31 OCA 566, 35 CD 468 [motion to certify record overruled, 17 OLR 112, 65 Bull 278]; see discussion in *Niemes v. Niemes*, 97 OS 145, 119 NE 503

[reversing 26 CC(NS) 513, 28 CD 61].

177. Evidence of a contradictory declaration made by a subscribing witness to a will cannot be offered at contest if such witness died before the trial of such case: *Runyan v. Price*, 15 OS 1; *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

178. The opinion of a witness as to testator's capacity to make a will is not admissible: *Runyan v. Price*, 15 OS 1.

179. When the opinion of a witness as to testator's sanity is admissible, it is his opinion when examined and not the opinion that he entertained at the execution of the will that must be offered: *Runyan v. Price*, 15 OS 1.

180. In a proceeding to contest a will, the question, "I will ask you to state now upon that occasion whether, in your judgment, he (the testator) had sufficient mind and memory to form an intention and purpose to dispose of his property by will," calls for the present recollection or opinion of the witness as to the mental condition of the testator at the time that he signed the instrument. Accordingly, it is not error to permit such question to be asked. If the answer to such question is "at the time I signed the will I thought he was, as far as I was capable of judging," such answer is not responsive to the question; but if no objection is made to it, and no motion is made to strike it out, it is not error for the court to permit it to go to the jury: *Dunlap v. Dunlap*, 89 OS 28, 104 NE 1006.

181. It is competent for the physician of a testator to express an opinion as to the actual condition of his patient's mind, founded on his study and observation of the testator while in professional attendance on him at the time and prior to the date of the will, and whether he was capable of comprehending large and complicated business propositions or the distribution of a large estate: *Bahl v. Byal*, 90 OS 129, 106 NE 766.

182. The testimony of an attorney is not competent to vary the terms of a written instrument prepared by him as such, and in a proceeding to construe a will the attorney who wrote the will, and with whom the testator consulted concerning it, is not competent to testify concerning a communication made to him by his client touching his estate, the objects of his bounty or the meaning and effect of provisions contained in the will: *Knepper v. Knepper*, 103 OS 529, 134 NE 476.

183. Evidence of inferior capacity, not amounting to incapacity, is admissible on the issue of undue influence: *Board of Education v. Phillips*, 103 OS 622, 134 NE 646.

184. Evidence that testator was of advanced age and weak mentality, and that the beneficiary lived with testator on intimate terms and was also on intimate terms with the attorney who drew the will, is sufficient evidence of undue influence to require submission of the issue to the jury: *Board of Education v. Phillips*, 103 OS 622, 134 NE 646.

185. While it is not necessary that hypothetical questions submitted to expert witnesses should be based on conceded facts or be stated in the language of the witness, replies to such questions are incompetent where the questions are not based on facts which the testimony tends to prove: *Board of Foreign Missions v. Bevan*, 2 App 182, 17 CC(NS) 275 [sub nomine, *Presbyterian Church v. Bevan*, 24 CD 318; affirmed, without opinion, *Board of Foreign Missions v. Bevan*, 91 OS 395].

186. Declarations of a subscribing witness, made after leaving the room in which the will was executed, cannot be admitted on the theory that they are part

of the *res gestae*: *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

187. In determining whether a testator was suffering from an insane delusion at the time he made his will, the testimony of experts does not outweigh absolutely that of laymen who had known the testator for years, and had business transactions with him, and frequently met and conversed with him: *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449 [petition in error dismissed by consent, *Ross v. Caldwell*, 50 Bull 108].

188. An expert may not be called upon to say whether one was competent to make a particular will, but only whether, in his opinion, his mental capacity was such as the law requires for the making of a valid will: *Walsh v. Walsh*, 18 CC(NS) 91, 32 CD 617.

189. Hypothetical questions as to testator's mental condition cannot be asked a witness who is not an expert, even upon cross-examination: *Hathaway v. Farley*, 22 CC(NS) 462, 33 CD 668 [affirmed, without opinion, 76 OS 562].

190. While it is incorrect to hold that a photograph of testator is always inadmissible in evidence if the question of his capacity is raised, it is not reversible error for the trial court to exclude a photograph which was taken when testator was eighty-two years of age, if he did not execute his will until he was ninety-one years of age: *Rogers v. Monroe*, 26 CC(NS) 193, 29 CD 558.

191. Declarations of a testator made either before, after, or at the time of the execution of the will are competent as evidence as tending to prove mental capacity of testator, but are not competent to prove undue influence nor, in most cases, to prove forgery: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

192. Declarations of a legatee are admissible to show a general intent or disposition to exercise undue influence over the testator: *Otte v. Bullock*, 22 NP (NS) 305, 31 OD 177.

193. When contestants of a will have produced evidence from which legitimate inferences could be drawn that a daughter had acquired a dominating influence over the testator five years preceding the will, declarations of the testator just preceding this period are not too remote to be admissible as material evidence of the last free exercise of his faculties and as showing his testamentary intentions: *Otte v. Bullock*, 22 NP(NS) 305, 31 OD 177.

194. An answer that witness "never did think" that testator was of sound mind, shows the opinion of the witness at the time of giving his answer and not at the time at which he had observed testator: *Otte v. Bullock*, 22 NP(NS) 305, 31 OD 177.

195. The opinion of a nonexpert witness that a testator was mentally unsound is admissible only after he has testified to some fact or circumstance indicating mental weakness or unsoundness in some degree, and must be confined to the opinion of the witness as to the mental condition of the testator at the time of observation: *Kohl v. Kohl*, 22 NP(NS) 171, 31 OD 27.

—Presumptions

200. It will be presumed that a will was drawn in accordance with the wishes of testator: *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion to certify record overruled, 61 Bull 152]; *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

201. The so-called presumption of undue influence

arising from confidential relations between testator and beneficiary is a mere inference of fact and not a presumption of law regarding which the court should charge the jury: *Haley v. Dempsey*, 14 App 326 [motion to certify record overruled, *Dempsey v. Haley*, 19 OLR 155; judgment on retrial sustained will affirmed by court of appeals; motion to certify record overruled, *Haley v. Dempsey*, 21 OLR 300].

Jury charges

207. In an action contesting a will, it is error to charge that the law scrutinizes with greater care the acts of a son or daughter who is remembered in a will to a larger extent than any others bearing the same kinship, if such son or daughter is in close relationship of trust or confidence, or upon whom a testatrix would implicitly rely, than it would on others bearing no such relationship: *Hall v. Hall*, 78 OS 415, 85 NE 1125.

208. For a charge of a trial court where the attending physician of testator was a witness to a codicil, and such witness signed an affidavit to the effect that the testator was of sound mind, while at the trial he gives as his opinion that testator was not of sound mind, see *Bahl v. Byal*, 90 OS 129, 106 NE 766.

209. For a charge as to capacity, see *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC (NS) 513, 28 CD 61].

210. An instruction that there is no valid will unless the jury believe from the evidence that testator, of his own free will, not only intended to make such disposition of his property as made in the alleged will, but was also capable of knowing what he was doing, understanding to whom he was giving his property and in what proportions, and whom he was depriving of it as his heir who would otherwise have inherited it, and was also capable of understanding the reasons for giving or withholding his bounty to them, is improper. The charge should have been to the effect that the will was valid unless the jury find from the evidence that testator did not make such disposition purposely and of his own free will: *West v. Knoppenberger*, 4 CC(NS) 305, 16 CD 168.

211. It is not error to charge that, in order to make a valid will, "it is necessary a person shall have sufficient mental capacity for the transaction of the ordinary affairs of life," when this was followed in a later paragraph by the express statement that "he need not have sufficient capacity to make a contract, but must understand substantially what he is doing and the nature of the act in which he or she is engaged": *Welsh Baptist Church v. Wilson*, 9 CC(NS) 611, 19 CD 391 [affirmed, without opinion, 75 OS 636].

212. A charge that "capacity enough to attend to ordinary business, and to know and understand the business he was engaged in," lacks essential requisites of testamentary capacity to make a will, and is misleading and prejudicial: *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110.

213. The charge that "it is not essential to the validity of a will that all or any of the subscribing witnesses should testify that the testatrix was of sound mind and memory, provided you find from all the evidence before you that she was of sound mind and memory," is proper: *Stark v. Cress*, 4 App 92, 22 CC(NS) 88, 28 CD 442 [reversing *Cress v. Stark*, 14 NP(NS) 545].

214. It is error to refuse to charge in a will case, that a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind, and competent to make a will, and while the law will permit him to subsequently testify to the contrary, because the truth, if such it be, should be learned, yet the jury in weighing his testimony may consider the fact of such im-

plied contradiction: *Stark v. Cress*, 4 App 92, 22 CC (NS) 88, 28 CD 442 [reversing *Cress v. Stark*, 14 NP (NS) 545].

215. It is erroneous to charge a jury that undue influence "is coercion produced by importunity, or by a silent, resistless power, which the strong will often exercises over the weak and infirm, so that the motive was tantamount to force or fear": *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

216. It is not error to charge that the law gives to testatrix "The right to dispose of her property by last will and testament lawfully executed in any way she saw fit. . . . You are not at liberty to make a will for her. That was her right. You are simply to decide whether the one she had made was sanctioned by and fulfilled the requirements of the law": *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

REVOCABLE LIVING TRUSTS

Effect of agreement

222. Catherine Hawkins during her lifetime entered into an agreement with a trust company whereby she delivered certain personal property to it in trust and reserved to herself the power to alter, amend, or revoke the trust. The agreement further provided that the trust company should invest, manage, and control the property but that all such investments should be made only with the written consent and approval of the creator of the trust. The net income was to be paid to the creator during her lifetime and at her death, by virtue of a supplemental agreement, the trust company was to distribute the trust fund to certain named beneficiaries. The instrument was not executed in accordance with the requirements of the statute of wills. Catherine Hawkins died intestate and left no creditors. The court held that:

"1. Where the owner of property executes to another an instrument under or in connection with which he does not divest himself of the title to any of his estate but provides for the disposition of such property at or after his death and it becomes operative to transfer the property only at the time and by reason of his death, such instrument is testamentary in character.

"2. At common law a trust instrument intended to operate as a conveyance of property at and after the death of the settlor must be consummated by such a distinct and absolute delivery of property by the settlor to the trustee for the benefit of the named beneficiaries as to be a relinquishment of dominion over it by the settlor.

"3. The amendment of § 8617, General Code (RC § 1335.01), effective August 14, 1921, authorizes a trust agreement, including the power to alter, amend or revoke the trust, and by virtue of that amendment a trust agreement making a transfer or conveyance of property including such power and to take effect at the death of the creator of the trust, will effect such transfer and conveyance, although the instrument be not executed in conformity with the law of wills": *Union Trust Co. v. Hawkins*, 121 OS 159, 167 NE 389 [reversing court of appeals of Cuyahoga county which had held that the supplementary agreement was ineffectual to pass the trust fund upon the death of Catherine Hawkins, to the beneficiaries therein named].

§ 2107.03 Method of making will. (GC § 10504-3)

Except oral wills, every last will and testament shall be in writing, but may be handwritten or typewritten. Such will shall be signed at the

end by the party making it, or by some other person in such party's presence and at his express direction, and be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge his signature.

HISTORY: GC § 10504-3; 114 v 320 (346). **Eff** 10-1-53. See former GC § 10505.

Comment

General Code § 10504-3 superseded former GC § 10505. The words "his signature" were substituted for the word "it" at the end of the section, and the necessity for an acknowledgment that the writing is a will was done away with. Under the former statute it was not necessary that the testator should acknowledge that the writing was his will when the testator affixed his signature in the presence of the witnesses, but when he affixed his signature in the absence of the witnesses, then it was necessary that he should declare in their presence that the instrument was his will. See *Underwood v. Rutan*, 101 OS 306, 128 NE 78 [distinguishing *Keyl v. Feuchter*, 56 OS 424, 47 NE 140].

Cross-References to Related Sections

Construction of will, RC § 2107.46.

Comparative Legislation

Manner of execution:

- Cal.—Probate Code, § 53
- Ill.—Rev Stat, ch 3, § 4-3
- Ind.—Burns' Stat, § 29-1-5-3
- Ky.—KRS, § 394.040
- Mich.—MCLA, § 702.05
- N.Y.—EPTL, § 3-2.1
- Pa.—Purdon's Stat, Tit. 20, § 2502
- Fla.—FSA, § 732.502

Forms

1 A&H Probate FORM 2107a et seq; Wills.

Research Aids

Formal requisites of will:

- Attestation and subscription:
O-Jur2d: Wills §§ 124-141
- Am-Jur 2d: Wills §§ 258-282, 313-326

Competency of witnesses:

- O-Jur2d: Wills §§ 142-150
- Am-Jur2d: Wills §§ 283-312

Necessity of writing:

- O-Jur2d: Wills §§ 104-106
- Am-Jur2d: Wills §§ 185

Publication of will:

- O-Jur2d: Wills §§ 151, 152
- Am-Jur2d: Wills §§ 254-257

Signed at the end:

- O-Jur2d: Wills §§ 118-122
- Am-Jur2d: Wills §§ 236-253

Signed by or for testator:

- O-Jur2d: Wills §§ 113-117
- Am-Jur2d: Wills §§ 210-231

Holographic wills:

- O-Jur2d: Wills §§ 45, 46
- Am-Jur2d: Wills §§ 702-723

Necessity of strict compliance with statute:

- O-Jur2d: Wills § 103
- Am-Jur2d: Wills §§ 183, 184

Oral wills:

- O-Jur2d: Wills §§ 27-33
- Am-Jur2d: Wills §§ 724-732

ALR

"Attestation" or "witnessing" of will, as including witnesses' subscription. 45 ALR2d 1365.

Competency, as witness attesting will, of attorney named therein as executor's attorney. 30 ALR3d 1361.

Effect of failure of attesting witness to observe testator's capacity. 69 ALR2d 662.

Failure of attesting witness to state place of residence as affecting will. 55 ALR2d 1053.

Interlineations and changes appearing on face of will. 34 ALR2d 619.

Letter as a will or codicil. 40 ALR2d 698.

Named executor as subscribing witness. 74 ALR2d 283.

Publication of will. 60 ALR2d 124.

Requirement that holographic will be entirely in handwriting of testator as affected by appearance of printed matter or handwriting of another. 89 ALR2d 1198.

Sufficiency, as to form, of signature to holographic will. 75 ALR2d 895.

Use of figures wholly or in part to express date of holographic will as affecting its sufficiency. 22 ALR3d 866.

Validity of a will signed by testator with the assistance of another. 98 ALR2d 824.

Validity of will signed by testator's mark, stamp, or symbol or partial or abbreviated signature. 98 ALR2d 841.

Validity of will written on disconnected sheets. 38 ALR2d 477.

What constitutes the presence of the testator in the witnessing of his will. 75 ALR2d 318.

Validity of will drawn by layman who, in so doing, violated criminal statute forbidding such activities by one other than licensed attorney. 18 ALR2d 918.

Sufficiency of testator's acknowledgment of signature from his conduct and the surrounding circumstances. 7 ALR3d 317.

Wills: place of signature of attesting witness. 17 ALR3d 705.

Law Reviews

Wills; sufficiency of signature by mark. (Case note.) 20 CinLRev 310.

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifield of the Steubenville bar. 8 CinLRev 174.

Signing a will at the end. Article by Dean W. T. Dunmore, W. R. U. Law School, 34 OLR 272.

Execution, acknowledgment and publication of wills. (Editorial note.) 3 CinLRev 191.

Order of signing in execution of wills. Editorial. 11 CinLRev 390.

Wills; publication and republication in Ohio; probable effect of GC § 10504-3 on this problem. (Case note.) 3 OSLJ 247.

Validity of will when testator signs after witnesses have signed. (Case note.) 9 OO 464.

Collateral attack on the admission to probate of a will; execution; signing in the attestation clause as signing at the end. (Case note.) 7 OSLJ 105.

Extension of the implied acknowledgment doctrine as prima facie evidence for probate of a will. Case note. 23 OSLJ 383.

CASE NOTES AND OAG

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Scope and effect

1. General Code § 10504-3 (RC § 2107.03) requires that, in order to be valid and effective, a will must comply with certain definite formalities. The reason for such formalities is to prevent the diversion of a decedent's estate from those who would take it under the statutes of descent and distribution except in instances where the decedent has clearly and deliberately expressed an intention to so divert it. *Sherman v. Johnson*, 159 OS 209, 50 OO 257, 112 NE(2d) 326.

1.1 In Ohio the making, probating and contesting of wills is controlled by the statutes: *Kelley v. Hazard*, 96 OS 19, 117 NE 182; *In re Murray*, 20 NP (NS) 305, 63 Bull 81.

2. The statutory requirements providing for the execution of wills must be complied with regardless of the apparent intention of the testator: *In re Borgman*, 61 OLA 429, 105 NE(2d) 69 (App).

2.1 Where testatrix made her mark in the presence of two persons whom she had asked to sign as witnesses, there was no statutory duty upon testatrix to acknowledge her mark or signature: *Kemp v. Matthews*, 89 OLA 524, 183 NE(2d) 259 (App.).

3. The object of requiring the execution of wills to conform to a statutory formula, in order to render them valid, is to prevent fraud upon heirs at law in the distribution of the estate of their ancestors, and courts in the construction of these provisions should have this object in mind, and should not place such a liberal construction, in order to sustain the execution, that the object of the statute would be destroyed: *Slemmons v. Toland*, 25 CC(NS) 485, 28 CD 455.

4. A will is valid only if executed in accordance with the provisions of this section: *Tims v. Tims*, 14 CC(NS) 273, 22 CD 506.

5. A statute which changes the requirements of a valid will does not apply to wills already executed: *Giddings v. Schmuck*, 20 CC(NS) 142, 31 CD 238 [affirmed, without opinion, 90 OS 465].

6. This section does not apply to a contract by a devisee to hold in trust for certain beneficiaries: *Winder v. Scholey*, 83 OS 204, 93 NE 1098, 33 LRA (NS) 995 [affirming circuit court, which affirmed *Scholey v. Winder*, 10 NP(NS) 642, 21 OD 59].

7. A power to dispose of lands by will must be executed with the same formalities as are necessary in a deed directly conveying the land: *Boltz v. Riley*, 18 CC(NS) 71, 24 CD 178 [reversed, without opinion, *Riley v. Boltz*, 90 OS 447].

8. If a will of personalty is made in a foreign jurisdiction, and thereafter the testator becomes domiciled in Ohio, the will cannot be probated here unless it is executed in accordance with the laws of this state: *In re Strasburger*, 23 OLR 216.

9. Where, in an action to contest a will, it is evident from the testimony that the will was not read either to or by the testator, that it was not acknowledged by him, and that he had no knowledge of what it contained, it can not be said that such will was executed by the testator in such a manner as to comply with the requirements of GC § 10505; and the verdict of a jury sustaining such a will is not sustained by the evidence and will be set aside: *Koch v. Meyers*, 7 App 306, 29 OCA 142.

In writing

14. A will may be partly written and partly printed: *Sears v. Sears*, 77 OS 104, 82 NE 1067, 17 LRA(NS) 353; *Roush v. Wensel*, 15 CC 133, 8 CD 141.

15. It is not necessary that the will be written on the same grade of paper or the same size sheets of paper: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

16. Executed and attested carbon copies of a will cannot be admitted to probate in lieu of the original last will and testament: *In re Steel*, 37 OO(2d) 70, 219 NE(2d) 237 (PC).

Signed at end

22. A will not signed at the end is invalid: *Glancy v. Glancy*, 17 OS 134; *Irwin v. Jacques*, 71 OS 395, 73 NE 683, 69 LRA 422; *Sears v. Sears*, 77 OS 104, 82 NE 1067, 17 LRA(NS) 353; *Honious v. Honious*, 102 OS 693, 135 NE 975; *Herbster v. Pincombe*, 10 App 322, 31 OCA 358 [motion to certify record overruled, *Pincombe v. Herbster*, 16 OLR 79, 63 Bull 195]; *Schubert v. Christman*, 16 App 432.

23. Where decedent, in his lifetime, drew a will and signed it, but without having it witnessed, and later added a clause making an additional devise of the property mentioned in the will, and then had it witnessed, but without again signing the same himself "at the end thereof," the whole instrument was invalid as a last will and testament: *Glancy v. Glancy*, 17 OS 134.

24. The act of 1840 (1 Curwen's Stat., § 685) changed the law as to execution of wills. Under this act, wills were to be signed "at the end thereof," which was not required in the acts of 1824 and 1831, and foreign wills executed and proved according to the foreign law, could be admitted to record in this state: *Jones v. Robinson*, 17 OS 171.

25. The words "the executrix is not required to give bond," added below the place of signing, do not avoid the rest of the will as not being signed at the end thereof: *Baker v. Baker*, 51 OS 217, 37 NE 125.

26. Where there was written, on the left margin of a will, a dispositive clause extending lengthwise from the bottom to the top of the page, and not connected with the body of the instrument by any words or marks to show where it is to be read in relation to the other provisions, and the testimony shows that the marginal matter was written after all the other provisions, at the request of the testator and before he attached his signature, then such will is not signed at the end thereof and is invalid: *Irwin v. Jacques*, 71 OS 395, 73 NE 683, 69 LRA 422.

27. Where the testator omitted to sign at the end of the testimonium clause, but did write his name in the attestation clause immediately following, it was held that the will was not signed at the end thereof: *Sears v. Sears*, 77 OS 104, 82 NE 1067, 17 LRA(NS) 353 [see also *Mauk v. Shellabarger*, 84 OS 461; for the opposite view in the probate court, see *In re Nicholson*, 2 NP(NS) 189, 49 Bull 379]; *Honious v. Honious*, 102 OS 693, 135 NE 975, 19 OLR 91.

28. A will is not invalidated by a space between dispositive and testimonium clauses, where it is signed directly after the testimonium clause and under this is the attesting clause and the signatures of the witnesses: *Mader v. Apple*, 80 OS 691, 89 NE 37, 131 AmSt 719, 23 LRA(NS) 515 [reversing 6 NP(NS) 592, 18 OD 801]; *Crafts v. Wilber*, 9 NP(NS) 161, 19 OD 421.

29. If testator does not sign the will nor authorize another to sign his name in his presence, the will is not properly signed: *West v. Lucas*, 106 OS 255, 139 NE 859.

30. If the only signature of testator appears in the testimonium clause, the will is not signed at the end: *Schubert v. Christman*, 16 App 432.

31. A will is signed at the end thereof, as required by the statute, when the signature of the testator appears after the will, just below a line intended in a blank form for the signature and in a blank space in the attestation clause intended for the name of the testator as part thereof, said name also appearing in the attestation clause, in the handwriting of the scrivener of the will, just below the testator's signature in such position as to read as a part of said attestation clause: *Giddings v. Schmuck*, 20 CC(NS) 142, 31 CD 238 [affirmed, without opinion, 90 OS 465; distinguishing *Sears v. Sears*, 77 OS 104 (see also *Mauk v. Shellabarger*, 84 OS 461)].

32. The end of the will is the blank line intended for his signature immediately after the testimonium clause, even if by mistake in transposing the different sheets on which the will is written, the sheet on which the testimonium clause and the signature of testator are found, is placed in front of a sheet of paper on which dispositive provisions are found: *Chandler v. Dockman*, 8 App 113, 28 OCA 297, 29

CD 405.

33. A will is not signed at the end thereof, as required by the statute, where the testator's name and the words "his mark" appear, in the handwriting of the scrivener, on the line where the signature of the testator is customarily inserted at the end of the testimonium clause and the space between the words "his" and "mark" is blank, but an X appears between the given name and surname of the testator on the first line of the attestation clause: *Herbster v. Pincombe*, 10 App 322, 31 OCA 358 [motion to certify record overruled, *Pincombe v. Herbster*, 16 OLR 79, 63 Bull 195].

34. Where a will and the codicil thereto are both legally executed, the fact that the codicil was written in the blank space between the last dispositive item and the testimonium clause does not invalidate the instrument: *Clark v. Carpenter*, 14 App 278, 32 OCA 87.

35. A will which is written on a double sheet of legal cap paper, to which a small sheet of paper is pinned, containing a dispositive clause added before execution, is said not to be signed at the end: *Smith v. Ellis*, 15 App 38 [motion to certify record overruled, *Ellis v. Smith*, 19 OLR 512].

36. In determining validity of will containing decedent's mark instead of signature, it was duty of court to pass on question whether will was lawfully attested and executed from face of instrument itself and evidence, and submission of question to jury was prejudicial error: *Hayes v. Halle*, 23 App 522, 155 NE 493.

37. A probate court has no jurisdiction to admit to probate, as a will, an instrument which is not signed at the end thereof by the purported maker, and an order of a probate court admitting such an instrument is a nullity and may be collaterally attacked: *In re Eakins*, 63 App 265, 16 OO 583, 26 NE(2d) 219, discussed in 7 OSLJ 105.

38. Where a will is written on two sheets of paper which are continuous in sense even though in fastening them together the sheet containing testimonium clause and signature is placed on top, the will is signed at the end thereof as required by former GC § 10505 (now GC § 10504-3 [RC § 2107.03]): *Lyon v. Lyon*, 16 OO 2 (App).

39. Under the provisions of this section a holographic instrument is signed at the end by the party making it where the following appears at the end of all dispositive items: "I Clara M. Smith, have subscribed my name this the 28th day of August, 1940. Signed and acknowledged by Clara M. Smith as and for her last Will and Testament in her presence and in the presence of each other have subscribed our names as witnesses. John S. Leggett, Mrs. Olga M. Leggett," and the same is entitled to probate as a last will and testament: *In re Smith*, 27 OO 520, 13 OSupp 66 (PC).

Signature by another

44. For signature for testator by another, see *Haynes v. Haynes*, 33 OS 598; *Trembley v. Trembley*, 5 OD(NP) 750, 4 OLR 545, 11 Bull 59.

46. Where signature to will is by mark, it is presumed, in contest of will, in absence of contrary showing, that signature was made by express direction, and mark inserted by testator: *Aston v. Hauck*, 22 App 430, 153 NE 277.

48. A will may be admitted to probate where there is a mark consisting of a cross which the witnesses testified was put there by the testatrix with the assistance of one of the witnesses, although the name of the testatrix does not appear anywhere in the body of the will or at the end thereof: *In re Ryan*, 23 OO 356, 9 OSupp 29 (PC).

49. A will is not properly signed by testator if, while he is unconscious, a pen is put in his hand and a mark is made therewith: *West v. Lucas*, 106 OS 255, 139 NE 859.

Acknowledgment of signature by testator

54. The witnesses need not see the testator sign. It is enough if he acknowledges his signature to them: *Reynolds v. Shirley*, 7 O (pt2) 39.

55. If one necessary witness signed when testator had not signed the will, and there was no evidence that testator, at any subsequent time, signed the will in the presence of such witness or acknowledged his signature to him, the will was held to be invalid since there was no acknowledgment by the maker, either of the paper as his will, or of his signature thereto, in the presence of such subscribing witness: *Keyl v. Feuchter*, 56 OS 424, 47 NE 140.

56. If the subscribing witnesses signed when the will was so folded that they could not see whether testator had signed or not, the will was held to be invalid: *Missionary Soc. v. Ely*, 61 OS 636, 57 NE 1133 [without opinion; for argument, etc., see 42 Bull 273; *contra*, *In re Nicholson*, 2 NP(NS) 189, 49 Bull 378, which was held erroneous on other grounds in *Sears v. Sears*, 77 OS 104 (see also *Mauk v. Shellabarger*, 84 OS 461)].

57. If the subscribing witnesses signed when testator had not signed, and four days later he signed in their presence, the court held that the will was valid since it was deemed to have been attested by the subscribing witnesses at the time of the testator's signature: *Bloechle v. Davis*, 132 OS 415, 8 OO 249, 8 NE(2d) 247, discussed in 9 OO 46. (In this case no reference is made to the earlier cases.)

58. Acknowledgment need not be in express words, but may be inferred from signs, motions, conduct, or attendant circumstances: *Raudebaugh v. Shelley*, 6 OS 307; *In re Kail*, 16 OO(2d) 93, 176 NE(2d) 850 (App).

59. Where a will has been signed for the testator by another person, in his presence and by his express direction, in the absence of the attesting witnesses, the acknowledgment of the fact by the testator in the hearing of the witnesses, which is requisite, is not required to be made in any particular form of words, or in any specified manner; but, if by signs, motions, conduct or attending circumstances, the attesting witnesses are given to understand, by the testator, that he acknowledges the signature thereto as his, and the instrument itself as a will, it is sufficient: *Haynes v. Haynes*, 33 OS 598.

61. When a woman asked two friends to be witnesses to her will, and said to them "This is my will," and the witnesses, at the time, saw upon the instrument some writing and the only other writing on it was the signature of the testatrix, *prima facie* proof is made that she acknowledged her signature as required by this section: *In re Fisher*, 67 App 6, 21 OO 44, 35 NE(2d) 784.

62. Where the witnesses to a will signed at the request of the testatrix who produced the instrument for the purpose of acknowledgment, all of the requirements of this section were complied with providing the testatrix had previously signed the will: *In re Borgman*, 61 OLA 429, 105 NE(2d) 69 (App).

63. Signature by A for testator in testator's presence is equivalent to testator's acknowledgment of such signature to A: *Trembley v. Trembley*, 5 OD (NP) 750, 4 OLR 545, 11 Bull 59.

64. It is not necessary that an acknowledgment be made in the presence of both witnesses at the same time or by any particular form of words: *Eggleston v. Gardner*, 16 CC(NS) 455, 31 CD 627.

65. Request in will contest to charge that every

will must be in writing and signature of testator and that of witnesses subscribed as one continuous transaction held properly refused as not correctly stating law: *Scholl v. Sterkel*, 46 App 389, 189 NE 15, 40 OLR 9.

67. Attestation and subscription of witnesses to a will are two separate and distinct acts, and both are necessary in proper execution of a will: *In re Pittis*, 29 NP(NS) 41.

68. A will is properly subscribed by witnesses when they sign their names thereto in presence of testator, but it is not properly attested unless witnesses see testator sign his name, or hear him acknowledge either the paper as his will or his signature thereto: *In re Pittis*, 29 NP(NS) 41.

69. A will is properly executed if it is signed at the end by the maker in the presence of two subscribing witnesses even though the witnesses have no knowledge that the instrument signed is a will: *In re Maurer*, 31 NP(NS) 247; *In re Williamson*, 6 NP 79, 8 OD 47 [reversing *In re Williamson*, 5 NP 1, 6 OD 505].

71. Where a will was signed by the testator in one room and then taken into another room where at the request of testator it was signed by two witnesses, but no express acknowledgment by the testator of his signature which was visible to the witness or of the nature of the instrument was made, the requirements of this section, relative to the execution of wills, have been complied with, since the production of the instrument and the request that the witnesses sign, imported that the signature to be witnessed was that of the testator and that he acknowledged it to be his: *Blagg v. Blagg*, 55 App 518, 9 OO 180, 9 NE(2d) 991.

72. Where the signature of the maker of a purported will appears at the end of a typewritten attestation clause, it is "signed at the end by the party making it," as required by this section, if the word "witnesses" appears in ink after the signatures of the witnesses, and if the instrument is so written as to guard against fraudulent additions: *In re Mazurie*, 9 OO 163 (PC).

Publication

77. It was formerly said that the witnesses must know that the instrument was a will: *Keyl v. Feuchter*, 56 OS 424, 47 NE 140. See also *Missionary Soc. v. Ely*, 61 OS 636, 57 NE 1133 [without opinion; for argument, etc., see 42 Bull 273].

78. This obiter was followed in *Tims v. Tims*, 14 CC(NS) 273, 22 CD 506, and in *Koch v. Meyers*, 7 App 306, 29 OCA 142, 30 CD 439.

79. It is now held that where two subscribing witnesses have seen a testatrix subscribe her name to a will by directing another to sign her name thereto in her presence, the testatrix attaching her mark thereto, and the signature so made is then attested and subscribed by said witnesses in the testatrix's presence, the will is properly executed. In such case it is not necessary that the testatrix declare that the instrument is her will or that she has signed it. (*Keyl v. Feuchter*, 56 OS 424, 47 NE 140, distinguished): *Underwood v. Rutan*, 101 OS 306, 128 NE 78.

80. This decision [case note 79] was anticipated in *In re Leffel's Will*, 8 NP(NS) 591, 54 Bull 336.

81. See also, to the same effect, *In re Williamson's Will*, 6 NP 79, 8 OD 47; *In re Reckard*, 15 NP(NS) 465, 24 OD 609.

82. For a discussion of the distinction between "acknowledgment" and "publication," see *In re Reckard*, 15 NP(NS) 465, 24 OD 609.

Subscribing witnesses

88. Proof that will was signed by testatrix and her

signature was attested by two subscribing witnesses, is sufficient proof of due execution under former GC § 10505 (see now RC § 2107.03). That section only required that subscribing witnesses see testatrix subscribe and did not require that testatrix make declaration of fact that it was her will: *Glanz v. Bauer*, 7 OLA 165.

90. The provision of this section which requires that a will must be signed by two or more competent witnesses, refers to the execution of the will, and not to the amount of testimony which must be offered at probate. The probate court may admit a will to probate although one subscribing witness testifies to facts which amount to a due execution of the will, even though the other subscribing witness testifies that the signature of the testator was not upon the will when he signed it as a witness and that he did not sign it in the presence of the testator. The questions as to the credibility of such witnesses are for the probate court: *In re Watts*, 19 NP(NS) 225, 27 OD 87.

91. In the absence of direct testimony that the provisions of RC § 2107.03, relating to the method for the execution of wills, has been complied with as to signature and acknowledgment, there must be some evidence upon which an inference of implied acknowledgment can be based, and probate will be refused where the witnesses to the will testified not only that they neither saw testatrix sign the instrument nor heard her acknowledge it, but also that they at no time prior to probate saw testatrix's signature on the instrument, even though both witnesses were able to testify that the signature on the will was that of testatrix: *In re LaMar*, 77 OLA 140, 146 NE(2d) 472 (PC).

—Competency

For competency, etc., of witnesses to a nuncupative will, see case notes under RC § 2107.60.

95. Unless modified by statute, the rule of the common law controls the competency of witnesses and the question of interest: *Vrooman v. Powers*, 47 OS 191, 24 NE 267, 8 LRA 39.

96. While an attorney cannot testify as to confidential communications made to him by testator, he may, if he is a subscribing witness, testify as any other subscribing witness may: *Collins v. Collins*, 110 OS 105, 143 NE 561, 38 ALR 230.

96.1 Where a written will is signed by a testator and attested and subscribed in the presence of such testator by two witnesses who are attorneys practicing law as partners, one of whom prepared such will, and who are nominated in such will as executor and alternate executor, respectively, such witnesses are competent within the meaning of this section, requiring such will to be attested and subscribed to "by two or more competent witnesses," and such will, if otherwise valid, is not thereby invalidated: *Blankner v. Lathrop*, 169 OS 229, 8 OO(2d) 221, 159 NE(2d) 229.

97. Parties who are financially interested in the construction of a will, and whose rights will be affected by the decision of the court, are not competent to appear as witnesses: *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43 [on appeal from 13 NP(NS) 1, where the same conclusion was reached].

97.1 A witness is not incompetent as a subscribing witness to a will because he is also named as an executor or trustee: *Fazekas v. Gobozy*, 78 OLA 258, 150 NE(2d) 319.

97.2 An executor who is not also a legatee or devisee is competent to be one of the necessary witnesses: *Blankner v. Lathrop*, 79 OLA 6, 154 NE(2d) 95.

98. One who signs testator's name to a will may also be a subscribing witness: *Trembley v. Trembley*,

5 OD(NP) 750, 4 OLR 545, 11 Bull 59.

99. General Code § 11494 (RC § 2317.02) disqualifies an attorney from testifying "concerning a communication made to him by his client in that relation, or his advice to his client," except by the express consent of the client, and when a testator procures his attorney as a subscribing witness to his will he by that act expressly consents that the attorney may testify as fully as any other subscribing witness touching the capacity of the testator or any other fact affecting the validity of the will. The object of requesting a person to witness a will is to assure the legal execution of the will and preserve the evidence thereto: *Knepper v. Knepper*, 103 OS 529, 134 NE 476.

100. A client who requests his attorney to prepare his will and to act as a subscribing witness consents that such attorney may testify as fully as any other subscribing witness; and the client thereby waives the exemption of GC § 11494 (RC § 2317.02): *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

—Attestation

106. "Attest" means to bear witness to, to certify, to affirm to be true or genuine: *In re Reckard*, 15 NP(NS) 465, 24 OD 609.

107. Where the testator, before requesting witnesses to sign, had so folded the paper that they could not see that it contained any writing at all and one of them could see only the word "witness" and not testator's signature, execution is defective: *Missionary Soc. v. Ely*, 61 OS 636, 57 NE 1133 [without opinion; for argument, etc., see 42 Bull 473; contra, *In re Nicholson*, 2 NP(NS) 189, 49 Bull 378, which was held erroneous on other grounds in *Sears v. Sears*, 77 OS 104 (see also *Mauk v. Shellabarger*, 84 OS 461)].

109. If the subscribing witnesses signed before testator signed, and testator then signed in their presence at the same transaction, the will was held to be valid: *Slemmons v. Toland*, 5 App 201, 25 CC(NS) 485, 28 CD 455.

110. The fact that one subscribing witness forgets the facts of execution, does not render a will invalid: *Egbert v. Egbert*, 10 App 432, 29 OCA 584 [motion to certify record overruled, 16 OLR 507, 64 Bull 61].

—Signature

115. Indorsements upon a will signed by the testator but not witnessed as provided by law are not codicils: *Porterfield v. Porterfield*, 4 NP(NS) 654, 17 OD 448.

116. Where a witness to a will took part in the physical act of writing his name as a witness by holding pencil while name was written by another at his direction, at testator's request and in his presence, he was an effectual subscribing witness: *In re Catchel*, 29 NP(NS) 206.

—Mutual presence

121. Witnesses need not sign at the same time or in the presence of each other: *Raudebaugh v. Shelley*, 6 OS 307.

122. A will executed and probated in a sister state, whereof an authenticated copy has been duly admitted to record in this state, read as follows: "Signed, sealed, and published in presence," the will being signed at the end thereof by the testator and three witnesses. Held: In the absence of proof to the contrary, it will be presumed that the testator and witnesses signed in the presence of each other: *Carpenter v. Denoon*, 29 OS 379.

123. By virtue of this section, it is not necessary to the validity of a last will and testament that the attesting and subscribing witnesses thereto sign the same in the presence of each other: *McFadden v. Thomas*, 154 OS 405, 43 OO 340, 96 NE(2d) 254.

Republication

128. In Ohio a will and a codicil are to be regarded as different parts of the same instrument; and a codicil may operate as a republication of a defectively executed will: *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion to certify record overruled, 61 Bull 152, and citing *Mack v. Bonner*, 3 OS 366; *Black v. Webb*, 20 O 304].

129. Even if testator executes a will without knowing its contents, such will is rendered valid by the subsequent execution by testator of a valid codicil to such will after such will and codicil have been read over to him: *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion to certify record overruled, 61 Bull 152].

130. The republication of a will which has been once revoked must be attended by the same formalities as were required to render valid its original execution: *Crane v. Tunkey*, 11 OLR 454, 58 Bull 316.

Evidence

139. Even though all who have apparently signed an instrument as attesting witnesses affirmatively testify that the instrument was not executed according to law, such execution and attestation may be established by other competent evidence: In re *Lyons*, 166 OS 207, 2 OO(2d) 26, 141 NE(2d) 151.

140. An affidavit of the testator, made contemporaneously with the will but not executed conformably to the wills act nor referred to in the will, cannot be employed to vary or add to the clear dispositive terms of the will: *Leopold v. Weaver*, 9 App 379, 29 OCA 567 [motion to certify record overruled, *Weaver v. Leopold*, 16 OLR 465, 64 Bull 40].

141. A declaration made by a testator to the effect that he has made a will, or that he has revoked a will, is not independent evidence of such fact, and it is not admissible without some foundation of direct evidence or presumption as to the existence of such fact: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

142. Where the proof of record shows testatrix was of full age, sound mind and memory, and not under any restraint, and the proffered will is typewritten, testamentary in character, with a testimonium clause and attestation clause reciting all essentials of due execution, and signed at the end by testatrix and attested by two subscribing witnesses, one of whom is deceased and the signature of the deceased witness, together with that of the testatrix and the surviving attesting witness are shown by substantial evidence to be genuine, a prima facie case in favor of the validity of the will is established, so that where the surviving attesting witness testifies in substance that testatrix requested her to witness what she stated to be her will, which was lying on the table, folded in such a manner that the witness could not see whether there was any other signature thereon other than that of the first subscribing attesting witness who was not present, and the surviving witness did not see the testatrix sign the will, nor did testatrix acknowledge her signature by spoken word, the probate court is required to disregard such testimony against the validity of the will and must admit the will to probate on the prima facie case of record, which includes an appraisal of all the surrounding facts and circumstances attending the execution of the will, and it is prejudicial error for the probate court to determine the ultimate issue of due execution of the will as on contest against the validity of the will, in the face of substantial evidence making a

prima facie case in favor of the validity of the will: *Roosa v. Wickward*, 90 App 213, 47 OO 207, 105 NE(2d) 454.

143. The presumption that a will was duly executed can be overcome by other evidence, but not by the mere absence of evidence: In re *McGraw*, 14 OApp(2d) 87, 43 OO(2d) 207, 236 NE(2d) 684.

144. There is a strong presumption that a will drawn by an attorney who directed its execution and was present when it was executed was regularly executed: In re *McGraw*, 14 OApp(2d) 87, 43 OO(2d) 207, 236 NE(2d) 684.

Charge

146. For charge as to execution, see *Slemmons v. Toland*, 5 App 201, 25 CC(NS) 485, 28 CD 455; *Eggleston v. Gardner*, 16 CC(NS) 455, 31 CD 627.

147. For a charge as to the effect of the evidence of the subscribing witness, see *Stark v. Cress*, 4 App 92, 22 CC(NS) 88 [reversing *Cress v. Stark*, 14 NP (NS) 545].

§ 2107.04 Agreement to make a will. (GC § 10504-3a)

No agreement to make a will or to make a devise or bequest by will shall be enforceable unless it is in writing. Such agreement must be signed by the maker or by some other person at such maker's express direction. If signed by a person other than such maker, the instrument must be subscribed by two or more competent witnesses who heard such maker acknowledge that it was signed at his direction.

HISTORY: GC § 10504-3a; 116 v 385 (404), § 2. Eff 10-1-53.

Comparative Legislation

Contract to make will:

Cal.—Probate Code, § 77

Ill.—Rev Stat, ch 3, § 4-8

Ky.—KRS, § 394.540

N.Y.—EPTL, § 13-2.1

Fla.—FSA, § 733.815

Forms

1 A&H Probate FORM 2107.04a et seq.

Research Aids

Action for breach:

O-Jur2d: §§ 17-24

Am-Jur2d: §§ 340 et seq

Part performance:

O-Jur2d: Wills § 16

Am-Jur2d: Wills §§ 333, 368-372

Requisites — writing, signature and subscription by witnesses:

O-Jur2d: §§ 12-16

Am-Jur2d: § 769

Validity and construction of contract to make a will:

O-Jur2d: Wills §§ 1, 2

Am-Jur2d: Wills §§ 768, 781-784

ALR

Measure of damages for breach of contract to will property. 65 ALR3d 632.

Provision for post-mortem payment or performance as affecting instrument's character and validity as a contract. 1 ALR2d 1178.

Remedies during promisor's lifetime on contract to convey or will property at death in consideration of support or services. 7 ALR2d 1166.

Statute of limitations applicable in action to en-

force, or recover damages for breach of, contract to make will. 94 ALR2d 810.

Validity and effect of promise not to make a will. 32 ALR2d 370.

Law Reviews

Effect of the new Ohio statute of frauds on a prior oral contract to make a will. (Editorial note.) 16 CinLRev 166.

Payment as an act of part performance. 18 CinL Rev 329.

Wills and estates; survey of Ohio law, 1953. 5 WestRLRev 318.

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1. An oral agreement to make a will is not enforceable by virtue of the provisions of this section: *McGlone v. Gompert*, 52 OO 77, 112 FSupp 840.

1.1 The mere fact that wills are executed concurrently, with full knowledge of their contents on the part of the testators, will not be sufficient to imply a contract to make mutual wills: *McGlone v. Gompert*, 52 OO 77, 112 FSupp 840.

1.2 In an action for specific performance of an alleged contract to make mutual and irrevocable wills leaving all property to the plaintiff, testimony concerning conversations had by the witnesses with plaintiff's stepmother shortly after the death of plaintiff's father is inadmissible under the provisions of this section: *McGlone v. Gompert*, 52 OO 77, 112 FSupp 840.

1.3 A promise to make a will in favor of a party, supported by sufficient consideration and in due form of law, is a valid contract and may be specifically enforced against the heirs of the promisor: *Emery v. Darling*, 50 OS 160, 33 NE 715.

1.4 A suit upon a contract to devise and bequeath all of an estate in consideration for personal services, which asks that the executor be ordered to pay over the residue of the personal property, and the heirs be ordered to convey the realty, is a suit for specific performance: *Foltz v. Boone*, 107 OS 562, 140 NE 761.

1.5 When an interest in a business is sold to two persons, by agreement in writing, and one of purchasers enters into a contemporaneous oral agreement to leave real estate to vendors by will, completed transfer of the business with payment of specified amount constitutes such part performance of contract as whole as takes the case out of both general statute of frauds, GC § 8621, and specific statute of frauds, this section: *Ayres v. Cook*, 140 OS 281, 23 OO 491, 43 NE(2d) 287.

2. An oral contract to make a will is unenforceable by virtue of this section, and payment of consideration by one in whose favor the contract is made, whether that payment consists of money or pecuniarily compensable services, will not remove such a contract from the operation of the section: *Snyder v. Warde*, 151 OS 426, 39 OO 253, 86 NE(2d) 489.

4. Where a writing does not contain words which can be reasonably construed as words of promise or agreement or as an indication of any contract or agreement, such writing cannot be a memorandum or note of any agreement within the meaning of GC § 8621 (RC § 1335.05) or an agreement in writing within the meaning of GC § 10504-3a (RC § 2107.04): *Sherman v. Johnson*, 159 OS 209, 50 OO 257, 112 NE(2d) 326.

6. By virtue of GC § 10504-3a (RC § 2107.04), an agreement to make a will or to make a devise or bequest by will is not enforceable under any circumstances unless it is in writing: *Sherman v. Johnson*, 159 OS 209, 50 OO 257, 112 NE(2d) 326.

6.1 In an action against the executor or administrator of a decedent's estate to subject the estate to the payment of a claim, where the petition alleges that there is an oral contract between the plaintiff and the decedent, and where the contract as alleged indicates that it created a monetary obligation of the decedent existing in his lifetime, although such obligation was not, by the terms of the contract, to be discharged until at or after the death of the decedent, such petition does not allege a contract to make a will, within the meaning of GC § 10504-3a (RC § 2107.04), and states facts sufficient to show a cause of action: *Moore v. Curtzweiler*, 165 OS 194, 59 OO 263, 134 NE(2d) 835.

6.2 While a contract by which one agrees that a certain person shall inherit from him as if such person was his legitimate child, does not bind the promisor to leave any property at his death, and while it possibly does not prevent him from conveying his property gratuitously during his lifetime, or devising it to another by his last will, such contract is broken by the death of the promisor intestate and without making any provision, by deed or will, to perform such contract; and one to whom such property descends may be held in equity as trustee for the promisee: *Snyder v. Shuttleworth*, 5 App 137, 25 CC(NS) 545, 27 CD 234.

6.3 The measure of damages for breach of a contract to make provision by will, without specifying the kind of property or amount of the money, is the value of services rendered under such contract: *Schulte v. Hagemeyer*, 16 App 1 [motion to certify record overruled, 20 OLR 147].

7. An action was instituted upon an oral contract made prior to the effective date of this section to make a bequest in consideration of the performance of services as a physician, during the remainder of the promisor's life. Performance of all conditions precedent was alleged. At the trial the plaintiff failed to prove that he was ready, willing and able to perform the services. For that reason he was not entitled to judgment: *Heyn v. Kahn*, 69 App 274, 24 OO 64, 39 NE(2d) 866 [affirming 19 OO 29 (CP); appeal dismissed, 140 OS 337].

9. The doctrine of partial performance may be applied in an action in equity to enforce the provisions of an oral contract to devise real estate by will, notwithstanding GC § 8621 (RC § 1335.05) and this section: *Emley v. Selepchak*, 76 App 257, 31 OO 558, 63 NE(2d) 919.

10. The right to sue on a verbal contract, valid at its inception, whereby one person agreed to leave property by will to another, and made more than five years prior to the effective date of this section, was not destroyed by the enactment of this statute: *Cowle*

v. Central Trust Co., 14 OO 185 (CP).

11.1 Where a will by which a decedent leaves his property to another person is executed the same day as a contract between the decedent and such other person, which contract contains no promise or agreement to make a will and which provides that "it is impossible to arrive at a definite figure . . . to be paid for the services to be rendered by" such other person and that such other person "will accept whatever" decedent "determines to be a just consideration for the services performed and to be performed," and the will makes no reference to the contract; neither the will nor the contract constitutes an enforceable contract entitling such other person to specific performance thereof, and such will is subject to revocation by a subsequently executed will: *Stork v. Troeger*, 103 App 144, 3 OO(2d) 207, 144 NE(2d) 675.

11.2 This section, providing that "no agreement to make a will or to make a devise or bequest by will shall be enforceable unless it is in writing," has no application to an oral agreement to not make a will but to die intestate: *Frantz v. Maher*, 106 App 465, 7 OO(2d) 209, 155 NE(2d) 471.

12.2 A writing consisting of a revoked will which does not contain words which can reasonably be construed as words of promise or agreement, or as an indication of any contract or agreement, cannot be a memorandum or note of any agreement within the meaning of RC § 1335.05, or an agreement in writing within the meaning of RC § 2107.04, providing that a contract to make a will must be in writing, and a petition which bases its cause of action upon such a writing, praying in the alternative for specific performance or a decree impressing a constructive trust, does not state facts constituting a cause of action and is subject to demurrer: *Wilson v. Dunkle*, 71 OLA 483, 132 NE(2d) 483 (CP).

13. An agreement to make a will takes priority over any other later disposition of property made during the lifetime of any of the parties to the agreement: *Fitch v. Oesch*, 59 OO(2d) 16, 30 OMisc 15, 281 NE(2d) 206.

14. It is not the duty of the administrator of the estate to recover nonprobate assets which were disposed of in violation of an agreement to make a will, but the right of action is left with those parties who might be injured by not receiving their full amount under the agreement and the will: *Fitch v. Oesch*, 59 OO(2d) 16, 30 OMisc 15, 281 NE(2d) 206.

§ 2107.05 Incorporation by reference. (CC § 10504-4)

An existing document, book, record, or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed. Such document, book, record, or memorandum shall be deposited in the probate court when the will is probated or within thirty days thereafter, unless the court grants an extension of time for good cause shown. A copy may be substituted for the original document, book, record, or memorandum if such copy is certified to be correct by a person authorized to take acknowledgments on deeds.

HISTORY: GC § 10504-4; 114 v 320 (346). **EFF** 10-1-53.

Comment

The common law rule as to incorporation by reference is well stated in *Page on Wills*, Lifetime Ed. § 250.

"In order to incorporate a document into a will by reference the following requisites must exist, even in states which recognize the general doctrine. The will itself must refer to such paper to be incorporated as being in existence at the time of the execution of the will, in such a way as reasonably to identify such paper in the will, and in such a way as to show testator's intention to incorporate such instrument in his will and to make it a part thereof. Such document must in fact be in existence at the time of the execution of the will. Such document must correspond to the description thereof in the will and must be shown to be the instrument therein referred to. These requisites must co-exist in order to incorporate a document into the will. The absence of any one of them will prevent such incorporation."

Research Aids

O-Jur2d: Wills §§ 107-111

Am-Jur2d: Wills §§ 199-209

ALR

Incorporation of extrinsic writings in will by reference. 173 ALR 568 (comment note).

Effect of reference in will to conveyance. 110 ALR 261.

Incorporation in will of extrinsic document not in existence at date of will. 3 ALR2d 682.

Validity of testamentary gift to existing nonreligious, noneducational, or noncharitable trust. 12 ALR3d 56.

Law Reviews

See explanatory article in 4 OBar 245.

Land contracts in decedents' estates. Address by Judge Kenneth T. Stevens of Chillicothe. 23 OBar (No. 23) 492.

A "relaxation of the requirement of a self-sufficient integration." (Editorial note.) 6 CinLRev 295.

Incorporation of amendable trust into a will. (Case note.) 2 OSLJ 72.

Analysis of history and present status of American wills statutes. John C. Fitzgibbons. 28 OSLJ 293.

Testamentary additions to inter vivos trusts—the present state of the law in Ohio. Harvey B. Hobson. 30 ClevBJ (No. 7) 99; 30 ClevBJ (No. 8) 115.

CASE NOTES AND OAG

1. Failure to deposit a contract to make a will within 30 days of the date the will was probated does not require a finding that the document was not properly incorporated into the will: *Winkle v. United States*, 381 FSupp 536 (1974).

2. An existing revocable and amendable living trust agreement, deed or settlement may be incorporated by reference in a will under this section: *Bolles v. Toledo Trust Co.*, 144 OS 195, 29 OO 376, 58 NE(2d) 381 overruled in part in *Smyth v. Cleveland Trust Co.*, 172 OS 489, 18 OO(2d) 42, 179 NE(2d) 60.

3. A trust agreement in actual existence, when incorporated in a will by reference and referred to as being actually in existence at the time the will is executed, is a document that is required to be deposited in the probate court when the will is probated in accordance with the provisions of this section: *In re Bunting*, 30 OO 269, 15 Supp 54 (PC).

4. Though an unfunded "pour over" trust is invalid under RC § 2107.63, such a trust may be upheld as a document incorporated by reference into the will pursuant to § 2107.05: *Hageman v. Cleveland Trust Co.*, 45 OS(2d) 178, 74 OO(2d) 295, 343 NE(2d) 121 (1976).

5. A provision of a will incorporating an extrinsic

writing into the will, pursuant to RC § 2107.05, has no effect unless such extrinsic writing is deposited with the probate court within thirty days after the will is probated, unless the court grants an extension of time for good cause shown: *Hirsch v. Hirsch*, 32 OApp(2d) 200, 61 OO(2d) 212, 289 NE(2d) 388 (1972).

6. Incorporated trust agreement and will must be read together: *Shawan v. City Bank Farmers Trust Co.*, 21 OLA 432.

7. A will which contains a provision attempting to "pour over" assets into an inter vivos trust which was not validly created, followed by language expressing that it was not the testator's intention to incorporate such trust agreement "as a probate trust" unless necessary to avoid his intestacy is thereby effective to incorporate such trust agreement by reference under this section: *Knowles v. Knowles*, 33 OO(2d) 218, 4 OMisc 153, 212 NE(2d) 88 (PC).

8. In order to incorporate a document in a will, the will must refer to the document so as to show that it is in existence, it must identify it, and must show testator's intention to incorporate it; the document must in fact be in existence at the time of execution of the will, and it must correspond to the description: *Miller v. Mackenzie*, 23 NP(NS) 158, 31 OD 497.

§ 2107.06 Bequests to charitable purpose and governmental units.

(A) If a testator dies leaving issue and by his will devises or bequeaths his estate, or any part thereof, in trust or otherwise to any municipal corporation, county, state, country, or subdivision thereof, for any purpose whatsoever, or to any person, association, or corporation for the use or benefit of one or more benevolent, religious, educational, or charitable purposes, such devises and bequests shall be valid in their entirety only if the testator's will was executed more than six months prior to the death of the testator. If such will was executed within six months of the testator's death, such devises and bequests shall be valid to the extent they do not in the aggregate exceed twenty-five per cent of the value of the testator's net probate estate, and in the event the aggregate of the devises and bequests exceeds twenty-five per cent thereof, such devises and bequests shall be abated proportionately so that the aggregate thereof equals twenty-five per cent of the value of the testator's net probate estate.

(B) The execution of a codicil to the testator's will within six months of his death shall not affect the validity of any such devises and bequests made by will or codicil executed more than six months prior to his death, except as the same are revoked or modified by the codicil. If a codicil executed within such period increases the aggregate of such devises and bequests to more than twenty-five per cent of the value of the testator's net probate estate, such increase by codicil is invalidated to the extent that such increases, plus the aggregate contained in the will and not revoked by the codicil, exceeds

twenty-five per cent of the value of the testator's net probate estate; and the amount of the codicil's increase of each such devise and bequest in the will and each such devise and bequest contained in the codicil which was not contained in the will shall be abated proportionately.

(C) The portion of any such devises and bequests which is invalid under this section shall be distributed per stirpes among such testator's issue unless expressly otherwise provided in the will or codicil.

(D) As used in this section, "the value of the testator's net probate estate" means the probate inventory value of all the testator's assets which are subject to the jurisdiction of the probate court, less all debts and costs and expenses of administration, but prior to the payment of any estate or inheritance taxes, and "issue" means a child or children, including an adopted child or adopted children, and their lineal descendants.

HISTORY: GC § 10504-5; 114 v 320 (346); 131 v 167. Eff 10-6-65.

See former GC § 10504.

Comparative Legislation

Bequest or devise to charity:

Cal.—Probate Code, § 328

Ky.—KRS, § 381.260

Mich.—MCLA, § 702.49

N.Y.—EPTL, § 5-3.3

Pa.—Purdon's Stat, Tit. 20, § 2507

Fla.—FSA, § 732.803

Research Aids

Devise or bequest:

To college or university:

O-Jur2d: Universities and Colleges § 18

To county:

O-Jur2d: Counties § 194

To corporations:

O-Jur2d: Corporations § 291

Am-Jur2d: Wills § 173

Effect of codicil:

O-Jur2d: Wills § 77

Am-Jur2d: Wills § 176

"Issue" includes adopted child:

O-Jur2d: Conflict of Laws §§ 94, 100

Restrictions on charitable devises:

O-Jur2d: Wills §§ 70-76, Charities § 5

Am-Jur2d: Wills §§ 175-177

ALR

What institutions or gifts are within statutes declaring invalid bequests for charitable, benevolent, religious, or similar purposes if made within a specified period before testator's death, or prohibiting or limiting the amount of such bequest. 111 ALR 525.

Second adoption as affecting right of inheritance. 132 ALR 778, 145 ALR 827.

What law, in point of time, governs as to inheritance from or through adoptive parent. 18 ALR 2d 960.

Validity, as charitable trust, of gift to church society, or trustees or officers thereof, without declaration or restriction as to its use. 81 ALR 2d 819.

Law Reviews

Wills; restriction on devise to educational institution; waiver of benefits of statute. (Case note.) 20 CinLRev 308.

Codicil; revocation of bequests; increase of residuum for charities; validity within mortmain statutes. (Case note.) 4 CinLRev 504.

The "dead hand" of charitable institutions—Ohio's statute of mortmain. James P. Edmiston. 1 No.Ky.St.L.F. 151 (1973).

The "Mortmain" act in Ohio. G. Stanley Joslin. 18 OSLJ 210.

Estate planning and conflict of laws. Ralph E. Heyman. 27 CinLRev 234.

The Ohio mortmain statute—a need for reform. Editorial. 13 WestResLRev 576.

The Ohio mortmain statute as amended. Richard W. Schwartz. 37 ClevBJ (No. 3) 61; 17 WestResLRev 83.

Decedents' estates—Ohio mortmain statute—exercise of general testamentary power not within survey of Ohio probate judges—proposed remedial technique. Case note. 34 CinLRev 169.

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Construction and application

1. The mortmain statute does not apply to the testamentary grant of a power of appointment or the testamentary exercise thereof: *In re Lowe*, 119 App 303, 27 OO(2d) 319, 191 NE(2d) 196.

2. This section does not apply when those whom the statute was designed to protect have, in fact, no interest to protect: *Central Natl. Bank v. Morris*,

10 OApp(2d) 225, 39 OO(2d) 433, 227 NE(2d) 418.

3. The mortmain statute has no application to an inter vivos trust: *Drew v. Richards*, 17 OO(2d) 92, 177 NE(2d) 633 (App).

3.1 To the extent that property of a decedent may not pass to a charitable institution because of the invalidity of the bequest under Ohio's mortmain statute, and to the extent that no provision is expressly made in the will for the bequest of such property to some other qualified beneficiary, the decedent is intestate as to such property and the same passes as prescribed by subdivision (C) of that statute, notwithstanding the testator has specifically disinherited the only person who could qualify as a beneficiary under that subdivision: *Balyeat v. Morris*, 28 OApp(2d) 191, 57 OO(2d) 301, 276 NE(2d) 258.

3.2 The doctrine of dependent relative revocation is not applicable in mortmain cases at least where the later document expressly revokes all prior wills: *Newman v. Newman*, 28 OO(2d) 154, 199 NE(2d) 904 (PC).

—Purpose

4. This section was designed for the protection of issue and adopted children, or their lineal descendants: *Central Natl. Bank v. Morris*, 10 OApp(2d) 225, 39 OO(2d) 433, 227 NE(2d) 418.

4.1 Grandchildren are not heirs at law where all the testator's children have survived him, and do not come within the protection of this section: *Central Natl. Bank v. Morris*, 10 OApp(2d) 225, 39 OO(2d) 433, 227 NE(2d) 418.

4.2 The purpose of the mortmain statute is to prevent a testator, under the fears incident to impending death, from disposing of his estate to the prejudice of his descendants: *Campbell v. Musart Society*, 2 OO(2d) 517, 131 NE(2d) 279 (PC).

4.4 A gift by will of the residue, provided the recipients pay certain sums to designated charities was conditional, and the condition was invalid as against the mortmain statute, where the testator died less than one year from the execution of the will: *Roenick v. Dollar Sav. &c. Co.*, 21 OO(2d) 452, 179 NE(2d) 379 (App).

Nature of charitable gifts

6. A bequest for charitable uses, where the objects are sufficiently defined, and the person designated as trustee acquires a capacity to hold by subsequent act of incorporation, take effect as an executory devise: *Trustees v. Zanesville Canal &c. Co.*, 9 O 203.

7. A gift to charitable use receives the most liberal construction: *Zanesville Canal &c. Co. v. Zanesville*, 20 O 483; *Landis v. Wooden*, 1 OS 161.

8. A devise of the residuum of an estate to such poor of two certain townships as were not able to support themselves, to be divided by the executors, is a valid devise: *Landis v. Wooden*, 1 OS 161.

9. Charitable bequest held not to be void for uncertainty: *Miller v. Teachout*, 24 OS 525.

10. An unincorporated society is capable of receiving a bequest of personalty not amounting to a trust: *American Tract Soc. v. Atwater*, 30 OS 78.

11. A residuary clause, "The residue of my estate I give to The X Trust Company to be devoted to the needy and poor women," creates a valid testamentary charitable gift: *Palmer v. Oiler*, 102 OS 271, 131 NE 362.

13. This section (formerly GC § 10504), rendering void a devise or bequest made to charity by a will executed within one year of the testator's death, under stated conditions, has no reference to a good and sufficient

charitable trust in praesenti: *Cleveland Trust Co. v. White*, 134 OS 1, 11 OO 377, 15 NE(2d) 627 [affirming 58 App 339, 9 OO 239, 16 NE(2d) 588].

14. The testatrix having died within one year of the execution of her will, the gift in remainder to the charitable and educational institutions became invalid by reason of the provisions of this section and the remainder descends as intestate property to the testatrix's sons: *Morgan v. First Nat. Bank*, 84 App 345, 39 OO 487, 84 NE(2d) 612.

Issue of body

20. "Issue of his body, or legal representatives" means "lineal descendants": *Patton v. Patton*, 39 OS 590.

21. One, not of the blood of the testator, who has been designated an heir under GC § 8598 (see now RC § 2105.15), is not "issue of the body" within the meaning of this section: *Theobald v. Fugmann*, 64 OS 473, 60 NE 606.

22. Where a testator devises or bequeaths property in trust, the income to be paid to his children and others for a period of time and at the expiration of such period the corpus of the trust property to be divided among certain charities, the devise or bequest to the charities is invalid under this section if the testator dies within one year after the execution of his will, leaving issue of his body: *Kirkbride v. Hickok*, 155 OS 293, 44 OO 297, 98 NE(2d) 815.

23. Where, under such circumstances, the children of the testator take the benefits accruing to them under the will and express a determination not to waive the provisions of this section, they do not thereby violate an in terrorem clause providing for their disinheritance if, by procedure in court or in any way for any cause, real or imaginary, they make any effort to break, change or set aside the will or any part thereof, nor do they consent that the provision as to the charities shall be considered valid: *Kirkbride v. Hickok*, 155 OS 293, 44 OO 297, 98 NE(2d) 815.

24. A child legally adopted under law of Ohio is included within meaning of word "issue" as used in former GC § 8577 (see now RC §§ 2105.01, 2105.10): *Miller v. Shepard*, 29 App 22, 162 NE 788.

Failure to comply with statute

31. Devise to child for life, remainder to Ohio state university, but if this should fail, then to nephews and nieces. Codicil requesting the child to ratify the devise to the university, and if she did so, then the devise to nephews and nieces is revoked. The child confirmed the devise by deed to the university. Held, the nephews and nieces can take nothing under the will: *Ohio State University v. Folsom*, 56 OS 701, 47 NE 581 [reversing *Folsom v. Haas*, 9 CC 473, 6 CD 460; approved, *Thomas v. Trustees*, 70 OS 92].

32. Bequests void under this section do not inure to the benefit of the residuary legatee, but are subject, as undisposed of property, to the statutes of descent and distribution: *Davis v. Davis*, 62 OS 411, 57 NE 317, 78 AmSt 725 [reversing *Davis v. Hutchings*, 15 CC 174, 8 CD 52, and sustaining *Davis v. Hutchings*, 4 NP 276, 6 OD 371].

33. For a charitable trust which is invalid because the method of creating the administrative board is too vague and the method of executing the charity is too ambiguous, see *Dirlam v. Morrow*, 102 OS 279, 131 NE 916 [affirming judgment of court of appeals, which affirmed *Morrow v. Dirlam*, 22 NP(NS) 565, 30 OD 27].

36. A person adopted pursuant to and in accordance with the law of a state other than Ohio, which,

at the time of adoption, was the domicile of the adopting parent, is an "adopted child" within the purview of the provisions of this section, even though such person had attained his majority at the time of his adoption: *Barrett v. Delmore*, 143 OS 203, 28 OO 133, 54 NE(2d) 789.

37. This section does not apply to a case where property is transferred in trust by the owner thereof in his lifetime, even if such transfer is in anticipation of his approaching death: *Redkey v. Worthington*, 22 CD 56, 13 CC(NS) 177 [reversed on the ground that title did not pass to trustee, *Worthington v. Redkey*, 86 OS 128]; *Andrew v. Kling*, 18 CC(NS) 134, 32 CD 639.

38. A charitable bequest is void where deceased died within a year, leaving issue: *The William Hooper Will*, 4 NP 186, 6 OD 560.

38.2. A testator whose grandchild, his only living blood relative, was adopted by another before testator's death, died without issue or the lineal descendant of issue within the meaning of the mortmain and adoption statutes considered in *pari materia*, and a provision in his will, executed within one year prior to his death, devising property to certain charitable institutions was valid: *Campbell v. Musart Society*, 2 OO(2d) 517, 131 NE(2d) 279 (PC).

38.3. Where the testator died within a year of making his will, and left a daughter, bequest of a sum of money in trust for the benefit of a music center is invalid under this section: *Lloyd v. Campbell*, 23 OO(2d) 329, 189 NE(2d) 660 (PC).

38.4. A gift to an organization or fund which has as one of its purposes better police protection for the whole community is a gift for a "benevolent purpose" within the purview of this section: *Anderson v. Malone*, 32 OO(2d) 407, 205 NE(2d) 131 (PC).

38.5. The police relief and pension fund of a municipality is so interrelated with the operation of a municipal corporation that a gift to it falls within the purview of this section as a gift to a municipal corporation: *Anderson v. Malone*, 32 OO(2d) 407, 205 NE(2d) 131 (PC).

38.6. This section, which invalidates under certain conditions gifts, devises or bequests for charitable purposes, contained in a will where the testator dies within a year of the date of execution thereof, permits and authorizes a waiver by the persons or classes named therein of the benefits thereby created with the consequent validation of such gifts, devises or bequests of a charitable nature as are contained in the will under consideration: *Ireland v. Cleveland Trust Co.*, 80 OLA 94, 11 OO(2d) 237, 157 NE(2d) 396 (PC).

Actions to determine validity

40. In an action to determine the validity of a bequest to a charity under this section, only those of the testator's issue who are heirs have rights under that statute: *Central Nat. Bank v. Morris*, 38 OO (2d) 265, 9 OMisc 167, 222 NE(2d) 674 (PC).

Codicil

44. Codicil executed within one year of testator's death revoking bequest, and thereby increasing residue which went to charities, was held not void under former GC § 10504 (see now RC § 2107.06): *Ruple v. College*, 35 App 8, 171 NE 417.

45. Former GC § 10504 (see now RC § 2107.06) rendering void bequest made to charity by will executed within one year prior to testator's death, must

be strictly construed: *Ruple v. College*, 35 App 8, 171 NE 417.

46. A devise of real estate to an educational institution under a codicil which was executed within one year of the death of the testatrix is merely voidable, and the persons intended to be benefited by this section may waive its benefits and thus validate the devise: *Deeds v. Deeds*, 42 OO 384 (PC).

48. Under the provisions of this section, it is intended that the property composing the invalidated gift will go to the persons named in the statute who are disappointed by the will or codicil; but no benefit can be conferred by this statute unless there is a residuary clause in favor of the class named in the statute or unless the class named can take by intestacy: *Deeds v. Deeds*, 42 OO 384 (PC).

49. Since this section is not a prohibition against the holding of property by charitable corporations, there is no reason to invoke the protection of the statute when the statutory benefit is impossible of conferment: *Deeds v. Deeds*, 42 OO 384 (PC).

49.1. A codicil is subject to the restrictions of this section, invalidating charitable bequests made by a will executed within a year of the testator's death: *Newman v. Newman*, 28 OO(2d) 154, 199 NE(2d) 904 (PC).

50. The testatrix having died within one year of the execution of her will, the gift in remainder to the charitable and educational institutions became invalid by reason of the provisions of this section and said remainder descended as intestate property to the testatrix's sons: *Morgan v. First Nat. Bank*, 53 OLA 129, 84 NE(2d) 612 (App).

[DEPOSIT]

§ 2107.07 Deposit of will. (GC §§ 10504-6, 10504-7)

A will may be deposited by the maker, or by some person for such maker, in the office of the judge of the probate court in the county in which such testator lives. Such will is to be safely kept until delivered or disposed of as provided by section 2107.08 of the Revised Code. The judge, on being paid the fee of one dollar, shall receive, keep, and give a certificate of deposit for such will.

Every will which is to be deposited must be enclosed in a sealed wrapper, which shall be indorsed with the name of the testator. The judge shall indorse thereon the date of delivery and the person by whom such will was delivered. The wrapper may be indorsed with the name of a person to whom it is to be delivered after the death of the testator. Such will shall not be opened or read until delivered to a person entitled to receive it, or otherwise disposed of as provided in section 2107.08 of the Revised Code.

HISTORY: GC §§ 10504-6, 10504-7; 114 v 320 (346, 347). **EF** 10-1-53. Analogous to former GC §§ 10506, 10508.

Cross-References to Related Sections

See RC § 2107.08 which refers to this section.

Comparative Legislation

Deposit of wills:

Ky.—KRS, § 394.110

Mich.—MCLA, § 702.15
N.Y.—SCPA, § 2507

Forms

1 A&H Probate FORM 2107.07a et seq.

Research Aids

O-Jur2d: Wills §§ 153-155

Am-Jur2d: Wills § 5

CASE NOTES AND OAG

1. The presumption that a will once proven to exist, and to have been in the custody of the testator, and which cannot be found after his death, was destroyed by the testator *animo revocandi*, does not arise when such will was deposited in the office of the probate court and was never called for thereafter by the testator and could not be found a few days after his death or at any subsequent time: *Egbert v. Egbert*, 10 App 432, 29 OCA 584 [motion to certify record overruled, 16 OLR 507, 64 Bull 61].

2. There being no statutory provisions governing the deposit of deeds in escrow with a probate judge, the deposit of a deed in escrow can not be received by the probate judge in his official capacity, and in the absence of such statutory provision there is no implied reservation in the person depositing the deeds in escrow with the probate judge to recall the same: *Gordon v. Bartlett*, 62 App 295, 16 OO 13, 23 NE(2d) 964.

§ 2107.08 Delivery of will. (GC §§ 10504-8, 10504-9)

During the lifetime of a testator, such testator's will, deposited according to section 2107.07 of the Revised Code, shall be delivered only to him or to some person authorized by him by a written order proved by the oath of a subscribing witness. After such testator's death such will shall be delivered to the person named in the indorsement on the wrapper of the will, if there is a person named who demands it.

If no person named in the indorsement demands the will, it shall be publicly opened in the probate court within two months after notice of the testator's death and retained in the office of the probate judge until offered for probate. If the jurisdiction belongs to any other court, such will shall be delivered to the person entitled to its custody, to be presented for probate in such other court. If the judge who opens such will has jurisdiction of it, he shall immediately give notice of its existence to the executor named in the will. If no executor is named, the judge shall give notice to other persons immediately interested.

HISTORY: GC §§ 10504-8, 10504-9; 114 v 320 (347). **EF** 10-1-53. For analogous sections, see former GC §§ 10509, 10510.

Cross-References to Related Sections

See RC § 2107.07 which refers to this section.

Forms

1 A&H Probate FORM 2107.08a et seq.

Research Aids

O-Jur2d: Wills §§ 153-155

Law Review

Estate planning and conflict of laws. Ralph E. Heyman. 27 CnLRev 234.

[PRODUCTION]

§ 2107.09 Who may enforce production of a will. (GC §§ 10504-10, 10504-13, 10504-11, 10504-12)

If real or personal estate is devised or bequeathed by a last will, the executor, or any interested person, may cause such will to be brought before the probate court of the county in which the decedent was domiciled. By citation, attachment, or warrant or, if circumstances require it, by warrant or attachment in the first instance, such court may compel the person having the custody or control of such will to produce it before the court for the purpose of being proved.

If the person having the custody or control of such will intentionally conceals or withholds it or neglects or refuses to produce it for probate without reasonable cause, he may be committed to the county jail and kept in close custody until he produces the will. Such person also shall be liable to any party aggrieved for the damages sustained by such neglect or refusal.

Such citation, attachment, or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered.

The officer to whom such process is delivered shall be liable for neglect in its service or return in like manner as sheriffs are liable for neglect in not serving or returning a *capias* issued upon an indictment.

HISTORY: GC §§ 10504-10, 10504-13, 10504-11, 10504-12; 114 v 320 (347, 348). Eff 10-1-53. See former GC §§ 10511 to 10514.

Comparative Legislation**Production of will:**

- Cal.—Probate Code, § 321
- Ill.—Rev Stat, ch 3, § 6-1
- Ind.—Burns' Stat, § 29-1-7-3
- Ky.—KRS, § 394.160
- Mich.—MCLA, § 702.18
- N.Y.—SCPA, § 1401
- Pa.—Purdon's Stat, Tit. 20, § 3137
- Fla.—FSA, § 732.901

Who may have a will probated:

- Cal.—Probate Code, § 323
- Ill.—Rev Stat, ch 3, § 6-2
- Ind.—Burns' Stat, § 29-1-7-4
- Ky.—KRS, § 394.170
- Mich.—MCLA, § 702.21
- N.Y.—SCPA, § 1402
- Pa.—Purdon's Stat, Tit. 20, § 3155
- Fla.—FSA, § 733.202

Forms

1 A&H Probate FORM 2107.09a et seq.

Outline of Procedure

Production of will enforced. Leyshon No. 93; A&H No. 72

Research Aids

How production enforced:

O-Jur2d: Wills § 237

Am-Jur2d: Wills §§ 832-838

Intentional concealment by custodian:

O-Jur2d: Wills § 237

Am-Jur2d: Wills §§ 832-838

Who may enforce production:

O-Jur2d: Wills § 236

Am-Jur2d: Wills §§ 832-838

CASE NOTES AND OAG

1. For a discussion of the nature of proceedings to probate a will, see *Kammann v. Kammann*, 6 App 455, 26 CC(NS) 60, 29 CD 349 [dismissed, 96 OS 600; motion to certify record overruled, 15 OLR 238, 62 Bull 309].

2. This section gives a right to any person interested to propound a will for probate: *Missionary Soc. v. Ely*, 56 OS 405, 47 NE 537.

3. Whether former GC § 10511 (see now RC § 2107.09) was repealed by former GC § 10604 (see now RC §§ 2113.01, 2129.04) was discussed but not decided in *State ex rel Barbee v. Allen*, 96 OS 10, 117 NE 13.

4. Proceedings to require the production of a will under GC § 10504-10 (RC § 2107.09), proceedings to admit a will to probate under GC § 10504-15 (RC § 2107.11), and proceedings to establish a lost, spoliated or destroyed will under GC § 10504-35 (RC § 2107.26) et seq, may be maintained only in the probate court of the county in which the testator was domiciled at the time of death: *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE (2d) 84.

6. It was prejudicial error to refuse to grant a new trial where newly discovered evidence clearly relevant on the question of whether a will had been revoked had been presented to the court in the trial of the special proceeding under GC § 10504-10 (RC § 2107.09), before the motion for a new trial was overruled: *In re Woods*, 61 OLA 548, 105 NE(2d) 589 (App).

7. A beneficiary under a will cannot maintain an action for its wrongful destruction during the testator's lifetime, since he has no legal interest in legacies given by will during the lifetime of the testator: *Van Develde v. Van Develde*, 22 CC(NS) 277, 33 CD 566.

§ 2107.10 Effect of withholding will. (GC § 10504-14)

No property or right, testate or intestate, shall pass to a beneficiary named in a will who knows of the existence of such will for three years and has the power to control it, and, without reasonable cause, intentionally conceals or withholds it or neglects or refuses within such three years to cause it to be offered for or admitted to probate. The estate devised to such devisee shall descend to the heirs of the testator, not including any heir who has concealed or withheld the will.

HISTORY: GC § 10504-14; 114 v 320 (348). Eff 10-1-53. See former GC § 10542.

Comparative Legislation

Forfeiture for failure to probate:

Ill.—Rev Stat, ch 3, § 6-1

Ind.—Burns' Stat, § 29-1-7-3

Ky.—KRS, § 394.160

Mich.—MCLA, § 702.20

Research Aids

O-Jur2d: Wills §§ 757-759

Am-Jur2d: Wills §§ 832-838

Law Reviews

Probated forged will; equity jurisdiction to declare trust in favor of devisee under unprobated will. (Editorial note.) 3 CinLRev 107.

CASE NOTES AND OAG INDEX

Custody and control, necessity, 8
 Intention of withholder, 4, 6
 Remainderman, 6
 Jurisdiction of appeal, 7
 Knowledge of will, 1-6, 19-22
 Application of former statutes, 1, 18 et seq
 Forfeitures, 1, 2, 6, 7, 19-21, 24

1. A widower who after his wife's death in 1922 retained her will in his possession and failed to produce it for probate, lost all rights given him in the will by virtue of former GC § 10542 (see now RC § 2107.10), and no action was required to divest him of such rights; GC § 11225 (RC § 2305.11), as to forfeitures, did not apply: *Stillwell v. Tudor*, 80 App 190, 35 OO 514, 75 NE(2d) 94.

2. A son who took possession of his mother's will in 1941 and withheld it until 1945 when, in response to a citation, he produced it for probate, was within the operation of this section, and could not inherit. Divesting as to him was in the nature of a forfeiture and subject to the limitation in GC § 11225 (RC § 2305.11): *Stillwell v. Tudor*, 80 App 190, 35 OO 514, 75 NE(2d) 94.

3. A daughter who never knew of her mother's will until it was produced for probate, would be neither estopped nor barred by the statute of limitation from invoking the provisions of this section. Another daughter who knew of the execution of the will, but did not know its contents, never had it in her possession and never saw it again until the time of probate, had the right to inherit: *Stillwell v. Tudor*, 80 App 190, 35 OO 514, 75 NE(2d) 94.

4. A beneficiary under a will who fails to cause such will to be offered for probate within three years after knowing of its existence, is not, by virtue of this section, deprived of his legacy or devise unless his withholding or neglect or concealment or refusal to cause it to be offered for probate is intentional and without reasonable cause, for the purpose of delaying its administration or defeating some rights or benefits given by the terms of the will: *Hoskins v. Lentz*, 7 OO 214 (PC).

6. The failure of a remainderman to have a will probated during the life tenant's life, where the remainderman had access to the will, and had exclusive control of it within three years after the life tenant's death, amounted to an intentional withholding of and neglect to probate the will, within the punitive provisions of this section: *In re Varley*, 27 OO 162, 10 OSupp 109 (PC) [affirmed, 27 OO 159 (App)].

7. The common pleas court does not have jurisdiction of an appeal on questions of law and fact from the probate court in an action for a declaratory judgment requiring the court to say whether the action of

a beneficiary of a will, by withholding it from probate, made him amenable to the penalties provided by this section and former GC § 10542 (see now RC § 2107.10), since the subject thereof does not fall within the provisions of GC § 10501-56 (RC § 2101.42): *In re Varley*, 37 OLA 280, 46 NE(2d) 878 (App).

8. Where a testatrix devised her undivided one-half interest in real property to her five children and directed that her husband be permitted to reside in the house while unmarried, the children acceded to their father's wishes not to probate the will for twenty-five years, and did not have the power to control the will until after their father's death when it was offered for, and admitted to probate, their acts did not bring them within the purview of this section so as to work a forfeiture against them: *In re Kusar*, 34 OO(2d) 32, 5 OMisc 23, 211 NE(2d) 535 (PC).

DECISIONS UNDER FORMER GC § 10542

18. Although a devise lapses by neglect to cause a known will to be offered for or admitted to probate, it will not lapse for neglect in causing a copy of a will, probated elsewhere, to be recorded in the county where the devised property may be situated: *Carpenter v. Denoon*, 29 OS 379.

19. Where devisee of land under will was in possession and control of will for more than three years after death of testatrix, but neglected to offer same for probate, as required by former GC § 10542 (see now RC § 2107.10), such devisee took nothing under the will, and land described therein passed to heirs. This section does not provide for forfeiture of interest that has vested, but prevents an estate from passing to negligent devisee: *Barron v. McCann*, 25 App 520, 159 NE 104.

20. The sole devisee under a will, having knowledge and possession of the will and opportunity for more than three years after testator's death to submit it to probate, but neglecting to offer it for probate as required by former GC § 10542 (see now RC § 2107.10), is thereby barred as a devisee thereunder, and the property descends to testator's heirs: *Lawson v. Thomas*, 48 App 311, 1 OO 483, 193 NE 655.

21. If devisees fail to offer for probate a will which is within their control, such will becomes inoperative as to them; title vests in the heirs, and a judgment rendered against an heir is a valid lien: *Loos v. Buffalo-Springfield Rubber Co.*, 32 OCA 443, 35 CD 809 [motion to certify record overruled, 20 OLR 89].

22. Where deceased left two wills, the later of which was probated, and this probate was contested and set aside after three years, after which the beneficiary, in whose custody the earlier will was, procured probate thereof, he was not debarred from taking as a devisee under this will by the fact that more than three years had elapsed before he offered it for probate: *Avery v. Howard*, 7 NP(NS) 97, 19 OD 71.

23. One retaining an attorney to secure for her the administration of her deceased husband's estate is not entitled to information acquired by her counsel in a prior professional relation concerning the will of her husband's brother, notwithstanding the fact that such knowledge might have enabled her to prevent the beneficiary from taking under such will under the above statute: *Long v. Bowersox*, 8 NP(NS) 249, 19 OD 494.

24. This section is punitive and must be strictly construed. Mere delay or lapse of time does not start this provision for forfeiture into operation, but to do so requires that an action be brought and a decree entered declaring the forfeiture: *Mitchell v. Long*, 9 NP(NS) 113, 20 OD 41.

[PROBATE]

§ 2107.11 Jurisdiction to probate. (GC § 10504-15)

A will shall be admitted to probate:

(A) In the county in which the testator was domiciled if, at the time of his death, he was domiciled in this state;

(B) In any county of this state where any real or personal property of such testator is located if, at the time of his death, he was not domiciled in this state, and provided that such will has not previously been admitted to probate in this state or in the state of such testator's domicile.

For the purpose of this section, intangible personal property is located in the place where the instrument evidencing a debt, obligation, stock, or chose in action is located or if there is no such instrument where the debtor resides.

HISTORY: GC § 10504-15; 114 v 320 (348); 120 v 649 (650), § 1. Eff 10-1-53. See former GC § 10520.

Cross-References to Related Sections

See RC § 2117.23 which refers to RC § 2107.11 et seq.

Comparative Legislation

Place of probate:

- Cal.—Probate Code, § 301
- Ill.—Rev Stat, ch 3, § 5-1
- Ind.—Burns' Stat, § 29-1-7-1
- Ky.—KRS, § 394.140
- Mich.—MCLA, § 702.17
- N.Y.—SCPA, § 206
- Pa.—Purdon's Stat, Tit. 20, § 3131
- Fla.—FSA, § 733.101

Forms

1 A&H Probate FORM 2107.12a et seq, Contest of jurisdiction.

1 A&H Probate FORM 2107.13a et seq, Probate of will.

Outline of Procedure

Probate of will in general. Leyshon No. 91; A&H No. 70

Research Aids

Admission of foreign wills:

- O-Jur2d: Wills § 303
- Am-Jur2d: Wills § 857

Jurisdiction and venue:

- O-Jur2d: Wills §§ 229, 234, 235; Conflict of Laws § 99
- Am-Jur2d: Wills §§ 852-858

ALR

Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state. 169 ALR 554.

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- Common law, effect, 9
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1. Whether the adjudication of the probate court, that decedent was domiciled within its jurisdiction, was conclusive was avoided in *Hoffman v. Fleming*, 66 OS 143, 64 NE 63 [for holding below that such adjudication was void, see *Fleming v. Hoffman*, 8 NP 86, 10 OD 560], the court holding that the sureties on the executor's bond were estopped to deny jurisdiction.

2. It is final where the domicile of decedent is claimed to be without the state: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming on rehearing, 88 OS 609, which modified in memorandum opinion, *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43, 58 Bull 125 (Ed); on appeal from 13 NP(NS) 1]; *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

3. It is final where his domicile is claimed to be in another county in the same state: *State ex rel Barbee v. Allen*, 96 OS 10, 117 NE 13.

4. The jurisdiction of a probate court acquired under GC § 10509-1 to appoint an administrator for the estate of an intestate who was a resident of the county of such court at the time he died is terminated and superseded by the admission to probate of a will of the same decedent by the probate court of another county in which such decedent was domiciled at the time of death: *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

5. Such judgment is final in case of an application by the executor to the probate court for instructions as to his duties: *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

6. When, upon a hearing of an application for the probate of a will and for letters testamentary, the probate court finds that the testator at the time of his death was a resident of the county in which the application is made, an order or judgment of the court admitting the will to probate and issuing letters testamentary thereon, however erroneous the conclusions of law and fact upon which the judgment or order is based may be, cannot be reviewed or set aside by a superior court in a proceeding in prohibition: *State ex rel Barbee v. Allen*, 96 OS 10, 117 NE 13 [followed, *State ex rel Hartford Life Ins. Co. v. Douds*, 96 OS 604].

7. The matter of the domicile of the testatrix is a question of fact to be determined from the evidence: *State ex rel Clary v. Probate Court*, 151 OS 497, 39 OO 319, 86 NE(2d) 765.

8. Domicile as used in this section means the place where one has voluntarily fixed his habitation, not for special or temporary purpose, but with intention of making it his permanent home, and to which when he is absent, he intends to return: *In re Stephan*, 17 OO 361 (PC).

9. In the amendment of this section and GC § 10504-22 (RC § 2107.18), the common law has not been changed nor has the legislature pre-empted the field by the provisions made for original probate of the wills of nonresidents: *In re McCombs*, 52 OLA 353 (PC).

9.1 Where testatrix was not domiciled in Cuyahoga County at her death and no property subject to administration was located there, the will could not be probated there: *In re Paich*, 90 OLA 470, 186 NE(2d) 755.

10. A court of another state is not bound by an adjudication of a court of Ohio as to the domicile of

intestate: *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

11. This section and GC § 10504-16 (RC § 2107.12) afford ample provision for reviewing a finding as to the domicile of the testator and the jurisdiction of the court: *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

12. An Ohio probate court has jurisdiction to admit the will of a nonresident decedent to probate, and administer his property located in the state: *Gordon v. Holly Woods Acres, Inc.*, 27 OO(2d) 188, 328 F(2d) 253.

§ 2107.12 Contest of jurisdiction. (GC § 10504-16)

When a will is presented for probate, persons interested in its probate may contest the jurisdiction of the court to entertain the application. Preceding a hearing of a contest as to jurisdiction, all parties named in such will as legatees, devisees, trustees, or executors shall have notice thereof in such manner as may be ordered by the court.

When such contest is made, parties may call witnesses and shall be heard upon the question involved. The decision of the court as to its jurisdiction may be reviewed on error.

HISTORY: GC § 10504-16; 114 v 320 (348). Eff 10-1-53. Analogous to former GC § 10521.

Comment

This section also derived from GC § 10504-15. See RC § 2107.11.

Forms

1 A&H Probate FORM 2107.12a et seq.
1 A&H Probate FORM 2107.13a et seq, Probate of will; notice.

Research Aids

Appellate review:
O-Jur2d: Wills § 233
Contest of jurisdiction:
O-Jur2d: Wills § 232
Notice:
O-Jur2d: Wills § 224

CASE NOTES AND OAG

See also case notes under RC § 2107.11.

1. While the declaration of a testator in his will as to his domicile is not conclusive, yet when there has been no material change in the situation with reference to it, between the execution of the will and the death of the testator, such declaration is evidence of high character, and will determine the question in the absence of more convincing proof to the contrary: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming on rehearing *Miller v. Miller*, 15 CC (NS) 481, 24 CD 43; which was modified in memorandum opinion, *Wilberding v. Miller*, 88 OS 609, and was on appeal from *Miller v. Miller*, 13 NP (NS) 1].

1.1 Under this section, in a proceeding to admit a will to probate, "persons interested in its probate" include those whose interests are opposed to its probate. One who contends that there has been a former adjudication by a denial of probate may, under these sections, contest

jurisdiction by asserting the defense of *res judicata*, and if aggrieved may prosecute error to the finding on such defense: *State ex rel Young v. Morrow*, 131 OS 266, 5 OO 584, 2 NE(2d) 595.

1.2 The probate court has no jurisdiction to consider an application to vacate the probate of a will filed while an action to contest the will is pending in the common pleas court: *State ex rel Cleveland Trust Co. v. Probate Court*, 172 OS 1, 15 OO(2d) 43, 173 NE(2d) 100 [affirming 113 App 1, 17 OO(2d) 1, 162 NE(2d) 574].

2. The acceptance of a bequest of personal property does not bind the beneficiary not to contest the will, as in the case of the acceptance of real property, but the money or property so received may be returned to the executor and the legatee left free to contest the will: *Spangler v. Beare*, 2 App 133, 19 CC(NS) 512, 26 CD 37.

3. In an action to contest a will, declarations by a party to the record, who is a legatee with others under the will, are inadmissible to prove that the will was contrary to the intentions of the testator or was procured by undue influence: *Seal v. Goebel*, 11 CC (NS) 433, 21 CD 286.

4. In such a case it is essential that the jury be instructed that the evidence of the contestants, in order to warrant the setting aside of the will, should not only outweigh the evidence adduced by the defendant, but also the presumption arising from the order admitting the will to probate: *Seal v. Goebel*, 11 CC(NS) 433, 21 CD 286.

5. Where the jury, in an action to contest a will, returned a verdict establishing its validity, but by a manifest error inserted the date of the execution of the will as the date of its probate, and the record shows that but one paper writing purporting to be the last will of the decedent was exhibited to the jury, and that, if the date of probate as given by the jury was correct, the right to contest the will would have been barred, it is not error for the court to treat the date given by the jury as mere surplusage and enter a judgment upon the verdict correcting the error and establishing the validity of the will: *Seal v. Goebel*, 11 CC(NS) 433, 21 CD 286.

§ 2107.13 Notice of probate.

No will shall be admitted to probate without notice to the surviving spouse known to the applicant, and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator under sections 2105.01 to 2105.21 of the Revised Code, if he had died intestate.

HISTORY: GC § 10504-17; 114 v 320 (348); 121 v 270; 127 v 36 (Eff 9-4-57); 136 v S 145 (Eff 1-1-76); 136 v S 466. Eff 5-26-76.

See former GC § 10507.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01

For text of RC § 2107.13 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2107.13 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Cross-References to Related Sections

See RC § 2107.22 which refers to this section.

Forms

1 A&H Probate FORM 2107.13a et seq.

Outline of Procedure

Probate of will in general. Leyshon No. 91; A&H No. 70

Research Aids**Notice:**

O-Jur2d: Wills § 238

Am-Jur2d: Wills §§ 932-934

Recourse where no notice:

O-Jur2d: Wills § 239

Am-Jur2d: Wills §§ 935, 936

Law Reviews

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

Validity of probate notice statutes in Ohio. Editorial. 27 CinLRev 76.

Ohio Rules

See Staff Note to Civil Rule 73(E) in Civil Rules Volume to PAGE'S OHIO REVISED CODE ANNOTATED.

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1. Where a will has been forged, and probated by perjured testimony without notice to the next of kin, and the return of service on them has been falsified, and the party procuring such forged will and its probate as a will is the sole beneficiary, and has procured a transfer of title to himself, he is a trustee ex maleficio for the next of kin: *Seeds v. Seeds*, 116 OS 144, 156 NE 193, 52 ALR 761.

2. An order of probate of a will without notice to persons entitled to notice, and without waiver by such persons, is void and is subject to direct attack by those who neither received notice nor waived service of notice: *Scholl v. Scholl*, 123 OS 1, 173 NE 305.

3. Mere knowledge of the death of the decedent and subsequent information of the order of probate will not estop such next of kin from attacking the order of probate, where it is not shown that the proponents of the will were misled by silence or delay, or that they were prejudiced thereby: *Scholl v. Scholl*, 123 OS 1, 173 NE 305.

3.1 The admission of a will to probate ordinarily cannot determine the rights of all interested parties, for only the surviving spouse and next of kin known to be residents of the state are required by provisions of GC § 10504-17 to be notified: *In re Frey*, 139 OS 354, 22 OO 411, 40 NE(2d) 145.

4. Next of kin, nonresident in the state, are required to be made defendants in error and served with summons, or publication made, in a proceeding in error to reverse a judgment refusing to admit a will to probate, notwithstanding the fact that notice

to them of the hearing on the application to probate the will is dispensed with by statute: *In re Nozica*, 13 App 480.

5. An order of the probate court admitting a will to probate, made without the service of notice upon the next of kin resident in this state, as required by this section and without waiver thereof, is void: *Young v. Guella*, 67 App 11, 21 OO 66, 35 NE(2d) 997.

6. Where probate of a will has been refused, interested parties may repropound it when they have not been served with notice of the offering of the will for probate: *In re Stacey*, 4 NP 143, 7 NP 277, 6 OD 142 [for opinion allowing probate, see 6 OD (NP) 501].

7. The words, "known to be residents of the state," as used in GC § 10504-17 (RC § 2107.13), means that such knowledge must be had by either the proponent of the will or the court: *In re Hammer*, 99 App 1, 58 OO 104, 130 NE(2d) 437.

8. Where the son of a decedent files an application to admit the decedent's will to probate, which application is accompanied by a waiver of notice signed by the applicant's sister but not by the applicant; on the same day that the will is admitted to probate, applicant files an application to be appointed as executor, which includes his sworn statement that the will has been admitted to probate; and the applicant accepts the appointment and proceeds to administer the estate; the applicant and anyone else are estopped from denying that the will was duly admitted to probate, on the ground that the applicant neither received nor waived notice prior to the admission of the will to probate: *In re Warrick*, 118 App 542, 26 OO(2d) 62, 196 NE(2d) 132.

9. The purported probate of a will is void where notice of the filing of an application to admit to probate was not given to the adopted daughter of a deceased son of the testatrix, known to be a resident of Ohio: *Vance v. Byerly*, 2 OO(2d) 216, 140 NE(2d) 912 (CP).

10. Under GC § 10504-17 (RC § 2107.13), notice of the application for probate of a will is required only as to heirs and the surviving spouse of the decedent who are residents of the state of Ohio: *Armstrong v. Brufach*, 59 OO 352 (CP).

11. Notice may be served upon a minor who is in the military service and temporarily outside the United States, and who is entitled to notice of the probate of decedent's will under this section, by leaving such notice or a copy thereof at his usual place of residence in Ohio, or by sending it to such residence by registered mail: *Case v. Case*, 55 OO 317, 124 NE(2d) 856 (PC).

12. A motion to set aside the proceedings to admit a decedent's will to probate for the reason that the application for appointment of the executor did not list the name of a person who would take under the half-and-half statute will be overruled since this section specifically provides that notice need not be given to any person who would be entitled to inherit from the testator solely by reason of relationship to a deceased spouse of the testator: *In re Hennekes*, 34 OO(2d) 204, 214 NE(2d) 273 (PC).

13. One who would inherit under the half and half statute, must be made a party to an action to contest a will: *Bussell v. Cline*, 82 OLA 331.

§ 2107.14 Examination of witnesses.

Upon demand by an interested party, the pro-

bate court shall cause at least two of the witnesses to a will, and other witnesses whom a person interested in having the will admitted to probate may desire to have appear, to come before the court. On request of the interested person, the court shall compel the attendance of any witness by subpoena. Witnesses shall be examined, and may be cross-examined, in open court, and their testimony reduced to writing and filed.

HISTORY: GC § 10504-18; 114 v 320 (349); 127 v 36 (Eff 9-4-57); 135 v H 120 (Eff 5-15-74); 136 v S 145. Eff 1-1-76.

See former GC § 10516.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.14 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2107.18 which refers to this section.

Forms

1 A&H Probate FORM 2107.14a et seq.

Outline of Procedure

Probate of will in general. Leyshon No. 91; A&H No. 70

Research Aids

O-Jur2d: Wills § 242 et seq

Am-Jur2d: Wills § 1008 et seq

ALR

Statute excluding testimony of one person because of death of another as applicable in proceeding to probate will. 173 ALR 1282.

Proof, or possibility of proof, of will without testimony of attesting witness as affecting application of statute relating to invalidation of will, or of devise or legacy, where attesting witness is beneficiary under will. 133 ALR 1286.

Law Reviews

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

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1. Evidence in opposition to the validity of the will cannot be offered at probate: *Hathaway's Will*, 4 OS 383; *Kammann v. Kammann*, 6 App 455, 26 CC(NS) 60, 29 CD 349 [dismissed, 96 OS 600]; *Barr v. Clostermann*, 3 CC 441, 2 CD 251 [affirmed, without report, *Clostermann v. Barr*, 27 Bull 392]; *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110; *Estate of Jones*, 2 NP 194, 2 OD 404 [for other opinions in same case, see *In re Jones*, 2 NP 190, 2 OD 409].

2. Where a will is duly executed, probated and admitted to record, error will not lie to review the testimony upon which the order of probate was made: *Mosier v. Harmon*, 29 OS 220.

2.1. Although two witnesses are all that are required, it does not follow that only two need be called to prove the will, where more than that number have attested: *Mosier v. Harmon*, 29 OS 220.

3. For a charge of a trial court where the attending physician of testator was a witness to a codicil, and such witness signed an affidavit to the effect that the testator was of sound mind, while at the trial he gives as his opinion that testator was not of sound mind, see *Bahl v. Bial*, 90 OS 129, 106 NE 766.

4. Even though all who have apparently signed an instrument as attesting witnesses affirmatively testify that the instrument was not executed according to law, such execution and attestation may be established by other competent evidence: *In re Lyons*, 166 OS 207, 2 OO(2d) 26, 141 NE(2d) 151 (*Haynes v. Haynes*, 33 OS 598.)

5. For history of this section, see *In re Lester*, 76 App 263, 31 OO 579, 64 NE(2d) 71.

5.1 Both subscribing witnesses need not testify positively with respect to the due execution of the will, but the court may give full weight to the testimony of one subscribing witness and disregard the testimony of the other subscribing witness: *In re Wood's Will*, 67 NE(2d) 11 (App).

6. In a hearing on an application to admit a will to probate, it is error for the court to admit in evidence, over the objection of the proponent, letters written by the testator, intended to reflect upon his mental condition. This section does not contemplate the offering of evidence to controvert the testimony of the witness called by the proponent: *In re Carson*, 83 App 510, 38 OO 547, 75 NE(2d) 248.

7. The fact that one subscribing witness forgets the facts of execution does not render a will invalid: *Egbert v. Egbert*, 10 App 432, 29 OCA 584 [motion to certify record overruled, 16 OLR 507, 64 Bull 61].

8. A client who requests his attorney to prepare his will and to act as a subscribing witness consents that such attorney may testify as fully as any other subscribing witness; and the client thereby waives the exemption of GC § 11494: *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

9. The statute does not provide for a contest touching the admission of a will to probate. Parties interested in not having the will admitted to probate have no right to call witnesses under this section: *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110.

10. The fact that testator is shown to have had possession of a paper which he believed to be a will, which was in writing and signed by him and signed by witnesses, is not sufficient to establish the existence of a will, if the witnesses who saw the document did not see any words of a testamentary character, such as "give and bequeath," "last will and testament," or "I appoint as executor"; since such instrument may have been a deed or a contract: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

11. A declaration made by a testator to the effect

that he has made a will, or that he has revoked a will, is not independent evidence of such fact, and it is not admissible without some foundation of direct evidence or presumption as to the existence of such fact: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

11.1 Where a testator signed his will out of the presence of the witnesses, the mere failure of a witness to hear the testator designate the signature as his signature to "his will" is not sufficient to defeat the will where, at its probate, other witnesses testified that the signature was acknowledged by the testator to be his signature to his will: *In re Leffel's Will*, 8 NP(NS) 591, 54 Bull 336.

12. The testimony of one competent witness to a will, that all formalities necessary to its due execution were complied with by the testator and the witness, is sufficient proof, if believed, for admission of the will to probate, notwithstanding the other witness to the will fails to remember or denies compliance with one or more of the essential statutory requirements to its due attestation: *In re Watts*, 19 NP(NS) 225, 27 OD 87.

12.1 As to probate where one subscribing witness denies the facts of execution, see *In re Watts*, 19 NP(NS) 225, 27 OD 87.

13. In the probate of a will, the opponents are not permitted to introduce evidence; but witnesses offered by the proponents may be cross-examined within reasonable limits: *In re Stocker*, 26 NP(NS) 112.

14. Under the provisions of this section a person objecting to the admission of a will to probate is not permitted to call witnesses, even on the issues specified in RC § 2107.18: *In re Piasecki*, 30 OO(2d) 169, 201 NE(2d) 840 (PC).

§ 2107.15 Witness a devisee or legatee.

If a devise or bequest is made to a person who is one of only two witnesses to a will, the devise or bequest is void. The witness shall then be competent to testify to the execution of the will, as if the devise or bequest had not been made. If the witness would have been entitled to a share of the testator's estate in case the will was not established, he takes so much of that share that does not exceed the bequest or devise to him. The devisees and legatees shall contribute for that purpose as for an absent or afterborn child under section 2107.34 of the Revised Code.

HISTORY: GC § 10504-19; 114 v 320 (349); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10515.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.15 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Witness as devisee forfeits interest:

Cal.—Probate Code, § 51

Ill.—Rev Stat, ch 3, § 4-6

Ind.—Burns' Stat, § 29-1-5-2

Ky.—KRS, § 394.210

Mich.—MCLA, § 702.7

N.Y.—EPTL, § 3-3.2

Research Aids

O-Jur2d: Wills §§ 145-147

Am-Jur2d: Wills §§ 289-291

ALR

Amount or value of testamentary gift as affecting application of statute invalidating will attested by beneficially interested witness or limiting benefit to such witness. 73 ALR2d 1230.

Depreciation of assets of decedent's estate before final settlement, but after partial distribution or setting up of trust, as giving right to contribution. 114 ALR 458.

Exception or proviso in statute invalidating testamentary gift to subscribing witness, saving the share witness would take in absence of will. 95 ALR2d 1256.

Rights as between specific devisee and residuary devisees in respect of blanket mortgage or other lien on real estate covered by those devisees. 168 ALR 701.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. This does not apply to a verbal will, an interested witness to which cannot qualify: *Vrooman v. Powers*, 47 OS 191, 24 NE 267, 8 LRA 39.

2. If the testimony of a devisee and legatee is relied upon to show the revivor or republication of a first will, he should be under no greater disability than an attesting witness to the will: *Collins v. Collins*, 110 OS 105 (128), 143 NE 561, 38 ALR 230.

3. Under this section a devisee or legatee is not an incompetent witness to a will; but if his testimony is necessary to prove the will, then the bequest or devise is void: *Fazekas v. Gobozy*, 78 OLA 258, 150 NE(2d) 319 (App).

4. In Ohio a witness-executor or witness-trustee is not an incompetent subscribing witness to a will by reason of such fact: *Fazekas v. Gobozy*, 78 OLA 258, 150 NE(2d) 319 (App).

5. The words, "devise or bequest," as they appear in RC § 2107.15 do not encompass the compensation paid to an executor for his services on behalf of the estate after the death of the testator: *Blankner v. Lathrop*, 169 OS 229, 230, 8 OO(2d) 221, 159 NE(2d) 229 [affirming 79 OLA 6, 154 NE(2d) 95].

§ 2107.16 Will proved in certain cases. (GC § 10504-20)

When offered for probate, a will may be admitted to probate and allowed upon such proof as would be satisfactory, and in like manner as if an absent or incompetent witness were dead:

(A) If it appears to the probate court that a witness to such will has gone to parts unknown;

(B) If the witness was competent at the time of attesting its execution and afterward became incompetent;

(C) If testimony of a witness cannot be obtained within a reasonable time.

HISTORY: GC § 10504-20; 114 v 320 (349). Eff 10-1-53. Analogous to former GC § 10517.

Forms

1 A&H Probate FORM 2107.14a et seq: Proof of signature of witness to will.

Research Aids

O-Jur2d: Wills § 251
Am-Jur2d: Wills § 1009

CASE NOTES AND OAG

1. In the absence of testimony to the contrary, it will be presumed that a will appearing in legal form and signed at the end by a testator while in the armed forces of the United States was attested and subscribed as provided by law, and that the testator had capacity to make a will and was free from restraint at the time of its execution: In re Blickensderfer, 28 OO 42 (PC).

§ 2107.17 Depositions taken by commission.

When a witness to a will, or other witness competent to testify at the probate proceeding, resides out of its jurisdiction, or resides within it but is infirm and unable to attend court, the probate court may issue a commission with the will annexed directed to any suitable person. In lieu of the original will, the probate court, in its discretion, may annex to the commission a copy of the will made by photostatic or any similar process. The person to whom the commission is directed shall take the deposition or authorize the taking of the deposition of the witness as provided by the Rules of Civil Procedure. The testimony, certified and returned, shall be admissible and have the same effect in the proceedings as if taken in open court.

HISTORY: GC § 10504-21; 114 v 320 (349); 116 v 385; 127 v 36 (E# 9-4-57); 136 v S 145. E# 1-1-76.

Analogous to former GC § 10518.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.17 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2107.17a et seq.

Research Aids

O-Jur2d: Wills § 252; Discovery and Depositions §§ 48, 87

ALR

Construction of statute or rule admitting in evidence deposition of witness absent or distant from place of trial. 94 ALR2d 1172.

Pretrial deposition—discovery of opinions of opponent's expert witnesses. 86 ALR2d 138.

Law Reviews

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

§ 2107.18 Admission of will to probate.

The probate court shall admit a will to probate if it appears from the face of the will, or if demanded under section 2107.14 of the Revised Code, from the testimony of the witnesses that its execution complies with the law in force at the time of execution in the jurisdiction where executed, or with the law in force in this state at the time of death, or with the law in force in the jurisdiction where the testator was domiciled at the time of his death.

HISTORY: GC § 10504-22; 114 v 320 (349); 120 v 649; 131 v 618 (E# 8-10-65); 136 v S 145. E# 1-1-76.

Analogous to former GC § 10519.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01

For text of RC § 2101.18 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Lost and spoliated wills, RC § 2107.26 et seq.

See RC § 2117.23 which refers to this section.

Forms

1 A&H Probate FORM 2107.14a et seq: Testimony of witnesses to will.

Research Aids

Admission to probate:

O-Jur2d: Wills §§ 255, 260

Am-Jur2d: Wills § 1028

Foreign wills:

O-Jur2d: Wills § 123

Holographic wills:

O-Jur2d: Wills § 46

ALR

Partial invalidity of will: may parts of will be upheld notwithstanding failure of other parts for lack of testamentary mental capacity or undue influence. 64 ALR3d 261.

Statute limiting time for probate of will as applicable to will probated in another jurisdiction. 87 ALR2d 721.

Sufficiency of general presumption of sanity to supply lack of affirmative evidence of testamentary capacity required of proponent of will. 110 ALR 675.

Law Reviews

Burden of proof in probate and contest proceedings. (Case note.) 2 OSLJ 292; 9 OBar (No. 13) 163.

Wills—requirements for admission of will to probate—quantum of proof. (Case note.) 18 OSLJ 547.

Wills can be made “unbreakable.” Ellis V. Rippner, 6 ClevMLRev 336.

CASE NOTES AND OAG

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Jurisdiction to probate

For the effect of the adjudication of the probate court as to the domicile of the testator, see case notes under RC § 2107.11.

1. While the will of a testator domiciled within this state at his decease may be admitted to probate in any county where the testator owned real or personal estate, letters testamentary can only issue from the probate court of the county in which he resided at the time of his death: *Limes v. Irwin*, 16 OS 488.

2. The will of a person whose domicile, at the time of his death, is in this state, is properly admitted to original probate at the place of such domicile, without regard to where the will was made, or where such person died: *Converse v. Starr*, 23 OS 491.

3. The probate court has exclusive jurisdiction to admit wills to probate, and to record them, together with the testimony, as provided in GC § 10504-24 (RC § 2107.20): *Brown v. Burdick*, 25 OS 260.

Nature of probate

8. In determining whether a will which is presented for probate and which is complete and regular in appearance and which apparently complies with all formalities should be admitted to probate, the probate court is not authorized to determine as a fact whether such will has been attested and executed according to law, but is merely required to determine whether there is substantial evidence tending to prove that fact, i.e., evidence which will enable a finding of that fact by reasonable minds: *In re Lyons*, 166 OS 207, 2 OO(2d) 26, 141 NE(2d) 151.

9. In a proceeding to probate a will it is not the duty of the court to weigh the evidence for or against the validity of the will, further than to determine whether there is substantial evidence tending to establish the essential facts necessary for the probate thereof as set forth in this section: *McWilliams v. Central Trust Co.*, 51 App. 246, 5 OO 104, 200 NE 532.

10. Application to admit a will to probate is a special proceeding within the meaning of GC § 12258 (see now RC § 2505.02), which provides that an order affecting a substantial right made in a special proceeding is a final order which may be vacated, modified or reversed: *Missionary Soc. v. Ely*, 56 OS 405, 47 NE 537.

11. Except as to questions of jurisdiction (see GC § 10504-16 [RC § 2107.12]), no provision is made in a proceeding to probate a will for hearing evidence, which is offered by one who resists the admission of such will to probate: *Kammann v. Kammann*, 6 App 455, 26 CC(NS) 60, 29 CD 349 [dismissed, 96 OS 600; motion to certify record overruled, 15 OLR 238, 62 Bull 309].

12. A proceeding to admit a will to probate is a

proceeding in rem: *In re Nozica*, 13 App 480.

13. In admitting a will to probate, the court is limited to a consideration of testator's capacity and freedom from restraint, and whether the instrument has been duly attested and executed. It cannot consider how the will is to operate: *Mitchell v. Long*, 9 NP(NS) 113, 20 OD 38.

14. A will cannot be admitted to probate in part and denied probate in part on the ground that certain gifts therein are contrary to public policy and illegal. The entire will must be admitted to probate and the question of such illegality must be determined later: *In re Schrader*, 20 NP(NS) 433, 63 Bull 95.

15. It will be presumed that the testator had capacity to make a will and that the will was made free from restraint, where it is not affirmatively shown that the testator labored under some legal disability: *In re Stocker*, 26 NP(NS) 112.

16. A purported will may be refused admission to probate if the circumstances surrounding its execution are such as to show that the free agency of the testator was destroyed as far as the objects of his bounty are concerned, even though such circumstances when taken separately are inconclusive: *In re Maurer*, 31 NP(NS) 247.

Necessity of probate

21. The probate of a will is indispensable to give validity to it: *Lessee of Swazey's Heirs v. Blackman*, 8 O 5.

22. When it appears that a will was duly attested and executed, and that the testator at the time of executing it was of full age, of sound mind and memory, and not under restraint, the mandatory duty rests upon the court to admit the will to probate: *In re Halterman*, 27 OO 521, 12 OSupp 150 (PC).

23. A title as devisee is not acquired until probate of the will: *Douglas v. Miller*, 3 NP 220, 4 OD 414.

24. A will does not pass title to realty before probate; see case notes under RC § 2107.61.

Effect of probate

29. Probate of a will, taken within the county, at another place than the county seat, is competent evidence to establish the will: *Le Grange v. Ward*, 11 O 258.

30. The order of the probate court, which recites that the will was presented for probate, and that the subscribing witnesses were sworn and examined in open court, and their testimony reduced to writing and filed, by order of court, and that thereupon the court ordered the will to be filed and admitted to record, is sufficient evidence that the will was proved according to law and ordered to be recorded: *Holman v. Riddle*, 8 OS 384.

31. A judgment of a probate court of another state wherein decedent was domiciled, is binding upon all who entered their appearance in such proceeding, at least if they received benefits thereunder, and on all claiming under them: *Hopper v. Nicholas*, 106 OS 292, 140 NE 186.

32. Before a proceeding to contest a will is begun, the order of probate has the force and action of a judgment; but it is said that such order is practically suspended when contest proceedings are instituted; and such order is superseded by the final judgment in such contest proceedings: *Kammann v. Kammann*, 6 App 455, 26 CC(NS) 60, 29 CD 349 [dismissed, 96 OS 600; motion to certify record overruled, 15 OLR 238, 62 Bull 309].

33. If one of the heirs of a deceased testator is given a legacy by testator's last will and testament, and is named as executor and he applies for the probate of such will, acts as executor, distributes the

estate and applies to the probate court for a transfer of the realty devised to him, such heir is estopped from bringing a second action to contest such will: *Patterson v. Atkinson*, 7 App 495, 27 OCA 427, 29 CD 354 [citing *Leedy v. Cockley*, 14 CC(NS) 72, 22 CD 299].

33.1 An order of a probate court admitting a will to probate is not a final appealable order. The only available challenge to such an order is a will contest, which is in the nature of an original action or "trial de novo," in the court of common pleas: *Carr v. Howard*, 17 OApp(2d) 233, 46 OO(2d) 360, 246 NE(2d) 563 [reversing 42 OO(2d) 174]; *State ex rel Cleveland Trust Co. v. Probate Court*, 113 App 1, 17 OO(2d) 1, 162 NE(2d) 574 [affirmed 172 OS 1, 15 OO(2d) 43, 173 NE(2d) 100].

34. In construing a will, the original will, together with the certified copy of the order of probate, may properly be introduced in evidence and considered by the court: *Wolf v. Menager*, 14 OD(NP) 128, 48 Bull 617.

35. Where the beneficiary under a forged will, fraudulently probated, was the husband of the decedent and is father of next of kin, there is a fiduciary relation which imposes upon him the legal duty to protect their interests; and violation of that duty makes him a trustee ex maleficio: *Seeds v. Seeds*, 116 OS 144, 156 NE 193, 52 ALR 761.

Record of will

40. A will is admitted to record where an order for such admission is made, and the regular uniform entry is used, although the will itself is not spread upon the record: *McClaskey v. Barr*, 54 Fed 781, 7 OFD 556.

Evidence, etc.

For capacity, see case notes under RC § 2107.02.

For execution, see case notes under RC § 2107.03.

For revocation, see case notes under RC § 2107.33 et seq.

45. The contestant has the right to prove want of due execution of the will, though he has not averred it: *Dew v. Reid*, 52 OS 519, 40 NE 718.

47. In order to probate the will the one offering it must prove that testator knew the nature of the instrument and realized that it was his last will and testament, but it is not necessary that this fact be known to or proved by the attesting and subscribing witnesses or either of them. It may be shown by any competent evidence: *In re Reckard*, 15 NP(NS) 465, 24 OD 609.

49. As to admission to probate where evidence of witnesses conflict, see *In re Stacey*, 6 OD(NP) 501 [for later opinion in same case, see 4 NP 143, 7 OD 277, 6 OD 142].

50. Only a prima facie case of testamentary capacity need be made out to secure probate of a will: *In re Will of Ludlow*, 4 NP 155, 6 OD 344 [for another opinion in same case, see 4 NP 99, 6 OD 106].

53. The court has only to be judicially satisfied that the will was duly attested and executed and that the testator possessed the requirements of the above section: *In re Jones*, 2 NP 194, 2 OD 409 [for other opinions in same case, see 2 NP 190, 2 OD 409; 2 NP 209, 2 OD 409].

54. In a will contest case it is misleading to charge the jury that it is of no importance what the probate judge did in probating the will, and that they are not to be influenced by what he did: *Walsh v. Walsh*, 18 CC(NS) 91, 32 CD 617.

Prima facie proof of execution

61. It is not necessary, in order to probate a will,

that both attesting witnesses orally testify that all the statutory requirements, regarding the execution of the will, had been complied with: *In re Schulz*, 102 App 486, 3 OO(2d) 41, 136 NE(2d) 730.

62. Where each of the attesting witnesses testified that he signed his name in the presence of and at the testator's request; that each signed separately not in the presence of each other; that he did not hear testator by spoken words acknowledge his signature, but each understood, when he signed, that he had been requested by testator to witness his will and each observed the handwritten words "witness of will" in testator's handwriting and his signature, there was sufficient evidence to make a prima facie case of due execution: *In re Kail*, 16 OO(2d) 93, 176 NE(2d) 850 (App).

63. If the applicant for probate of a will makes a prima facie case on the validity of the execution and attestation, and on the capacity and freedom from restraint of the testator, the will must be admitted to probate: *In re Piasecki*, 30 OO(2d) 169, 201 NE(2d) 840 (PC).

Hearing, issues

71. This section, relating to the admission of a will to probate, indicates that the only proper subjects of inquiry are the execution and attestation of the will, plus the question whether the testator was of full age, of sound mind and memory, and not under restraint: *In re Piasecki*, 30 OO(2d) 169, 201 NE(2d) 840 (PC).

72. Under this section and GC § 10504-22 (RC § 2107.18), the following principles govern the hearing on an application to admit a will to probate: (a) no issue is presented for a contest of the will between its proponents and opponents; (b) opponents of the will may cross-examine witnesses fully upon the dueness of attestation and execution, the mental capacity of the testator and undue influence, but are not allowed to call witnesses against the admission of the will to probate; (c) a prima facie case in favor of the validity of the will is all that is required, and when all the evidence shows as a matter of law that such a case is made out, the court must admit the will to probate, even though the evidence is conflicting: *In re Elvin*, 146 OS 448, 32 OO 534, 66 NE(2d) 629.

[§ 2107.18.1] § 2107.181 Re-hearing for admission to probate.

If it appears that the instrument purporting to be a will is not entitled to admission to probate, the court shall enter an interlocutory order denying probate of the instrument, and shall continue the matter for further hearing. The court shall order that not less than ten days' notice of the further hearing be given by the applicant, the executor named in the instrument, or a commissioner appointed by the court, to all persons named in the instrument as legatees, devisees, beneficiaries of a trust, trustees, or executors. Upon further hearing, witnesses may be called, subpoenaed, examined, and cross-examined in open court or by deposition, and their testimony reduced to writing and filed in the same manner as in hearings for the admission of wills to probate. Thereupon, the court shall revoke its interlocutory order denying probate to the instrument, and admit it to probate, or enter a final order refusing to probate it. A final order

refusing to probate the instrument may be reviewed on appeal.

HISTORY: 125 v 411 (Eff 10-16-53); 136 v S 145, Eff 1-1-76.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.18.1 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Notice to attorney general of probate of will creating charitable trust, RC § 109.30.

Forms

1 A&H Probate FORM 2107.18.1a et seq.

Research Aids

Appeal:

O-Jur2d: Wills §§ 315-319

Procedure on refusal to probate:

O-Jur2d: Wills §§ 256-259

Am-Jur2d: Wills § 839 et seq

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. In determining whether a will which is presented for probate and which is complete and regular in appearance and which apparently complies with all formalities should be admitted to probate, the probate court is not authorized to determine as a fact whether such will has been attested and executed according to law, but is merely required to determine whether there is substantial evidence tending to prove that fact, i.e., evidence which will enable a finding of that fact by reasonable minds: *In re Lyons*, 166 OS 207, 2 OO(2d) 26, 141 NE(2d) 151.

§ 2107.19 Notice of admission of will to probate. (GC § 10504-23)

When a will has been admitted to probate, the executor shall promptly give notice by registered mail to the surviving spouse and to all legatees and devisees named in the will. Such notice shall mention the probate of the will and that the person notified is named in the will as a beneficiary. The fact that such notice has been given shall be evidenced by an affidavit of the executor filed in the probate court. The executor need not give such notice to persons who have been notified of the application for probate or of a contest as to jurisdiction or to persons whose names or places of residence are unknown and cannot with reasonable diligence be ascertained and the executor files in the court his affidavit to that effect. The notice provided in this section may be waived in writing filed in the court.

HISTORY: GC § 10504-23; 114 v 320 (349). Eff 10-1-53.

Cross-References to Related Sections

Notice to attorney general of probate of will creating charitable trust, RC § 109.30.

Forms

1 A&H Probate FORM 2107.19a et seq.

Outline of Procedure

Probate of will in general. Leyshon No. 91; A&H No. 70

Research Aids

O-Jur2d: Wills § 261

Law Reviews

See explanatory article in 4 OBar 245.

CASE NOTES AND OAG

1. In providing in this section that notice shall mention the probate of the will and that the person notified is named therein as a beneficiary the purpose of the legislature was to apprise the beneficiary of the probate of the will and that he is a beneficiary so that he may take the necessary steps to see that his legacy or devise is secured to him: *Feeley v. First Nat. Bank*, 55 OO 324, 124 NE(2d) 800 (CP).

§ 2107.20 Filing and recording of will; certified copy. (GC §§ 10504-24, 10504-25)

When admitted to probate every will shall be filed in the office of the probate judge and recorded, together with the testimony, by him or the clerk of the probate court in a book to be kept for that purpose.

A copy of such recorded will, with a copy of the order of probate annexed thereto, certified by the judge under seal of his court, shall be as effectual in all cases as the original would be, if established by proof.

HISTORY: GC §§ 10504-24, 10504-25; 114 v 320 (350). Eff 10-1-53. Analogous to former GC §§ 10525, 10529.

Comparative Legislation

Certificate of probate:

Ill.—Rev Stat, ch 3, § 6-18

Ind.—Burns' Stat, § 29-1-7-14

Ky.—KRS, § 394.130

Mich.—MCLA, § 702.37

N.Y.—SCPA, § 1422

Pa.—Purdon's Stat, Tit. 20, § 921

Forms

1 A&H Probate FORM 2107.20a et seq.

Research Aids

O-Jur2d: Wills §§ 263, 264

Am-Jur2d: Wills § 1034

CASE NOTES AND OAG

1. A record thus made is the only one authorized by law, and without probate and record thereof, wills are wholly inoperative in Ohio for any purpose whatever: *Brown v. Burdick*, 25 OS 260, 265.

2. On the trial of a collateral issue, between a stranger and a devisee, respecting the disposition of testator's estate, a duly certified copy of the probate and record of the will is conclusive evidence of its validity, and is admissible as evidence, notwithstanding proceedings to contest may be pending at that time: *Brown v. Burdick*, 25 OS 260.

3. The recording is a mere clerical act, and no part of the admission of the will to probate. Where there is a difference in the wording of the recorded

copy and the original, the latter will prevail: *Wolf v. Menager*, 14 OD(NP) 128, 48 Bull 617.

§ 2107.21 Recorded in each county where real estate is situated. (GC § 10504-26)

If real estate devised by will is situated in any county other than that in which the will is proved, an authenticated copy of the will and the order of probate shall be admitted to the record in the office of the probate judge of each county in which such real estate is situated upon the order of such judge. The authenticated copy shall have the same validity therein as if probate had been had in such county.

HISTORY: GC § 10504-26; 114 v 320 (350). **EFF** 10-1-53. Analogous to former GC § 10530.

Forms

1 A&H Probate FORM 2107.21a et seq.

Research Aids

O-Jur2d: Wills § 263

Law Review

It can't be done. Article by William R. Kinney. 19 OBar (No. 13) 225.

CASE NOTES AND OAG

1. Applies only to domestic wills: *Barr v. Closterman*, 2 CC 387, 1 CD 548 [affirmed, without report, *Closterman v. Barr*, 27 Bull 392].

2. This section is part of the system created by our lawmakers for the registration of deeds of land within each county, so as to show the true condition of title to all lands therein: *Eggleston v. Harrison*, 61 OS 397, 55 NE 993.

§ 2107.22 Probate of will of later date.

When a will has been admitted to probate by a probate court and a will of later date is presented to the same court for probate, notice thereof shall be given to those persons required to be notified under section 2107.13 of the Revised Code, and to the fiduciaries and beneficiaries under such will of earlier date. Such court may admit the will of later date to probate the same as if no earlier will had been so admitted. In such case, the proceedings shall be the same as if no other will had been admitted.

When an authenticated copy of a will has been admitted to record by a probate court, and an authenticated copy of a will of later date executed and proved as required by law, is presented to the same court for record, it shall be admitted to record in the same manner as if no authenticated copy of the will of earlier date had been so admitted.

If the court admits the later will to probate, or the authenticated copy of a later will to record, its order shall operate as a revocation of the order admitting the will of earlier date to probate, or shall operate as a revocation of the order admitting the authenticated copy of the will of earlier date to record, and the court shall enter

on the record of the earlier will a marginal note [as follows:] "later will admitted to probate" (giving date admitted).

HISTORY: GC §§ 10504-27, 10504-28; 114 v 320 (350); 130 v 612, § 1. **EFF** 7-17-63.

Analogous to former GC §§ 10522, 10523.

Comparative Legislation

Setting aside final settlement of estate:

Cal.—Probate Code, § 1067

Ind.—Burns' Stat., § 29-1-1-21

Ky.—KRS, § 394.295

Mich.—MCLA, § 701.19

N.Y.—SCPA, § 1413

Pa.—Purdon's Stat., Tit. 20, § 3138

Fla.—FSA, § 733.903

Outline of Procedure

Probate of will in general. Leyshon No. 91; A&H No. 70

Research Aids

O-Jur2d: Wills § 265

Am-Jur2d: Wills § 1053

ALR

Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder. 157 ALR 1351.

CASE NOTES AND OAG

1. Where a will is probated by the probate court, and a later will is afterwards filed for probate, and proceedings are pending on appeal, such proceedings will not be enjoined at the suit of those interested in the will first probated: *Stafford v. Todd*, 17 App 114.

2. Earlier will cannot be probated where later will revoking it has been admitted to probate and probate stands unimpeached: *Pettitt v. Morton*, 38 App 348, 176 NE 494 (affirmed 124 OS 241, 177 NE 591).

3. The provisions of this section relating to the probate of a later dated will, after an earlier will has already been probated, do not in any manner alter the scope of inquiry in the proceeding for probate: *In re Piasecki*, 30 OO(2d) 169, 201 NE(2d) 840 (PC).

[CONTEST]

§§ 2107.23, 2107.24 Repealed, 136 v S 466, § 2 [GC §§ 10504-32, -33; 114 v 320; 121 v 270; 136 v S 145]. **EFF** 5-26-76.

For section analogous to former RC § 2107.23, see RC § 2107.76.

For text of RC § 2107.23 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2107.23 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

§ 2107.25 †Repealed, 136 v S 466, § 2, eff 5-26-76 [GC § 10504-34; 114 v 320; 136 v S 145] (Amended 136 v S 145, eff 1-1-76; 136 v S 466, eff 5-26-76).

† *Note:* Am SB 466 both *amends* and *repeals* this section. The text of this section as amended by Am SB 466 is as follows:

§ 2107.25 **Contest of later wills.** Section 2107.23 of the Revised Code applies in all respects to later wills admitted to probate.

The repeal of RC § 2107.25 in Am SB 466, § 2, seems to be the legislative intent, however, because:

1. RC § 2107.25 as amended by Am SB 466 (see above) refers to RC § 2107.23 (also repealed by Am SB 466); and

2. RC § 2107.77, enacted by Am SB 466, is analogous to former RC § 2107.25.

For text of RC § 2107.25 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2107.25 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

[LOST, SPOLIATED, OR DESTROYED WILLS]

§ 2107.26 **Lost, spoliated, or destroyed wills may be admitted to probate.** (GC § 10504-35)

When an original will is lost, spoliated, or destroyed subsequent to the death of a testator, or before the death of such testator if the testator's lack of knowledge of such loss, spoliation, or destruction can be proved by clear and convincing testimony, or after he became incapable of making a will by reason of insanity, and such will cannot be produced in the probate court in as complete a manner as the originals of last wills and testaments which are actually produced therein for probate, the court may admit such lost, spoliated, or destroyed will to probate, if such court is satisfied the will was executed according to the law in force at the time of its execution and not revoked at the death of the testator.

HISTORY: GC § 10504-35; 114 v 320 (352). Eff 10-1-53. See former GC § 10543.

Cross-References to Related Sections
 "Will" defined, RC § 2107.01.

Comparative Legislation

Lost wills:

- Cal.—Probate Code, § 350
- Ind.—Burns' Stat., § 29-1-7-4
- Ky.—KRS, § 422.200
- Mich.—MCLA, § 702.25
- N.Y.—SCPA, § 1407
- Fla.—FSA, § 733.207

Forms

- 1 A&H Probate FORM 2107.26a et seq.

Outline of Procedure

Probate of lost, spoliated or destroyed wills. Leyshon No. 92; A&H No. 71

Research Aids

O-Jur2d: Wills § 284 et seq
 Am-Jur2d: Wills § 1071 et seq

ALR

Proof of due execution of lost will. 41 ALR2d 393.

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CASE NOTES AND OAG

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Definitions

1. For definition of a lost will, see *Gibson v. Gibson*, 6 CC(NS) 269, 15 CD 698 [affirming *In re Gibson*, 14 OD(NP) 331, which affirmed 1 NP(NS) 552, 49 Bull 58, and was affirmed, without report, *Gibson v. Gibson*, 72 OS 677].

2. A lost will is a will that cannot be found: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

3. A spoliated will may be a will which is mutilated or which is in part lost or destroyed: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

4. A destroyed will is said to be one that cannot be produced: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

5. Tearing with intent to revoke is not spoliation within the meaning of this section, and such will cannot be probated: *In re Jones*, 2 NP 209, 2 OD 409 [for other opinion in same case, see 2 NP 190, 2 OD 409].

6. The words "lost and destroyed" in this section are used in their popular meanings, the former referring to a will that cannot be found after a search but still may be in existence, and the latter to one that is not in existence: *In re Downie*, 35 OO(2d)

31, 6 OMisc 36, 213 NE(2d) 833 (PC).

7. "Spoliation," as used in this section means the doing of some act manifest on the face of the will by someone other than the testator: In re Downie, 35 OO(2d) 31, 6 OMisc 36, 213 NE(2d) 833 (PC).

Construction

10. The spirit of this statute is, to some extent, in odium spoliatoris, and to render the same practically effective, it must be so administered: Banning v. Banning, 12 OS 437.

11. Under the constitution and laws of Ohio, proceedings to admit to probate lost, spoliated or destroyed wills, are statutory in nature, and appeals from probate court to the court of appeals from a denial of admission of such documents to probate are not equitable in nature and, therefore, do not invoke the chancery powers of the court of appeals: In re Bowles, 93 App 461, 51 OO 197 113 NE(2d) 259.

Evidence of existence

13. Where a will has been lost or destroyed before the death of the testator, the law presumes that he revoked it, and where he became insane after he made the will, the evidence to overcome this presumption must be certain, satisfactory and conclusive that it was unrevoked and in existence after he became "incapable by reason of insanity to make a will": Cole v. McClure, 88 OS 1, 102 NE 264.

14. Where a will is in the custody of the testator from the time of its execution until his death, and is found among his effects after his death with the entire surname of testator's signature torn off and with "X" marks in ink through his initials which are on the margin of each page of the will, it will be presumed that the will was mutilated by the testator with the intention of revoking the same: In re Tyler, 159 OS 492, 50 OO 419, 112 NE(2d) 668.

15. In such case, to establish a claim that the mutilation occurred subsequent to the death of the testator, the evidence must satisfy the mind of the probate judge, and to establish a claim that the mutilation was made by some one other than the testator before his death and without his knowledge, the evidence must be clear and convincing: In re Tyler, 159 OS 492, 50 OO 419, 112 NE(2d) 668.

16. In order to establish the execution and contents of an alleged lost will, the evidence must be clear, positive, free from bias, and convincing beyond a reasonable doubt; and it must be proved that the will was in existence at the death of the testatrix and thereafter destroyed or lost, or that it was in existence at the time the person became incapable of making a will by reason of insanity: In re Ayres, 19 OO 465 (PC).

17. It is said that a will being in the custody of a person other than the testator, and not being in existence after death of the latter who was incapable of revoking it, or not having access to it, it must have been fraudulently destroyed in the lifetime of the testator, or subsequent to his death. If so destroyed it was fraudulently so done, and the legal result is the same precisely as if it had continued in existence up to the time of the death of the testator: In re Thompson, 16 NP(NS) 121, 59 Bull 307 (Ed), 59 Bull 344.

18. A paper in seven pieces, found in decedent's pocket after his death, is not subject to probate as a spoliated will although one piece is missing, where it became in such a condition from being pocket-worn before decedent's death: In re Miller, 26 NP(NS) 209.

19. A will which has not been legally revoked or canceled may be admitted to probate although the

signatures of the witnesses thereto are partially obliterated, if the witnesses can identify the portion of the signatures remaining: In re Miller, 26 NP(NS) 209.

20. Where, by testator's neglect, a material clause of his will becomes so obliterated before his death that it can no longer be read in full, the missing part must be supplied by competent evidence before the will can be admitted to probate: In re Miller, 26 NP(NS) 209.

21. Lack of knowledge of the loss of a will during the lifetime of the testator is a negative fact which can only be established by evidence of his conduct and statements made to persons interested as well as others, and his treatment of such beneficiaries during his lifetime and also evidence as to whether there was a change in testator's interest in those who are beneficiaries under such lost will, as well as the care with which the will is drawn and the relationship between the deceased and those who would, by law, succeed to his property upon his death, in the absence of a will. Broad latitude in receiving evidence must be allowed of all surrounding circumstances to permit a full inquiry on such issue: In re Bowles, 96 App 265, 54 OO 296, 114 NE(2d) 229.

22. Requiring the proponent of a lost will, in an application for its probate, to establish lack of knowledge "by the best evidence" constitutes reversible error: In re Bowles, 96 App 265, 54 OO 296, 114 NE(2d) 229.

23. Where the only issue presented in an application to probate a lost will is that the deceased did not have knowledge of such loss, there being no question as to its provisions and proper execution, the quantum of proof required by this section, is that the proponent must establish by clear and convincing evidence that testator did not know of its loss: In re Bowles, 96 App 265, 54 OO 296, 114 NE(2d) 229.

23.1 A decedent's brother, who makes application to probate an alleged lost will of such decedent, may not testify, in a hearing on an application to probate such will, concerning matters occurring prior to the death of such decedent. (RC § 2317.03): In re Karras, 109 App 403, 11 OO(2d) 334, 166 NE(2d) 781.

23.2 In such case, declarations made by such decedent prior to his death may be introduced into evidence, provided the proper foundation is made therefor: In re Karras, 109 App 403, 11 OO(2d) 334, 166 NE(2d) 781.

23.3 The law in Ohio states that when a will is not found it gives rise to a presumption of revocation. Therefore the burden of proof was on the proponents to prove by clear and convincing evidence such as to satisfy the court that said will was not revoked but was lost: In re Simon, 20 OO(2d) 59, 86 OLA 380, 177 NE(2d) 92.

24. Under the provisions of this section the testator must have a lack of knowledge of the spoliation in order for the spoliated will to be admissible: In re Steel, 37 OO(2d) 70, 219 NE(2d) 237 (PC).

Procedure for admission

31. Where a will is admitted to probate on the ground that the original will has been destroyed, the omission of the record to state that the destruction of the original will was subsequent to the death of the testator, does not render the order admitting such will to probate, void: Converse v. Starr, 23 OS 491.

32. Probate of a paper as a last will and testament is not reviewable on error, though an order refusing to probate such paper is reviewable. The admission to probate of a lost or spoliated will can be annulled or revoked in no other manner than that prescribed for other wills: Hollrah v. Lasance, 63 OS 58, 57

NE 964 [affirming 16 CC 187, 8 CD 788].

33. An appeal lies to the court of common pleas from an order of the probate court overruling an application to find and establish the contents of a lost will: *Roth v. Siefert*, 77 OS 417, 83 NE 611.

34. Proceedings to require the production of a will under GC § 10504-10, proceedings to admit a will to probate under GC § 10504-15, and proceedings to establish a lost, spoliated or destroyed will under GC § 10504-35 et seq may be maintained only in the probate court of the county in which the testator was domiciled at the time of death: *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

35. A will, lost or destroyed, cannot be probated unless it was in existence subsequent to the death of the testator: *Sinclair's Will*, 5 OS 291; *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820; *Cole v. McClure*, 88 OS 1, 102 NE 264; *Gibson v. Gibson*, 6 CC(NS) 269, 15 CD 698 [affirming *In re Gibson*, 14 OD(NP) 331, which affirmed 1 NP(NS) 552, 49 Bull 58, and was affirmed, without report, *Gibson v. Gibson*, 72 OS 677]; *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

36. The fact that a lost will was made in conformity to a contract between the testator and the proponent is not ground for the admission of such will to probate: *In re Fox*, 84 App 135, 39 OO 165, 85 NE(2d) 585.

37. General Code § 11421-2 [RC § 2315.22], providing for separate findings of fact and conclusions of law, has no application to a proceeding in the probate court to probate a lost will: *In re Hughes*, 84 App 275, 39 OO 404, 85 NE(2d) 583.

38. Contest of copy of lost will admitted to probate: *Carr v. Howard*, 17 OApp(2d) 233, 46 OO(2d) 360, 246 NE(2d) 563 (reversing 15 OMisc 5, 42 OO(2d) 174, 237 NE(2d) 180).

39. Executed and attested carbon copies of a will cannot be admitted to probate in lieu of the original last will and testament: *In re Steel*, 8 OMisc 133, 37 OO(2d) 70, 219 NE(2d) 237 (PC).

§ 2107.27 Notice of application; testimony; probate. (GC §§ 10504-36, 10504-37, 10504-38, 10504-40)

When application is made to the probate court to admit to probate a will which has been lost, spoliated, or destroyed, the party seeking to prove such will shall give a written notice to the surviving spouse and to the next of kin of the testator known to be residents of the state, and to all persons, known to reside in the county where the testator resided at the time of his death, whose interest it may be to resist the probate. The party seeking to prove such will shall give the written notice not less than five days before the day on which such proof is to be made, or give notice, by publication in a newspaper printed in the county, not less than thirty days before the day set for hearing such proof.

In such cases, the court shall cause the witnesses to such will and other witnesses whom a person interested in having such will admitted to probate may desire to have appear, to come before the court. Such witnesses shall be examined by the probate judge and their

testimony reduced to writing and filed by him in his court. When witnesses reside out of its jurisdiction, or reside within such jurisdiction but are infirm or unable to attend, the court may order their testimony to be taken and reduced to writing by some competent person, which testimony shall be filed in such court.

If upon such proof, the court is satisfied that such last will and testament was executed in the manner provided by the law in force at the time of its execution, that its contents are substantially proved, that it was unrevoked at the death of the testator, and has been lost, spoliated, or destroyed since his death or since he became incapable of making a will by reason of insanity, or before the death of the testator if his lack of knowledge of such loss, spoliation, or destruction can be proved by clear and convincing testimony, such court shall find and establish the contents of such will as near as can be ascertained and cause them and the testimony taken in the case to be recorded in such court.

The contents of such a last will and testament shall be as effectual for all purposes, as if the original will has been admitted to probate and record.

HISTORY: GC §§ 10504-36, 10504-37, 10504-38, 10504-40; 114 v 320 (352, 353). EFF 10-1-53. See former GC §§ 10544, 10545, 10546, 10548.

Cross-References to Related Sections

Computation of time, RC § 1.14.

Publication, RC § 7.10 et seq.

Requisites of a lost or spoliated will, RC § 2107.26.

See RC § 2107.28 which refers to this section.

Forms

1 A&H Probate FORM 2107.27a et seq.

1 A&H Probate FORM 2107.26a et seq: Spoliated will, admission to probate.

Outline of Procedure

Probate of lost, spoliated or destroyed wills. *Leyshon* No. 92; *A&H* No. 71

Research Aids

Burden of proof; presumption of revocation:

O-Jur2d: Wills §§ 290, 291

Am-Jur2d: Wills §§ 1075, 1076

Effect of probate of lost or spoliated will:

O-Jur2d: Wills § 301

Notice of application:

O-Jur2d: Wills § 288

Am-Jur2d: Wills § 1073

Witnesses and testimony:

O-Jur2d: Wills § 289

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See also case notes under RC § 2107.26.

Notice

1. The notice herein provided for does not make the parties served therewith parties to the proceeding: *Estate of Jones*, 2 NP 194, 2 OD 404.

2. It is error to establish a spoliated will without notice: *Baugarth v. Miller*, 26 OS 541 [affirming *Miller v. Bengart*, 1 Bull 126].

3. Under former GC § 10544 (see now RC § 2107.27) it was held that where no person interested in resisting the probate of a lost, spoliated or destroyed will resides within the county in which application is made to admit the same to probate, notice must be given by publication, in the manner and for the time required by the statute: *Baugarth v. Miller*, 26 OS 541 [affirming *Miller v. Bengart*, 1 Bull 126].

3.1 When an application is made to the probate court to admit a lost will to probate, written notice must be given to the administrator of the estate who is a resident of the county and known to the applicant: *In re Simon*, 20 OO(2d) 59, 86 OLA 378, 177 NE(2d) 92 (PC).

Presumptions

8. When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the presumption is that testator destroyed it with intent to revoke it: *In re Simon*, 378, 86 OLA 20 OO(2d) 59, 380, 177 NE(2d) 92. *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820; *Cole v. McClure*, 88 OS 1, 102 NE 264; *Gibson v. Gibson*, 6 CC(NS) 269, 15 CD 698 [affirming *In re Gibson*, 14 OD(NP) 331, which affirmed 1 NP(NS) 552, 49 Bull 58, and affirmed, without report, *Gibson v. Gibson*, 72 OS 677]; *In re Blymeyer's Will*, 7 NP 591, 5 OD 399; *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

9. Declarations of testator that he destroyed his will or meant to destroy it are admissible to strengthen the presumption that a will in testator's custody, and missing on his death, was revoked by him: *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820.

10. The probate of a copy is prima facie evidence of the contents and due execution of the will, but it is only prima facie and all the matters essential to the probate of a copy are as rebuttable as the

numerous other matters that may be an issue in the contest of a will where the probate of a copy is not involved: *Chenoweth v. Cary*, 17 OO 76 (App) [appeal dismissed, 136 OS 123].

10.1 A will, which was at all times in the exclusive possession of the decedent and which was not found at the time of his death, presumptively was revoked and a proponent had to prove that it was not revoked by clear and convincing evidence: *In re Simon*, 20 OO(2d) 59, 177 NE(2d) 92 (PC).

Burden of proof and sufficiency of evidence

15. The burden of proof as to the existence of the will after testator's death is on the proponents: *Gibson v. Gibson*, 6 CC(NS) 269, 15 CD 698 [affirming *In re Gibson*, 14 OD(NP) 331, which affirmed 1 NP(NS) 552, 49 Bull 58, and affirmed, without report, *Gibson v. Gibson*, 72 OS 677].

17. Where a will has been lost or destroyed before the death of the testator, the law presumes that he revoked it, and where he became insane after he made the will, the evidence to overcome this presumption must be certain, satisfactory and conclusive that it was unrevoked and in existence after he became "incapable by reason of insanity to make a will": *Cole v. McClure*, 88 OS 1, 102 NE 264.

18. General Code § 10504-38 (RC § 2107.27) seeks to surround the probate of copies with special precautionary provisions. The court must be satisfied that the will was executed in the mode provided by law; that its contents are substantially proved; that it was unrevoked at the death of the testator and has been destroyed since his death or before his death if his lack of knowledge of such destruction can be proved by clear and convincing testimony: *Chenoweth v. Cary*, 17 OO 76 (App) [appeal dismissed, 136 OS 123].

19. A higher degree of proof than the mere preponderance of the evidence is required under GC § 10504-38 (RC § 2107.27), in order to warrant the court to probate a claimed lost or spoliated will: *In re Ayres*, 36 OLA 267, 43 NE(2d) 918 (App) [affirming 19 OO 465 (PC)].

20. The contents of a will, which has been destroyed together with the record thereof, cannot be established by the testimony of a single witness who speaks entirely from memory after an interval of more than thirty years since he saw the will and heard it read: *Consumers Brew. Co. v. Hardway*, 2 App 171, 17 CC(NS) 475, 26 CD 443 [affirmed on motion of defendant, *Hardway v. Consumers Brew. Co.*, 13 OLR 31].

21. The contents of a lost or spoliated will may be established by the testimony of one witness: *Egbert v. Egbert*, 10 App 432, 29 OCA 584 [motion to certify record overruled, 16 OLR 507, 64 Bull 61].

22. The burden of proof is on the proponents. When subscribing witnesses are dead, secondary evidence may be introduced, and a copy of a will made shortly after testator's death, by his attorney, is admissible to prove the contents: *In re Estate of Larence*, 5 NP 20, 7 OD 246.

23. To establish the contents of a spoliated will upon declarations alone of the testator, without other clear and convincing evidence as to the precise provisions of the will, would be an unsafe rule of evidence: *In re Thompson*, 16 NP(NS) 121, 59 Bull 344.

24. A spoliated will cannot be admitted to probate, notwithstanding declarations which sufficiently establish its existence at the time of the death of the testator, if it is impossible to determine its contents by clear and convincing evidence as to its provisions: *In re Thompson*, 16 NP(NS) 121, 59 Bull 344.

—Testimony of witnesses

29. Testator's declarations that he has destroyed, or intended to destroy, his will, are admissible to corroborate the presumption, from its nonappearance, that he had destroyed it: *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820.

30. Under GC § 10504-37 (RC § 2107.27) it is within the discretion of the probate court to permit persons opposing the probate of a lost will to cross-examine the witnesses offered by the proponents: *In re Ayres*, 19 OO 465, 33 OLA 1 (PC) [affirmed 36 OLA 267, 43 NE(2d) 918 (App)].

31. Declarations of the testator are not of themselves alone sufficient to establish the execution of a lost or destroyed will, but are admissible in evidence and have great weight when corroborated by other evidence: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

32. On probate of a spoliated will, although those adverse to the probate cannot offer evidence, yet they may be allowed to question witnesses, not as a cross-examination to controvert evidence, but to elicit all facts and circumstances bearing on the execution or revocation of the will: *In re Jones*, 2 NP 190, 2 OD 409 [for other opinions in this case, see 2 NP 194, 2 OD 404; 2 NP 209, 2 OD 409].

33. Merely being a legatee does not make a person so interested as that he may call witnesses: *In re Jones*, 2 NP 190, 2 OD 409 [for other opinions in this case, see 2 NP 194, 2 OD 409; 2 NP 209, 2 OD 409].

34. But no witness in resistance to the probate will be heard, and if a cross-examination by a legatee shows that he is in fact hostile to the probate he will not be allowed to call witnesses either before or after he became a party: *In re Jones*, 2 NP 194, 2 OD 409 [for other opinions in same case, see 2 NP 190, 2 OD 409; 2 NP 209, 2 OD 409].

Procedure

39. Probate of a lost or spoliated will can be revoked in no other manner than that prescribed with respect to wills not lost or spoliated: *Hollrah v. Lasance*, 63 OS 58, 57 NE 964 [affirming 16 CC 187, 8 CD 788].

40. The order admitting a lost will to probate is prima facie evidence of the due attestation, execution and validity of the will; and in proceedings to set aside such probate, plaintiff, to obtain a verdict, must prove by a preponderance of the evidence either want of mental capacity or undue influence, or that the alleged paper writing was not the will of testatrix: *Bloor v. Platt*, 78 OS 46, 84 NE 604.

41. As to findings of the jury and charge of the court in proceedings to set aside the probate of a lost will, see *Bloor v. Platt*, 78 OS 46, 84 N.E. 604.

Effect of will so established

46. The record of a spoliated will, duly found, admitted to probate, and recorded, is prima facie evidence in a future proceeding to contest the validity of such will, not alone of its due attestation and execution, but also of its contents: *Banning v. Banning*, 12 OS 437.

47. The establishment of a spoliated will is prima facie evidence of the will on contest, and the burden is on the contestants to invalidate it: *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820; *Hutson v. Hartley*, 72 OS 262, 74 NE 197.

48. An order of the probate court admitting a paper to probate as a last will and testament is not reviewable on petition in error, though an order re-

fusing to admit such paper to probate is reviewable: *Hollrah v. Lasance*, 63 OS 58, 57 NE 964 [affirming 16 CC 187, 8 CD 788].

49. An order overruling an application to find and establish the contents of a lost will is appealable. An order of the common pleas court finding and establishing the contents of a lost will is not reviewable upon petition in error: *Roth v. Siefert*, 77 OS 417, 83 NE 611.

50. When no evidence is offered on the trial to show when a will was lost or destroyed, whether before or after the death of the testator, the order of probate admitting the will to record is sufficient evidence of the existence of the will after such death to justify a verdict sustaining the will: *Egbert v. Egbert*, 10 App 432, 29 OCA 584 [motion to certify record overruled, 16 OLR 507, 64 Bull 61].

§ 2107.28 Will lost, spoliated, or destroyed after admission to probate. (GC § 10504-39)

If a will is lost, spoliated, destroyed, mislaid, or stolen, after it has been admitted to probate but before it has been recorded, upon notice being given, as provided by section 2107.27 of the Revised Code, to persons whose interest it may be to resist the probate and record of such will, the probate court may hear testimony, and if satisfied that the contents of the will have been substantially proved, the court may record such will as thus proven, which record shall have all the effect of a record of the original will.

HISTORY: GC § 10504-39; 114 v 320 (353). Eff 10-1-53. Analogous to former GC § 10547.

Research Aids

O-Jur2d: Wills § 302
Am-Jur2d: Wills § 1079

[NEW RECORD OF PROBATE]

§ 2107.29 Record of will destroyed. (GC § 10504-41)

When the record of a will is destroyed, a copy of such will or a copy of such will and its probate may be recorded by the probate court if it appears to the court's satisfaction that such record has been destroyed and if it appears, by reason of a certificate signed and sealed by the probate judge, or by the clerk of the court of common pleas, that such copy is a true copy of the original will or a true copy of the original will and its probate.

HISTORY: GC § 10504-41; 114 v 320 (353). Eff 10-1-53.

Comment

This section is also derived from GC § 10504-43.

Cross-References to Related Sections

See RC § 2107.31 which refers to this section.
See RC § 2107.32 which refers to RC § 2107.29 et seq.

Comparative Legislation

New record of probate:
Ky.—KRS, § 422.250
N.Y.—SCPA, § 1407

Forms

1 A&H Probate FORM 2107.29a et seq.

Outline of Procedure

New record of probate. Leyshon No. 96; A&H No. 75

Research Aids

O-Jur2d: Wills § 320

§ 2107.30 Original will may again be admitted to probate. (GC § 10504-42)

When the record of a will has been destroyed, the original will may again be admitted to probate and record.

HISTORY: GC § 10504-42; 114 v 320 (353). **EFF** 10-1-53.
Analogous to former GC § 10550.

Cross-References to Related Sections

See RC § 2107.31 which refers to this section.

Outline of Procedure

New record of probate. Leyshon No. 96; A&H No. 75

Research Aids

O-Jur2d: Wills § 321

§ 2107.31 Limitations as to contests. (GC § 10504-44)

Sections 2107.29 and 2107.30 of the Revised Code do not affect the proceedings or extend the time for contesting the validity of any will or for asserting rights thereunder. The record provided for in such sections must show that the original record was destroyed, and the time, as near as may be, when the will was originally admitted to probate and record.

HISTORY: GC § 10504-44; 114 v 320 (354). **EFF** 10-1-53.
Analogous to former GC § 10552.

Research Aids

New record:
O-Jur2d: Wills § 320
Time limitation for contests:
O-Jur2d: Wills § 344
Am-Jur2d: Wills § 1074

§ 2107.32 Notice. (GC § 10504-45)

Every probate judge who admits a will or copy of a will to record under sections 2107.29 to 2107.31, inclusive, of the Revised Code, immediately thereafter shall give notice for three consecutive weeks in two weekly newspapers of his county if two are published therein, or if not, in one newspaper of general circulation in the county, stating the name of the person the record of whose will has been destroyed and the day when such record was supplied.

All persons interested in the record, at any time within five years from the making of such record, may come into the probate court and contest the question whether the record thus supplied is the same as the record destroyed.

HISTORY: GC § 10504-45; 114 v 320 (354). **EFF** 10-1-53.
Analogous to former GC § 10553.

Forms

1 A&H Probate FORM 2107.32a et seq.

Research Aids

O-Jur2d: Wills §§ 322, 323

[REVOCATION]

§ 2107.33 Revocation of will.

A will shall be revoked by the testator by tearing, canceling, obliterating, or destroying it with the intention of revoking it, or by some person in the testator's presence, or by the testator's express written direction, or by some other written will or codicil, executed as prescribed by sections 2107.01 to 2107.62 of the Revised Code, or by some other writing that is signed, attested, and subscribed in the manner provided by those sections.

If after executing a will, a testator is divorced, obtains a dissolution of marriage, or has his marriage annulled, or upon actual separation from his spouse, enters into a separation agreement whereby the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, any disposition or appointment of property made by the will to the former spouse, any provision in the will conferring a general or special power of appointment on the former spouse, and any nomination in the will of the former spouse as executor, trustee, or guardian, shall be revoked unless the will expressly provides otherwise.

Property prevented from passing to a former spouse because of revocation by this section shall pass as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse shall be interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they shall be deemed to be revived by testator's remarriage with the former spouse or upon the termination of a separation agreement executed by them.

A bond, agreement, or covenant made by a testator, for a valuable consideration, to convey property previously devised or bequeathed in a will, does not revoke the devise or bequest. The property passes by the devise or bequest, subject to the remedies on the bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, that might be had by law against the heirs of the testator, or his next of kin, if the property had descended to them.

HISTORY: GC §§ 10504-47, 10504-48; 114 v 320 (354); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10555, 10556.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.33 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Revocation by change of estate, RC § 2107.36.

Revocation of revoking will, RC § 2107.38.

Comparative Legislation

Revocation:

- Cal.—Probate Code, § 70
- Ill.—Rev Stat, ch 3, § 4-7
- Ind.—Burns' Stat, § 29-1-5-6
- Ky.—KRS, § 394.080
- Mich.—MCLA, § 702.9
- N.Y.—EPTL, § 3-4.1
- Pa.—Purdon's Stat, Tit. 20, § 2505
- Fla.—FSA, § 732.505

Research Aids

Agreement to convey property previously devised:

O-Jur2d: Wills § 186

Animus revocandi:

O-Jur2d: Wills § 174

Am-Jur2d: Wills § 500

Revocation:

In general:

O-Jur2d: Wills §§ 173-180

Am-Jur2d: Wills §§ 498-509

By physical act:

O-Jur2d: Wills §§ 190-195

Am-Jur2d: Wills §§ 540-562

By subsequent instrument:

O-Jur2d: Wills §§ 181-189

Am-Jur2d: Wills §§ 510-539

By operation of law:

O-Jur2d: Wills §§ 196-211

Am-Jur2d: Wills §§ 570-596

ALR

Admissibility of testator's declarations on issue of revocation of will, in his possession at time of his death, by mutilation, alteration, or cancellation. 28 ALR3d 994.

Revocation of will as affecting codicil and vice versa. 7 ALR3d 1143.

Revocation of will by nontestamentary writing. 22 ALR3d 1346.

Testator's failure to make new will, following loss of original will by fire, theft, or similar casualty, as constituting revocation of original will. 61 ALR3d 958.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed. 7 ALR2d 544.

Exercise of power to make disposition of testator's property contrary to provisions of will as revocation of will. 108 ALR 1098.

Implied revocation of will by later will. 59 ALR 2d 11.

Destruction or cancellation of one copy of will, executed in duplicate, as revocation of other copy. 17 ALR2d 805.

Power conferred upon third person to change will as attempted revocation. 108 ALR 1098.

Codicil as reviving revoked will or codicil. 33 ALR2d 922.

Revocation as affected by invalidity of some or all of the dispositive provisions of later will. 28 ALR2d 526.

Validity of oral promise or agreement not to revoke will. 29 ALR2d 1229.

Implied revocation of will by later will or codicil. 59 ALR2d 11.

Right to take under spouse's will as affected by agreement or property settlement. 53 ALR2d 475.

Law Reviews

Presumptive revocation of lost will; effect on codicil. (Case note.) 16 CinLRev 346.

Implied revocation by divorce coupled with a settlement of property rights. (Case note.) 4 ClevBJ (No. 3) 12.

Implied revocation of wills by divorce. (Editorial note.) 5 WestResLRev 394.

Wills; implied revocation. (Case note.) 13 OSLJ 423.

Wills—statutory interpretation—revocation by operation of law—divorce and property settlement as effecting implied revocation of a will. (Case note.) 23 CinLRev 277.

Wills—revocation by divorce. (Case note.) 15 OSLJ 395.

Drafting of the "simple" will. Ellis V. Rippner. 8 ClevMarLRev 320.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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Capacity to revoke

1. Capacity to revoke a will must be equal to the capacity to make a will no more complicated than a descent if intestate: *In re Jones*, 2 NP 209, 2 OD 409 [for other opinions in same case, see 2 NP 190, 2 OD 409; 2 NP 194, 2 OD 404].

Statutory methods

2. The methods of revoking a will provided in RC § 2107.33 are exclusive. An unsigned statement in the handwriting of a testatrix on the margin of her will that she intends to revoke a bequest contained therein, which writing does not touch that in the will itself, is not a cancellation of the will, but is a mere writing without the formalities required by statute for the making or revoking of a will: *Kronauge v. Stoecklein*, 33 OApp(2d) 229, 62 OO(2d) 321, 293 NE(2d) 320 (1972).

3. It is within the jurisdiction of the probate court to determine what passes under a will and what application of other circumstances and conditions affect or control the passing of interests under the will: *Skorapa v. Skorapa*, 17 OO(2d) 97, 177 NE (2d) 310 (PC).

Tearing, canceling, etc.

7. Intent to revoke without an act of tearing, etc., is inoperative: *Kent v. Mahaffey*, 10 OS 204.

8. The sign, or symbol, of the attempt to tear, obliterate, cancel or destroy the will must be apparent upon the instrument purporting to be the will: *Kent v. Mahaffey*, 10 OS 204.

9. There can be no partial revocation by tearing, canceling, etc.: *Giffin v. Brooks*, 48 OS 211, 31 NE 743 [affirming 3 CC 110, 2 CD 64]; *Coghlin v. Coghlin*, 79 OS 71, 85 NE 1053 [affirming 9 CC(NS) 385, 19 CD 251]; *Porterfield v. Porterfield*, 4 NP(NS) 654, 17 OD 448.

9.1 This section sets out the ways in which a will may be legally revoked. An "agreement" whereby stepchildren waived any and all right which they might have had to share in the estate of their stepmother, is not one of those ways: *McFayden v. Hanisch*, 169 OS 471, 8 OO(2d) 477, 160 NE(2d) 272.

10. Pencil marks drawn through a will presented for probate, not on the will when executed, there being evidence of statements that testatrix intended to change her will, are not sufficient to effectuate a cancellation by act to the instrument under GC § 10504-7 (RC § 2107.33): *Cummings v. Nichols*, 6 OO 414 (App).

11. Drawing ink lines through a clause after execution, with intent to revoke the clause, but not the whole will, does not revoke the clause. If all the words of such clause remain legible, the whole will should be admitted to probate, including the erased clause: *Giffin v. Brooks*, 48 OS 211, 31 NE 743 [affirming 3 CC 110, 2 CD 64]; *Porterfield v. Porterfield*, 4 NP(NS) 654, 17 OD 448.

12. Intent to revoke must concur with the physical act of destruction or partial destruction. Tearing in pieces a part of the will with the intent to remove the torn portions only therefrom does not revoke the will, where such pieces are afterwards recovered and put together, and the sheet in legible condition is placed in the will without the knowledge of the testator: *Coghlin v. Coghlin*, 79 OS 71, 85 NE 1053 [affirming 9 CC(NS) 385, 19 CD 251].

13. A written direction to the custodian of a will to "dispose of" it, is not a revocation if such custodian does not receive such instruction, and such will is not destroyed, at least if testator knows that

it remains in existence: *Lesnett v. Hunter*, 15 App 388, 32 OCA 298.

14. Revocation of a will within the provisions of GC § 10504-47 (RC § 2107.33) may be accomplished by tearing, however slight, if done with the intention of revoking the will: *In re Eliker*, 32 OLA 465.

15. Tearing with intent to revoke is not spoliation: *Jones' Will*, 2 NP 209, 2 OD 409.

16. Lines drawn through the clause of a will, by express direction of the testator, for the purpose of canceling such clause, and done before the same is signed, render such clause ineffective, and it is no part of the will of the testator: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

Other will, etc., in writing

21. Written will cannot be revoked by subsequent nuncupative will: *McCune v. House*, 8 O 144.

22. Codicil does not revoke former will except to extent that its provisions are inconsistent with will, unless intent to revoke is expressed: *Foye v. Foye*, 35 App 283, 172 NE 386.

23. As a will and codicil are to be taken and construed together as parts of the same instrument, and the intent of the testator gathered from the whole, a codicil to a will will not revoke the same any further than is clearly expressed or necessarily to be inferred from it: *Collier v. Collier*, 3 OS 369.

24. The making of a subsequent will, when the terms thereof are inconsistent with an earlier will, operates as a revocation of the earlier will without specific words of revocation, by virtue of GC § 10504-47 (RC § 2107.33), although such subsequent will is not in existence and could not be probated as a "lost, spoliated, or destroyed" will under GC § 10504-35 (RC § 2107.26): *Hennessy v. Volz*, 59 App 1, 12 OO 335, 16 NE(2d) 1019.

25. A codicil, by the terms of which specified property is given in fee simple and absolutely to a devisee named, revokes that portion of the will whereby the same property is given to the same devisee as a life estate: *Moller v. Wareham*, 30 NP(NS) 315.

26. Where the language of a codicil is, "Whereas in said will the one-third equal share in said property was devised to my son N without the intervention of trusteeship, and whereas since the execution thereof good and sufficient reasons satisfy me that the same is required in his case as well as in that of his sister, now I do therefore revoke the said devise and bequest to him and do transfer the same to his wife and children instead," it was held that the codicil did not enlarge the trusteeship provided for the sister, but transferred the devise from N to his wife and children: *Wade v. Bartlett*, 16 CC(NS) 391, 31 CD 565.

27. It is said that if a second will purports to revoke an earlier will it does not operate as a revocation until it takes effect as a will at the death of the testator: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

28. Will is wholly revoked by execution of second will only if second will contains express revocation clause, or is utterly inconsistent with provisions of first will: *Paully v. Crooks*, 41 App 1, 179 NE 364.

29. Second will, if inconsistent in part with provisions of first will, revokes first will to extent of inconsistency: *Paully v. Crooks*, 41 App 1, 179 NE 364.

30. A provision in a will "hereby revoking all former wills by me made," is a sufficient compliance with the requirements of GC § 10504-47 (RC § 2107-33) for revocation of a former will: *Westfall v. Notman*, 18 OLA 407.

31. Indorsements upon a will, which are not witnessed as provided by law, will not work a revocation of any provisions in the will: *Porterfield v. Porterfield*, 4 NP(NS) 654, 17 OD 448.

32. A codicil operates as a revocation of a will only as far as is absolutely necessary to give effect to the provisions of such codicil: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

33. Where the contest of a will is based upon the claim that the will which has been admitted to probate is not the last will of the decedent, it is incumbent on the plaintiffs to show that the will in question was annulled and revoked by a later valid will, either by an express statement to that effect in the later will, or by reason of the fact that the provisions of the later will are wholly inconsistent with those of the original will: *Crane v. Tunkey*, 11 OLR 454, 58 Bull 316.

Intent to revoke

34. Under GC § 10504-47 (RC § 2107.33), when there is an obliteration of a part of a will the intention of the testator accompanying the act must govern, and if a revocation of the entire will was not intended there is no revocation: *Kerfel v. Trimbach*, 69 OLA 419, 125 NE(2d) 753 (App).

Change in circumstances

38. A will was executed, making a bequest to an intended wife as such. She afterwards married the testator and then abandoned him, and subsequently obtained a divorce. Held: This did not constitute a revocation: *Charlton v. Miller*, 27 OS 298.

39. Where the evidence shows that a testatrix made disposition of her entire estate by a codicil to her will in favor of a beneficiary to whom she was married more than a year later, that such codicil contained no mention of a prospective marital relationship between the testatrix and the beneficiary as the motivation for such disposition, that subsequently there was a written property settlement agreement between the parties followed by divorce, in which agreement there was no reference to any testamentary disposition, and that the testatrix lived for several months thereafter without changing or expressly revoking such testamentary disposition of her property, a determination and adjudication by the court of appeals that the facts and circumstances presented are insufficient to constitute a revocation implied by law, under the latter part of GC § 10504-47 (RC § 2107.33), will not be disturbed by this court on appeal: *Codner v. Caldwell*, 156 OS 197, 46 OO 89, 101 NE(2d) 901, discussed in 13 OSLJ 423.

39.1 Under the circumstances of a divorce decree coupled with a full settlement of property rights, a court is warranted in finding that there is, as to legacies and devises to the divorced spouse, an implied revocation of a will executed during the marriage: *Yunker v. Johnson*, 160 OS 409, 52 OO 320, 116 NE(2d) 715.

40. While an instrument in writing, such as a deed, may have the effect, under GC §§ 10504-47 and 10504-52 (RC §§ 2107.33 and 2107.36), of revoking a devise in a will, it does not thereby become a will and subject to the rules of construction applicable to wills but retains its original character, and, if a deed, is subject to the rules of construction applicable to deeds: *Gordon v. Bartlett*, 62 App 295, 16 OO 13, 23 NE(2d) 964.

42. Divorce and settlement of property rights revokes prior will of one spouse only so far as it is in favor of other spouse: *Pardee v. Grubiss*, 34 App 474, 171 NE 375.

43. A separation agreement in which the right of each party to dispose of his or her property by will, without interference by the other, is expressly declared, and both parties waive every conceivable right based on the marital relation and as heir, surviving spouse, or in any other capacity, does not in fact or in law effect a revocation of the wife's will made prior to the divorce

action: *Sutton v. Bethell*, 97 App 52, 51 OO 293, 116 NE(2d) 594.

43.1 Where it is shown that a testator obtained a divorce and executed a property settlement pursuant thereto, a court may validly conclude that by such acts he intended, within the provisions of RC § 2107.33, to revoke his previously made last will and testament devising all of his property to his spouse: *In re Estate of McQuay*, 44 OApp(2d) 74, 73 OO(2d) 63, 335 NE(2d) 743 (1975).

43.2 A divorce decree in effect restoring to the parties their separate property rights, but not coupled with a voluntary separation agreement contemplating a full settlement of their property rights, does not warrant a court finding an implied revocation of a will executed during marriage: *Lang v. Leiter*, 103 App 119, 3 OO(2d) 184, 144 NE(2d) 332.

43.3 Where a divorce is coupled with settlement of property rights, there is an implied revocation of a prior will of one spouse in favor of the divorced spouse, under this section, but only so far as said will makes bequest or devise to divorced spouse: *Skorapa v. Skorapa*, 17 OO(2d) 97, 177 NE(2d) 310 (PC).

44. A divorce, coupled with a full property settlement, is such a subsequent change in testator's circumstances that any legacy or bequest in a will executed during marriage for benefit of divorced wife is impliedly revoked, but divorce alone, without a separation agreement executed during coverture, does not impliedly revoke a devise or bequest for either one of the divorced parties: *Davis v. Davis*, 24 OMisc 17, 51 OO(2d) 388, 258 NE(2d) 277 (CP) [see also *In re Davis*, 22 OMisc 14, 50 OO(2d) 37, 256 NE(2d) 281].

Partial revocation ineffective

45. There can be no partial revocation of a will: *Kerfel v. Trimbach*, 69 OLA 419, 125 NE(2d) 753 (App).

45.1 Where the original will unquestionably contained six legatees on page one thereof and it was apparent that someone had deleted the last two bequests, the act of cutting or tearing a portion of the will done at some time subsequent to the execution of two codicils ratifying and confirming the original will and prior to the testator's death, did not constitute an intent to revoke the will in its entirety: *In re Downie*, 35 OO(2d) 31, 6 OMisc 36, 213 NE(2d) 833 (PC).

Procedure

47. Revised Code § 2741.04, providing that a jury shall try the issues in a will contest, does not preclude a directed verdict or a summary judgment, when appropriate: *Kronauge v. Stoecklein*, 33 OApp(2d) 229, 62 OO(2d) 321, 293 NE(2d) 320 (1972).

48. If a will is revoked by the testator himself, under this section, or by operation of law, under former GC § 10561 (see now RC § 2107.34), and is, nevertheless, admitted to probate and record, any person interested in having it set aside as invalid may contest its validity: *Myers v. Barrow*, 3 CC 91, 2 CD 52.

Evidence, presumptions, etc.

53. When a will, once known to exist, and to have been in the custody of the testator, cannot be found after his decease, the presumption is that testator destroyed it with intent to revoke it: *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820; *Cole v. McClure*, 88 OS 1, 102 NE 264; *Gibson v. Gibson*, 6 CC(NS) 269, 15 CD 698 [affirming *In re Gibson*, 14 OD(NP) 331, which affirmed 1 NP(NS) 552, 49 Bull 58, and affirmed, without report, *Gibson v. Gibson*,

72 OS 677]; In re Blymeyer's Will, 7 NP 591, 5 OD 399; In re Murray, 20 NP(NS) 305, 63 Bull 81.

54. Declarations of testator that he destroyed his will or meant to destroy it are admissible to strengthen the presumption that a will in testator's custody, and missing on his death, was revoked by him: Behrens v. Behrens, 47 OS 323, 25 NE 209, 21 AmSt 820.

55. Where a will is proved to have been once executed and the testator retained custody of it or had ready access to it, and it cannot be found after his death, a legal presumption is raised that the will was destroyed by testator with intention of revoking it: Chenoweth v. Cary, 17 OO 76 (App) [appeal dismissed, 136 OS 123].

56. Where a revoking instrument is not introduced in evidence and the only evidence introduced is to the effect that the testator stated that he intended to execute such an instrument, the prior will is not revoked: Dyce v. Koch, 79 OLA 596, 157 NE(2d) 130.

57. The fact that a testator has been adjudged insane and that a will in his custody has been destroyed does not raise a presumption that such destruction was accomplished by him while he was insane if there was a substantial period of time both before and after his insanity during which he might have destroyed such will: In re Murray, 20 NP(NS) 305, 63 Bull 81.

Other questions

61. An unrevoked and unamended, revocable and amendable living trust, the terms of which have been incorporated in a will by reference, does not invalidate a testamentary devise to the trustee of such trust to be administered according to the terms and conditions of the trust and is not repugnant to the provisions of GC § 10504-47 (RC § 2107.33): Bolles v. Toledo Trust Co., 144 OS 195, 29 OO 376, 58 NE(2d) 381 [contra, Smyth v. Cleveland Trust Co., 172 OS 489, 18 OO(2d) 42, 179 NE(2d) 60].

62. The provisions of GC § 10504-47 (RC § 2107.-33) apply exclusively to cases in which the estate or interest of the testator in property previously devised or bequeathed by him is altered, but not wholly divested: Gordon v. Bartlett, 62 App 295, 16 OO 13, 23 NE(2d) 964.

63. The making of a change in a will, which there is reason to believe was done for reasons satisfactory to the testator, is not, where standing alone, a sufficient reason for setting the instrument aside on the ground of undue influence, notwithstanding the will as so changed did not, in the opinion of some, make a fair and reasonable distribution of the estate of the testator: Gregg v. Moore, 14 CC(NS) 570, 23 CD 534.

64. A beneficiary under a will cannot maintain an action for its wrongful destruction during the testator's lifetime, since he has no legal interest in legacies given by will during the lifetime of the testator: Van Develde v. Van Develde, 22 CC(NS) 277, 33 CD 566.

65. This section prevents the application of the doctrine of equitable conversion to devises of real estate which is under covenant of some character at the devisor's death: Sells v. Needles, 34 OO 186, 69 NE(2d) 767 (PC).

§ 2107.34 Afterborn or pretermitted heirs.

If, after making a last will and testament, a testator has a child born alive, or adopts a child, or designates an heir in the manner provided by section 2105.15 of the Revised Code, or if a child or designated heir who is absent and re-

ported to be dead proves to be alive, and no provision has been made in such will or by settlement for such pretermitted child or heir, or for the issue thereof, the will shall not be revoked; but unless it appears by such will that it was the intention of the testator to disinherit such pretermitted child or heir, the devises and legacies granted by such will, except those to a surviving spouse, shall be abated proportionately, or in such other manner as is necessary to give effect to the intention of the testator as shown by the will, so that such pretermitted child or heir will receive a share equal to that which such person would have been entitled to receive out of the estate if such testator had died intestate with no surviving spouse, owning only that portion of his estate not devised or bequeathed to or for the use and benefit of a surviving spouse. If such child or heir dies prior to the death of the testator, the issue of such deceased child or heir shall receive the share the parent would have received if living.

If such pretermitted child or heir supposed to be dead at the time of executing the will has lineal descendants, provision for whom is made by the testator, the other legatees and devisees need not contribute, but such pretermitted child or heir shall take the provision made for his lineal descendants or such part of it as, in the opinion of the probate judge, may be equitable. In settling the claim of a pretermitted child or heir, any portion of the testator's estate received by a party interested, by way of advancement, is a portion of the estate and shall be charged to the party who has received it.

Though measured by sections 2105.01 to 2105.21, inclusive, of the Revised Code, the share taken by a pretermitted child or heir shall be considered as a testate succession. This section does not prejudice the right of any fiduciary to act under any power given by the will, nor shall the title of innocent purchasers for value of any of the property of the testator's estate be affected by any right given by this section to a pretermitted child or heir.

HISTORY: GC § 10504-49; 114 v 320 (355); 129 v 7 (8), § 1. Eff 10-5-61.

See former GC §§ 10561, 10563, 10565.

Cross-References to Related Sections

See RC § 2107.15 which refers to this section.

Comparative Legislation

Birth of child after will is made:

Cal.—Probate Code, § 123

Ill.—Rev Stat, ch 3, § 4-10

Ind.—Burns' Stat, § 29-1-3-8

Ky.—KRS, § 394.380

Mich.—MCLA, § 702.12

N.Y.—EPTL, § 5-3.4

Pa.—Purdon's Stat, Tit. 20, § 2507

Fla.—FSA, § 732.302

Forms

1 A&H Probate FORM 2107.34a et seq.

Research Aids

Abatement of legacies to pay share:

O-Jur2d: Wills §§ 753, 885

Advancements:

O-Jur2d: Wills § 892; Advancements § 11 et seq

Am-Jur2d: Advancements § 54 et seq

Intent to disinherit:

O-Jur2d: Wills § 749

Am-Jur2d: Wills § 644 et seq

Pretermitted heirs generally:

O-Jur2d: Wills § 744 et seq

Am-Jur2d: Wills § 642 et seq

Surviving spouse's testate share:

O-Jur2d: Wills § 747

Am-Jur2d: Wills § 652

ALR

Adoption of child as revoking will. 24 ALR2d 1085.

Will charging distributee's share with advancement to or debt owing by him as invoking doctrine of hotchpot. 165 ALR 899.

Nature of, and remedies for enforcement of, interest which after-born child takes by virtue of statute where parent leaves will. 123 ALR 1073.

Illegitimate child as within contemplation of statute regarding rights of child pretermitted by will. 142 ALR 1447.

What, other than express disinheritance or bequest, avoids application of statute for benefit of pretermitted or after-born children. 170 ALR 1317.

Adopted child as within contemplation of statute regarding rights of children pretermitted by will. 105 ALR 1176.

When will deemed to have provided for, or contemplated, contingency of future adoption of children, or other event, which by statute wholly or partially revokes or otherwise renders such will inoperative. 97 ALR2d 1026.

Statutory revocation of will by subsequent birth or adoption of child. 97 ALR2d 1044.

Law Reviews

When is a trust not a trust? Article by Robert P. Goldman and Evans L. DeCamp of the Cincinnati bar. 16 CinLRev 191.

Ohio's afterborn or pretermitted heirs statute. Leo Weinberger. 39 OO(2d) 358.

Wills—pretermitted heirs. (Case note.) 16 OSLJ 631.

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1. An adopted child has the right to have a will revoked under former GC § 10561 (see now RC § 2107.34): Surman v. Surman, 114 OS 579, 151 NE 708, (affirming 21 App 434, 153 NE 873).

3. The fact that the testatrix survived the child does not revive a will that has been revoked under

this section: Ash v. Ash, 9 OS 383.

4. Where a child of a testator is born after the probate of his will, the birth of the child revokes the will: Evans v. Anderson, 15 OS 324.

5. A reversionary interest, whether vested or contingent, is not a provision for an after-born child. To save a will from the revocation provided by the act, the provision must be expressly and specifically made: Rhodes v. Weldy, 46 OS 234, 20 NE 461, 15 AmSt 584.

5.1. Where a testator had no children at the time of executing his will and has made clear his intention that his will shall apply to unborn children, it is not for the court to inquire whether such provision was large or small, equal or unequal, vested or contingent, present or future: Rhodes v. Weldy, 46 OS 234, not followed: McMillan v. McMillan, 12 NP(NS) 593, 23 OD 69.

5.2 Where a person having a child or children executes his will and thereafter another child is born, for whom no provision is made in the will or by codicil thereto, the estate of testator as to such after-born child is intestate: Krueger v. Krueger, 111 OS 369, 145 NE 753.

6. The surviving children of a designated heir who predeceases his designator are not, upon death of such designator, heirs at law or next of kin of such designator, and do not under the statute of descent and distribution have any right of inheritance in the estate of such designator, unless, by virtue of the provisions of this section, the designation of the heir occurs after the execution of a last will and testament of the designator and no provision is made in such will or by settlement for such designated heir or his children, in which event, unless it appears by such will that it was the intention of the testator to disinherit such designated heir, the children of the latter receive a share equal to that which he, if living, would have been entitled to receive out of the estate if such designator-testator had died intestate: Kirshe-man v. Paulin, 155 OS 137, 44 OO 134, 98 NE(2d) 26.

6.1 Where a testatrix executed a will devising her entire estate to her husband and providing that if he predecease her, such entire estate shall be placed in trust for "the use and benefit of my children" and further providing that "the income of my said estate to be used for the purpose of maintaining, supporting, and educating my said children until the youngest shall become twenty-five years, when a distribution shall be made between my said children, share and share alike," provision is made in such will for children born after, as well as for those living at the time of its execution, and there is no preemption of such after-born children: The Provident Sav. Bank &c. Co. v. Nash, 75 App 493, 31 OO 290, 62 NE(2d) 736.

6.2 The interest reversed to a pretermitted child by this section in the real estate of which a testator died seized, is a specific interest which passes and vests in the pretermitted child instantly upon the death of the testator: Twitchell v. Alexander & Liggett, Inc., 115 App 51, 20 OO(2d) 186, 184 NE(2d) 421.

7. The creation of an irrevocable trust in favor of the testator's adopted son constitutes a settlement as contemplated by this section, and by virtue thereof the adopted child is precluded from taking any portion of the testator's estate owned by him at the time of his death: City Nat. Bank v. Kelly, 19 OO 231 (PC).

9. Under this section a statement in a will that an item therein leaving all of testator's property to his wife should remain in full force and effect regardless of whether or not any child should thereafter be born to testator and his wife, discloses an intention to disinherit a child subsequently adopted by the testator

and his wife, although such provision refers only to a child "born" to them, and consequently such adopted child is not entitled to share in the deceased's estate as a pretermitted heir: *York v. York*, 42 OLA 242, 60 NE(2d) 70 (App).

9.1 Where a testator at the time of the execution of his will has six living children and his wife is six months pregnant with a seventh child and the evidence reveals that the testator was fully aware of the prospective birth of the seventh child within a few months time, and, under these circumstances devises his entire estate to his spouse without reference to the living children and the child yet unborn, an intention to disinherit said afterborn child may be implied from the language of the will and the after-born child has no interest in the estate: *Spieldenner v. Spieldenner*, 54 OO 290, 122 NE(2d) 33 (PC).

9.2 Where it was known that decedent had two sons, their ages and the date of decedent's will, a mistake in failing to apply the provisions of this section, relating to pretermitted heirs in the original distribution of the estate and the inheritance taxes thereon was a mistake of law and exceptions by the state to a redetermination of the inheritance tax after distribution in accordance with this section are well taken: *In re Cones*, 88 OLA 577, 184 NE(2d) 776 (PC).

10. Where a will contains a clause disinheriting an unborn child, such clause does not constitute a provision for the after-born child within the meaning of this section, and the intention of the testator, being contrary to law, does not control: *German Mut. Ins. Co. v. Lushey*, 66 OS 233, 64 NE 120 [affirming 20 CC 198, 11 CD 52; which affirmed 7 NP 62, 10 OD 24].

11. Court of common pleas has jurisdiction to enforce the right of contribution given, by this section, to a child born after execution of the will of its parent: *McGarry v. Smith*, 22 OS 190.

13. Where testator acquired property after the execution of his will, and also had a child born thereafter, unprovided for in the will (there being other children), that child's share must be worked out of the entire estate, and not out of the after-acquired property; and its guardian may, therefore, maintain a suit for the partition of the property specifically devised: *Weiland v. Muntz*, 2 CC(NS) 71, 15 CD 185.

§ 2107.35 Encumbrances.

An encumbrance upon real or personal estate for the purpose of securing the payment of money or the performance of a covenant shall not revoke a will previously executed and relating to such estate.

HISTORY: GC § 10504-50; 114 v 320 (356); 127 v 36 (37), § 1. Eff 9-4-57.

Analogous to former GC § 10557.

Comment

An interesting case, which dealt with a very similar statute in California, is *In the Matter of the Estate of Frederick A. Woodworth*, 31 Cal 595. The California statute read as follows:

"A charge or encumbrance upon any estate for the purpose of securing the payment of money for the performance of any covenant or agreement shall not be deemed a revocation of any will relating to the same estate which was previously executed, but the devises and legacies therein contained shall pass subject to such charge or incumbrance."

In construing this statute, the court says at page

607 of the opinion: "It is further claimed that section fifteen of the 'Act concerning wills' (being the section above quoted) requires the devisees of lands incumbered by mortgages to take them cum onere without any right to have them exonerated out of the personal estate. It is plain, however, that no such object was contemplated or provided for in this section. The object was simply to provide in express terms that a subsequent mortgage should not be construed as a revocation of the will as to the mortgaged land—that it should still go to the devisee, but subject to the mortgage. That is to say, that as to the mortgagee and devisee, neither the mortgage nor the devise should fail, unless the entire mortgaged estate should be required to satisfy the debt secured. This is a provision affecting the rights of the parties to the mortgage and devise. It has no reference whatever to the order of priority as between legatees, devisees and heirs. The words 'subject to such charge or incumbrance' mean no more nor less, in this connection in a statute, than in the same connection in a will. And the signification of these words, in a similar connection in wills, had long been settled by an unvarying line of decisions. Says Jarman: 'Thus it is settled that a devise of lands subject to the mortgage or incumbrance thereupon, does not so throw the charge on the estate as to exempt the funds, which by law are preferably liable.' (From Jarman on Wills, 553-4.) (Other authorities are cited.) It was with reference to this settled construction of similar language in wills that these words were used in the statute. Like many of the provisions already cited, it only enacted in express terms the rule of the common law upon the subject. . . ."

It would seem that the Ohio statute should receive the same construction in this particular as the California statute above quoted, and there is an unreported decision by the probate court of Cuyahoga county in accord with the California case above cited.

Comparative Legislation

Encumbrances:

Cal.—Probate Code, § 73

Ky.—KRS, § 394.350

N.Y.—EPTL, § 3-3.6

Research Aids

O-Jur2d: Wills § 200

Am-Jur2d: Wills § 593

§ 2107.36 Effect of alteration of property. (GC §§ 10504-51, 10504-52)

An act of a testator which alters but does not wholly divest such testator's interest in property previously devised or bequeathed by him does not revoke the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee the actual interest of the testator, which would otherwise descend to his heirs or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest.

If the instrument by which such alteration is made is wholly inconsistent with the previous devise or bequest, such instrument will operate as a revocation thereof, unless such instrument depends on a condition or contingency, and such

condition is not performed or such contingency does not happen.

HISTORY: GC §§ 10504-51, 10504-52; 114 v 320 (356). **EFF** 10-1-53. Analogous to former GC §§ 10558, 10559.

Research Aids

O-Jur2d: Wills § 197 et seq
Am-Jur2d: Wills § 589 et seq

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See also case notes under RC § 2107.33

1. A deed of conveyance, made subsequent to a devise, does not revoke the will, unless it makes an entire disposition of the estate; but to any portion undisposed of by the deed, the will attaches pro tanto, and carries it to the devisee: *Brush v. Brush*, 11 O 287.

2. A devise of all the personalty and real estate will carry the proceeds of sale of real estate remaining on hand at death and not otherwise disposed of: *Kent v. Mahaffey*, 10 OS 204.

3. The provisions of GC § 10504-52 (RC § 2107.36) apply exclusively to cases where the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of the previous devise or bequest: *Gordon v. Bartlett*, 62 App 295, 16 OO 13, 23 NE(2d) 964.

3.1 Where a testator devised certain real estate to his wife, and subsequently a guardian was appointed for the testator on the ground of physical incompetency, to which the testator gave written consent, a sale of the real estate by such guardian, under authority of the probate court, will result in an ademption: *Roderick v. Fisher*, 97 App 95, 54 OO 264, 122 NE(2d) 475.

4. Where a testator, subsequent to making his will, executed a conveyance whereby his entire estate and interest in property specifically devised were wholly divested, such conveyance constitutes a complete revocation of the devise, although the property sold was not fully paid for and a mortgage had been executed to secure the balance of the purchase price: *Lewis v. Thompson*, 142 OS 338, 27 OO 262, 52 NE(2d) 331, discussed in 30 OO 94.

4.1 This section prevents the application of the doctrine of equitable conversion to devises of real estate which is under covenant of some character at the devisor's death: *Sells v. Needles*, 34 OO 186, 69 NE(2d) 767 (PC).

4.2 Mineral rights reserved when land is conveyed will pass to the original devisees: *In re Knickel*, 89 OLA 135, 185 NE(2d) 93.

4.3 Revised Code § 2107.36 has no bearing on the situation where the testator sells the real estate specifically devised: *Mastics v. Kiraly*, 93 OLA 193, 196 NE(2d) 172.

5. Where testatrix, in her will, devised specific real estate, and thereafter conveyed such real estate to another, and later the same was reconveyed to the testatrix, such devise passes under the will and is not revoked: *Ridenour v. Callahan*, 8 CC(NS) 585, 19 CD 65.

6. Where a nephew is bequeathed one thousand dollars in cash, to be a charge on real property which testatrix devised to her husband for life, then to remaindermen, but sold during her lifetime, legacy does not become payable until after death of husband: *Rugg v. Larimore*, 27 NP(NS) 97.

7. Since GC § 8510 (RC § 5301.01) provides that a deed must be subscribed by two witnesses, an instrument which purports to be a deed but which is subscribed by one witness only, is not a deed; and accordingly such instrument cannot operate to defeat a specific devise of such realty in a prior will made by the grantor in such alleged deed: *Mateer v. Croft*, 6 App 13, 26 CC(NS) 182, 29 CD 9 [reversing and remanding judgment of common pleas court; judgment on retrial was also reversed, and motion to certify record overruled, *Croft v. Mateer*, 15 OLR 115, 62 Bull 176].

§ 2107.37 [Subsequent marriage.]

A will executed by an unmarried person is not revoked by a subsequent marriage.

HISTORY: GC § 10504-53; 114 v 320 (356); 136 v S 145. **EFF** 1-1-76.

Analogous to former GC § 10560.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.37 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Revocation, effect of marriage:

Cal.—Probate Code, § 71
 Ill.—Rev Stat, ch 3, § 4-7
 Ind.—Burns' Stat, § 29-1-5-8
 Ky.—KRS, § 394.090
 N.Y.—EPTL, § 5-1.3
 Pa.—Purdon's Stat, Tit. 20, § 2507
 Fla.—FSA, § 732.507

Text Discussion

1 *Anderson Fam. L.* § 7.7.

Research Aids

O-Jur2d: Wills § 204 et seq
Am-Jur2d: Wills § 575 et seq

Law Review

Probative value of an inference drawn upon another inference, with special consideration of Ohio decisions. Article by Byron T. Jennings of the Cincinnati bar. 22 *CinLRev* 39.

CASE NOTES AND OAG

1. The marriage by a woman to the residuary legatee of her existing will does not of itself operate as a revocation of the legacy: *Walter v. Pugh*, 30 OO 561 (CP).

2. In Ohio a subsequent marriage of either the husband or wife, unless a child be born, does not revoke a prior executed will. Of course, in such a case the marital rights would attach, and in that manner some of the provisions of the will before marriage might be revoked in part or as a whole: *Mundy v. Mundy*, 15 CC 155, 8 CD 44.

§ 2107.38 Destruction of a subsequent will. (GC § 10504-54)

If a testator executes a second will, the destruction, cancellation, or revocation of the second will shall not revive the first will unless the terms of such revocation show that it was such testator's intention to revive and give effect to his first will or unless, after such destruction, cancellation, or revocation, such testator republishes his first will.

HISTORY: GC § 10504-54; 114 v 320 (356). Eff 10-1-53. Analogous to former GC § 10562.

Comparative Legislation

Revocation of second will:

- Cal.—Probate Code, § 75
- Ill.—Rev Stat, ch 3, § 4-7
- Ind.—Burns' Stat, § 29-1-5-6
- Ky.—KRS, § 394.100
- N.Y.—EPTL, § 3-4.6
- Pa.—Purdon's Stat, Tit. 20, § 2506
- Fla.—FSA, § 732.505

Research Aids

- O-Jur2d: Wills § 212 et seq
- Am-Jur2d: Wills § 684 et seq

ALR

Revocation of later will as reviving earlier will.
162 ALR 1072.

Law Review

Wills; publication and republication in Ohio; probable effect of GC § 10504-3 (RC § 2107.03) on this problem. (Case note) 3 OSLJ 247.

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1. If part of a will has been revoked expressly by codicil, the subsequent destruction of such codicil and the oral declarations of testator to persons who are not the original subscribing witnesses to the will, and who did not subscribe as witnesses after such declaration, cannot revive such parts of the will: *Collins v. Collins*, 110 OS 105, 143 NE 561, 38 ALR 230.

2. Will executed nine years before execution of probated will could not be admitted to probate, where later will had been probated and had remained unchallenged until long after period for contest had passed and only reason suggested for probating earlier will was that under later will charitable bequests would be defeated: *State ex rel Haughey v. Lueders*, 46 App 287, 187 NE 724, 39 OLR 255.

3. A will is revoked by the execution of a second will duly executed, when the second will contains an express clause of revocation, or is utterly inconsistent with the provisions of the first will; and, if the second will be

inconsistent in part with the provisions of the first will, it revokes the first will to that extent: *Paully v. Crooks*, 41 App 1, 179 NE 364.

3.1 An unwitnessed, signed paper writing in which the testator has declared his intention to revive his earlier will and codicil is not effective to revive the earlier will since he has failed to comply with the formal requirements for the re-execution of a will and codicil: *Shinn v. Phillips*, 8 OApp(2d) 58, 31 OO(2d) 537, 197 NE(2d) 564 (App).

4. Where a revoked codicil cannot be reproduced in full, and it cannot be determined what portions of the original will were revoked, and what parts remained unaffected by execution of the codicil, the original will must be refused admission to probate unless it can be shown that the original will was subsequently revived as provided by this section: *In re Paulus*, 27 OO 283 (PC).

5. Under this section which provides that the revocation of a second will does not revive the first unless the terms of such revocation show that the testator intended to revive the first will or unless after such revocation of the second will he republishes the first will, testator's intention to revive the first will must appear from the wills themselves, and such intention cannot be shown by evidence of testator's oral declarations: *In re Patterson*, 11 OLR 373, 58 Bull 305.

6. In an action to contest a will, proof of the destruction, cancellation or revocation of a later will does not revive an earlier will, unless the revocation of the later will discloses an intention to revive the earlier will, and such intention can be gathered only from the instrument itself, or the former will must be republished with all the statutory formalities of its first publication: *Crane v. Tunkey*, 11 OLR 454, 58 Bull 316.

7. In the absence of contrary intent, revocation of the second will does not revive the first will, and the court's refusal of requested charge in the language of this section, where pertinent, is prejudicial error: *Westfall v. Notman*, 18 OLA 407.

8. It is said that this section applies only to a case in which the second will was in existence at the death of the testator and was destroyed after his death so that it could have been admitted to probate as a spoliated will under GC § 10504-38 (RC § 2107.27) et seq. It is said that if such will is destroyed by testator during his lifetime, there is no second will in existence at the time of testator's death and accordingly this section cannot affect the validity of the first will: *In re Murray*, 20 NP(NS) 305, 63 Bull 81.

9. A codicil operates not only as a new adoption of the will to which it refers, but also as a revocation of an intermediate will: *In re Stocker*, 26 NP(NS) 112.

[ELECTION]

§ 2107.39 Election by surviving spouse.

After the probate of a will and the filing of the inventory, appraisal, and a schedule of debts where ordered, the probate court shall issue a citation to the surviving spouse, if any be living at the time of the issuance of the citation, to elect whether to take under the will or under section 2105.06 of the Revised Code. If the spouse elects to take under section 2105.06 of the Revised Code, the spouse shall take not to exceed one-half of the net estate unless two or more of the decedent's children or their lineal descendants survive, in

which case the spouse shall take not to exceed one-third of the net estate. Unless the will expressly provides that in case of such an election there shall be no acceleration of remainder or other interests bequeathed or devised by the will, the balance of the net estate shall be disposed of as though the spouse had predeceased the testator. The election shall be made within one month after service of the citation to elect. On a motion filed before the expiration of the one-month period, and for good cause shown, the court may allow further time for the making of the election. If no action is taken by the surviving spouse within the one-month period, it is conclusively presumed the surviving spouse elects to take under the will. The election shall be entered on the journal of the court.

When proceedings for advice or to contest the validity of a will are begun within the time allowed by this section for making the election, the election may be made within three months after the final disposition of the proceedings, if the will is not set aside.

When a surviving spouse succeeds to the entire estate of the testator, having been named the sole devisee and legatee, it shall be presumed that the spouse elects to take under the will of the testator, and no citation shall be issued to the spouse as provided in this section, and no election shall be required, unless the spouse manifests a contrary intention.

HISTORY: GC §§ 10504-55, 10504-58; 114 v 320 (357); 116 v 385; 119 v 394; 125 v 411 (E# 10-16-53); 133 v S 185 (E# 1-1-71); 135 v H 374 (E# 10-31-73); 136 v S 145. E# 1-1-76.

See former GC §§ 10566, 10571.

See provisions, § 3 of SB 145 (136 v -) following RC § 2101.01.

For text of RC § 2107.39 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

The former analogous sections to GC § 10504-55 were GC § 10566 and a part of GC § 10571, which provided that "in case such election is made in person in the manner specified in the preceding section (former GC § 10570) the same shall be entered upon the minutes of the court." This section as it was enacted in the new probate code, effective January 1, 1932, was as follows:

"After probate of the will and filing of the inventory, appraisal and schedule of debts, the probate court on the motion of the executor or administrator, or on its own motion, forthwith shall issue a citation to the surviving spouse if any, to elect whether to take under the will or under the statute of descent and distribution; but in the event of election to take under the statute of descent and distribution, such spouse shall take not to exceed one-half of the estate. Such election shall be made not later than one month after service of the citation to elect, and when made shall be entered upon the minutes of the court."

This new statute made the following changes in

the former sections:

1. Election to take under the statute gives to the electing spouse the increased intestate share but not to exceed one-half of the estate (one-third if there is more than one child).

2. Election is made after filing of inventory and schedule of debts, thus affording an opportunity to know what the estate consists of.

3. The time limit for election is reduced, as a part of the effort to expedite the closing of an estate.

4. Election is permitted even though there may be no provision in the will for the surviving spouse. Former GC § 10566 provided for an election by the widow or widower only in cases where provision had been made in the will for such widow or widower. However, our supreme court in construing this former section held where no provision was made for a widow in the will, that nevertheless if she elected to take under the law, she would be entitled to her distributive share of the personal estate. See *Doyle v. Doyle*, 50 OS 330, 34 NE 166. It goes without saying that she would be entitled to her dower in the real estate, under the former section.

This section was amended in 1935 so as to provide that if the surviving spouse elects to take under the statute of descent and distribution such spouse shall take not to exceed one-half of the net estate. Formerly this section provided that in case of such election the spouse should take not to exceed one-half of the estate, and there was some controversy as to whether net estate or gross estate was meant, and this change clarified the matter. Before this change, however, it had been held the term "estate," as used in this section, was the amount of the estate after the payment of debts and cost of administration and not the gross estate. See *Weller v. Weller*, 32 NP(NS) 329. The statute was further amended in 1935 so as to provide that if no citation is issued, then such election of the surviving spouse shall be within nine months after the appointment of the executor or administrator, or the further time allowed by the court therefor for good cause shown, on motion filed before the expiration of such period.

Cross-References to Related Sections

See RC §§ 2107.39.1, 2107.40, 2107.41, 2107.45, 2107.63 which refer to this section.

See RC § 2129.07 which refers to RC § 2107.39 et seq.

Comparative Legislation

Election:

- Cal.—Probate Code, § 201.7
- Ill.—Rev Stat, ch 3, § 15-1
- Ind.—Burns' Stat, § 29-1-3-1
- Ky.—KRS, § 392.080
- Mich.—MCLA, § 702.69
- N.Y.—EPTL, § 5-1.1
- Pa.—Purdon's Stat, Tit. 20, § 2510
- Fla.—FSA, § 732.201

Forms

- 1 A&H Probate FORM 2107.39a et seq.
- 1 A&H Probate FORM 2107.39.1 et seq: Citation to make the election.

Outline of Procedure

Election by spouse under will by citation or voluntary appearance. *Leyshon No. 70: A&H No. 43*

Research Aids

- Acceleration of remainders:
 - O-Jur2d: Estates § 154 et seq
 - Am-Jur2d: Estates § 307

Election by surviving spouse:

O-Jur2d: Wills § 816 et seq; Descent and Distribution §§ 68, 198

Am-Jur2d: Wills § 1651 et seq

Record of election:

O-Jur2d: Wills § 823

ALR

Conflict of laws regarding election for or against will, and effect in one jurisdiction of election in another. 69 ALR3d 1081.

Extension of time within which to elect to accept or renounce will. 173 ALR 999.

Extension of time within which spouse may elect to accept or renounce will. 59 ALR3d 767.

Election by spouse to take under or against will as exercisable by agent or personal representative. 83 ALR2d 1077.

Election to take against will as extinguishing power of appointment. 38 ALR2d 977.

Inclusion of funds in savings bank trust (Totten Trust) in determining surviving spouse's interest in decedent's estate. 64 ALR3d 187.

Revocation of election to take under or against will. 71 ALR2d 942.

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Time within which election must be made for incompetent to take under or against will. 3 ALR 3d 119.

Validity and effect of will clause disinheriting children if surviving spouse elects to take against will. 32 ALR2d 895.

Validity of election to take under or against will as affected by fact that it was filed before probate of will or grant of letters. 120 ALR 1270.

When widow is put to her election between provision made for her by her husband's will, and her dower, homestead, or community right. 171 ALR 649.

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Law Reviews

Effect of an election to take against a will on a relict spouse's rights as an heir at law. (Editorial note.) 2 CinLRev 310.

When is a trust not a trust? Article by Robert P. Goldman and Evans L. DeCamp of the Cincinnati bar. 16 CinLRev 191.

Practical considerations in probate practice. Address by Judge Chase M. Davies of Cincinnati. 22 OBar (No. 19) 277.

Torts—parent and child—right of action of child for damages resulting from enticement of mother away from family home. (Case note.) 19 CinLRev 411.

Marriage is a damnably serious business. Ellis V. Rippper. 40 OBar (No. 10) 291.

Ohio's afterborn or pretermitted heirs statute. Leo Weinberger. 39 OO(2d) 358.

Probate code amendments. Francis J. Eberly. 14 OS LJ 368.

Estate planning and conflict of laws. Ralph E. Heyman. 27 CinLRev 234.

Surviving spouse's election and acceleration of remainders in pour-over trusts. Thomas P. Atkins, 41 CinLRev 441 (1972).

Trusts; surviving spouse electing against settlor's will may realize assets from corpus of revocable, amendable, pour-over trust. Case note. 34 CinLRev 117.

Wills; property acquired by election statute, this section; application of half and half statute, GC § 10503-5 (RC § 2105.10), upon childless elector's intestacy. (Case note.) 22 OO 107.

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See also case notes under RC § 2107.39.1.

1. A widow is not deprived of a distributive share of the personal estate of her deceased husband, by his leaving a will in which he disposed of all of it to others, without making any provision for her. As to her in such case, he is regarded as dying intestate: *Doyle v. Doyle*, 50 OS 330, 34 NE 166.

1.1. Property which would pass to a surviving spouse under former GC §§ 8574, 8578 (RC § 2105.06) or 8592 (repealed, 114 v 320 [475]), in case of intestacy, cannot be said to be "secured" to such surviving spouse by a will, and under a gift by a testator to a surviving wife of a property which is "secured" to her by the laws of Ohio, "in the cases where wives survive husbands who died intestate," she cannot take what she would have taken under this section if he had died intestate but merely that part of which he cannot deprive her by his will: *Foster v. Clifford*, 87 OS 294, 101 NE 269, AnnCas 1915B, 65 [reversing *Clifford v. Foster*, 14 CC(NS) 391, 23 CD 429; which affirmed 10 NP(NS) 446].

1.2 The phrase "under the statute of descent and distribution," as [formerly] used in this section and GC § 10504-60 (RC § 2107.41), does not mean that the surviving spouse is actually placed within the operation of the statute of descent and distribution (GC § 10503-4 [RC § 2105.06]), but such phrase is used as merely definitive or descriptive of the share to be taken by the surviving spouse within a limitation of not to exceed one-half of the estate: *Miller v. Miller*, 129 OS 230, 2 OO 45, 194 NE 450.

2. The actual taking of a share of such estate by such surviving spouse is under this section and GC § 10504-60 (RC § 2107.41); GC § 10503-5 (RC § 2105-10), relating to the "descent" of an estate which came from a deceased spouse, has no application; therefore, upon the death of the surviving spouse intestate, his or her whole estate passes under GC § 10503-4 (RC § 2105.06), pertaining to descent and distribution: *Miller v. Miller*, 129 OS 230, 2 OO 45, 194 NE 450.

3. The debts and other expenses enumerated in GC § 10509-121 (RC § 2117.25) include the federal estate tax: *Tax Commission ex rel Price v. Lamprecht*, 107 OS 535, 140 NE 333, 31 ALR 985; *Davidson v. Miners and Mechanics Sav. & Trust Co.*, 129 OS 418, 430, 2 OO 404, 409, 195 NE 845, 98 ALR 1318; *In re Gatch*, 38 OO 279 (PC) [affirmed, 43 OO 143 (App) and 153 OS 401].

4. Under GC § 10504-55 (RC § 2107.39) et seq a citation may be issued to compel an election; but whether the citation is issued, the election of the surviving spouse may be made either in person in the probate court or by written instrument signed by the spouse and duly acknowledged and filed in the probate court within the time allowed for making an election: *Juhasz v. Juhasz*, 134 OS 257, 12 OO 57, 16 NE(2d) 328.

5. If election is made in person the court is required to explain the provisions of the will and what the rights are under it as well as what the rights are by law: *Juhasz v. Juhasz*, 134 OS 257, 12 OO 57, 16 NE(2d) 328.

6. In case of refusal to take under the will, the statutes do not contemplate a determination of contested rights upon an election whether it is made in person or by written instrument: *Juhasz v. Juhasz*, 134 OS 257, 12 OO 57, 16 NE(2d) 328.

7. The filing of the written election by the widow, which election had incorporated in it a statement to the effect that the antenuptial agreement was procured by fraud and was repudiated, did not present an issue on the validity of the agreement for determination by the court: *Juhasz v. Juhasz*, 134 OS 257, 12 OO 57, 16 NE(2d) 328.

8. A valid voluntary trust in praesenti, formally executed by a husband and existing at the time of his death, in which he reserved to himself the income therefrom during life, coupled with an absolute power to revoke the trust in whole or in part, as well as the right to modify the terms of the settlement and to control investments, bars the wife, upon the death of the settlor, from a claimed right to a distributive share of the property in the trust upon her election to take under the statutes of descent and distribution: *Smyth v. Cleveland Trust Co.*, 172 OS 489, 18 OO(2d) 42, 179 NE(2d) 60.

9. Under this section a surviving spouse cannot elect to take under a will or under the statute of descent and distribution until after the probate of the will: *Raleigh v. Raleigh*, 153 OS 160, 41 OO 209, 91 NE(2d) 241, discussed in 19 CinLRev 411, 64 HarvLRev 513.

9.1 Where a widow elects under GC § 10504-55 (RC § 2107.39), to take under the statute of descent and distribution and the applicable portions of that statute (GC § 10503-4 [RC § 2105.06]) provide that "personal property shall be distributed" and any "real estate or inheritance shall descend and pass in parcenary" in part to the surviving spouse, the amount of the federal estate tax on the decedent's estate should be deducted therefrom before computing the widow's share thereof: *Campbell v. Lloyd*, 162 OS 203, 55 OO 102, 122 NE(2d) 695.

9.2 Where a deceased husband, by his will, made a specific bequest of a certain number of shares of

stock in a corporation for the creation of a trust for the benefit of one of his employees, and where the remaining portion of his estate is sufficient, after the payment of all debts and other obligations, to provide his relict, who elected not to take under the will, with the share of his net estate to which she is entitled under the provisions of RC § 2105.06, the relict's share of the net estate is an undivided fractional interest in the real estate plus such additional amount of personal property not specifically bequeathed under the will, either in kind or in money, as shall make her total share of the net estate that amount to which she is entitled under the provisions of the statute: *Winters Nat. Bank & Co. v. Riffe*, 2 OS(2d) 72, 31 OO(2d) 56, 206 NE(2d) 212.

9.3 After nine months following the appointment of the fiduciary initially charged with the administration of an estate under a will, a surviving spouse, who remains alive and competent, is precluded by this section from making a valid election to take against the will of his deceased spouse, unless, before the expiration of the nine-month-period, he requests and is allowed further time for making the election: *In re Wittman*, 3 OS(2d) 66, 32 OO(2d) 49, 209 NE(2d) 427.

9.4 This section does not by its words apply only "after the probate of a will" in Ohio. The words, "In Ohio" do not appear in the statute: *Pfau v. Moseley*, 9 OS(2d) 13, 38 OO(2d) 8, 222 NE(2d) 639.

9.5 Where a widow elects, as provided in this section, to take under the Ohio statute of descent and distribution (RC § 2105.06), the amount of the federal estate tax on the decedent's estate should be deducted therefrom before computing the widow's share thereof: *Weeks v. Vandever*, 13 OS(2d) 15, 42 OO(2d) 25, 233 NE(2d) 502.

9.6 The presence or absence of a tax provision in the will of a testator does not alter the statutory share of a surviving spouse electing to take against the will as provided in this section: *Weeks v. Vandever*, 13 OS(2d) 15, 42 OO(2d) 25, 233 NE(2d) 502.

9.7 A widow who elects not to take under the will of her deceased husband is entitled to only so much of the personality belonging to the said estate as would have passed to her had her husband died intestate: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

9.8 A surviving spouse cannot be deprived, by the last will of the decedent, of the distributive share fixed by statute: *Whyde v. Lunn*, 15 App 297, 32 OCA 183 [motion to certify record overruled, 19 OLR 372]; *State ex rel Zollinger v. Sloane*, 24 OD(NP) 119.

9.9 A widower, electing not to take under the will of his wife who died testate but leaving no children or their legal representatives, is entitled to take such portion of the personality as though decedent had died intestate leaving children: *Whyde v. Lunn*, 15 App 297, 32 OCA 183 [motion to certify record overruled, 19 OLR 372].

10. A surviving spouse may make an election at and after the admittance of the will to probate, within the time limited, and need not wait until the schedule of debts is filed and citation issued: *Davis v. Warner*, 47 App 495, 192 NE 270, 40 OLR 384.

11. The relict of a deceased spouse who is presumed "to elect to take under the statute of descent and distribution" is limited by this section to a distributive share "not to exceed one-half of the estate" of the deceased spouse: *Miller v. Miller*, 49 App 220, 3 OO 170, 197 NE 134 [affirmed, 129 OS 230].

11.1 Where testator, who died March 3, 1927, devised the balance of his estate to his wife and to his son, "each to share according to law, suggesting that they hold the same in common as long as it may be consistent, dividing

the proceeds" one-third to the wife and two-thirds to the son, the widow, electing to take under the will, takes, by the provisions of GC § 10572 (repealed, 114 v 320, 475; see GC § 10504-61), then in force, the interest provided by law but as a devisee and tenant in common with the son, and is entitled to partition: *Bunnell v. Bunnell*, 53 App 235, 6 OO 488, 4 NE(2d) 698.

12. Where a testatrix devises one-half of her real estate to her spouse for life, remainder to be sold and the proceeds divided among devisees, and the other half to a devisee in fee, the surviving spouse electing not to take under the will and there being no surviving children or parents of the deceased, does not take the whole estate under the provisions of GC § 10503-4 (RC § 2105.06), but is limited to one-half the net estate under the terms of this section: *Shearn v. Shearn*, 60 App 317, 14 OO 262, 21 NE(2d) 133.

13. The election by a surviving spouse to renounce the provisions of a will made for her and to take under the law, as provided by this section, does not destroy the efficacy of the testator's last will and testament as to other provisions, and the surviving spouse is not entitled to have her one-half of the net estate administered as though there were no will: *In re Ellis*, 66 App 121, 19 OO 392, 32 NE(2d) 23.

13.1 The plain intentment of RC § 2107.39 is that the election of the surviving spouse shall be made after the filing of the inventory and appraisalment, at which time the explanation by the probate judge as to her rights under the will and under the law, as required by RC § 2107.43 can be made to such spouse: *In re Bersin*, 98 App 432, 57 OO 475, 129 NE(2d) 868.

13.2 In the absence of a showing that the testator intends the effect of an election of a surviving spouse to take against the will should be borne to the contrary, when the election results in the executor being deprived of property, or interests in property, to such extent and in such manner, that the property, or interests in property, remaining available for distribution to different classes of legatees named in different items of the will would, if so distributed, cause the reduction resulting from said election to be borne equitably, but not necessarily equally or proportionately, between said classes, distribution shall be made accordingly without further adjustment or contribution between the classes: *Blackford v. Vermillion*, 107 App 26, 7 OO(2d) 350, 156 NE(2d) 339.

13.3 Where a testator in his will directs the executor to sell all the property of his estate and to divide the proceeds from certain real property among his grandchildren and to divide the proceeds from the residue, consisting of other real property and the personal property, among his children, and the surviving spouse elects to take under the statute of descent and distribution, the surviving spouse is thereupon vested, as of the time of testator's death, with a fee simple title in an undivided one-third interest in all the real property owned by testator at the time of his death; is entitled to all the rents and profits from such undivided one-third interest in real property which was received after the date of testator's death and to an undivided one-third interest in all the personal property of the estate, including rents and profits received after testator's death from such personal property and from the other undivided two-thirds interest in real property; such share of the surviving spouse is a charge against all the remaining property of the estate, both real and personal, available to the executor; and the different classes of legatees bear an equitable, but not necessarily equal or proportionate, share of the reduction

in the assets of the estate which was caused by the election of the surviving spouse to take under the statute of descent and distribution: *Blackford v. Vermillion*, 107 App 26, 7 OO(2d) 350, 156 NE(2d) 339.

13.4 The period of time prescribed by this section within which a surviving spouse may make an election to take under the will of a decedent or under the statute of descent and distribution is not extended by the filing after the termination of such period of an action alleging that an election made during the period is void and praying that it be held void: *In re Wolfel*, 3 OApp(2d) 11, 32 OO(2d) 75, 209 NE(2d) 594.

13.5 Legatees under the will of a decedent have no legal interest in or right to contest an election of a surviving spouse made under this section, and are not properly appellees in an appeal by the guardian of the surviving spouse: *In re Strauch*, 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95 [affirmed, 15 OS(2d) 192, 44 OO(2d) 158, 239 NE(2d) 43].

13.6 Where an antenuptial agreement places restraints upon a testator and where such testator neglects to comply properly with such provisions in his will, and the widow, within nine months following the appointment of the executor, brings an action in a declaratory judgment proceeding to determine the validity of such antenuptial agreement and seeks the advice of the court, such declaratory judgment action is a "proceedings for advice" as is contemplated in RC § 2107.39: *Barlup v. Holloway*, 25 OApp(2d) 44, 54 OO(2d) 77, 266 NE(2d) 241.

13.7 In such event the widow has three months after the final disposition of such declaratory judgment proceedings within which to make her election as to whether she will take under the statute of descent and distribution or whether she will take under the will: *Barlup v. Holloway*, 25 OApp(2d) 44, 54 OO(2d) 77, 266 NE(2d) 241.

14. Under GC § 10504-58 (RC § 2107.39), an action to construe a will, filed within the time allowed for making an election, extends the time for the election to any time within three months after the final disposition of the will construction case: *In re Jones*, 15 OO 250 (PC).

15. Where a wife dies testate, and her surviving spouse elects not to take under the will, this section measures the share of the estate passing to the surviving spouse, and legal title does not pass by "descent" within the meaning of GC § 10504-5 (RC § 2107.06): *Fee v. Linthicum*, 11 OO 568 (CP).

16. The term "net estate," as used in this section, means so much of the testator's property as remains for distribution after payment of the surviving spouse's statutory allowances, his other debts, funeral expenses and expenses of administration: *Citizens Nat. Bank v. Linn*, 22 OO 195 (PC).

19. A widow who elects to take under the statute of descent and distribution, the decedent having left two children, is entitled on distribution to one-third of the net estate after deducting the marital deduction from the gross estate. She must bear her proportionate share of the burden of the whole of the federal estate tax: *In re Miller*, 42 OO 325 (PC).

19.1 For the purpose of determining whether distribution should be made under the terms of a will or under the provisions of law when a surviving spouse has elected to take against a will, an executor has the right to object to the making of an election by such spouse: *In re Gould*, 1 OO(2d) 372, 140 NE(2d) 801 (App).

20. The purpose of that part of this section, stating that in the event of election to take under the statute of descent and distribution "such spouse shall take not to exceed one-half of the net estate," is to

limit a widow who declines to take the provision made by her husband to not more than one-half of the estate in lieu of the provision made for her in the rejected will, relates entirely to testamentary disposition of estates and does not limit the widow's rights to intestate property by virtue of GC § 10503-4 (RC § 2105.06): *Goodfellow v. Wilson*, 32 OLA 569.

21. A surviving spouse who, under and by virtue of the provisions of this section (119 v 397), elects to take under the statute of descent and distribution and not under the will of the decedent, takes one-half of the net estate, real and personal, of the decedent, and has a vested interest in fee in the real estate: *Barlow v. Winters Nat. Bank & Co.*, 41 OLA 457, 59 NE(2d) 212 (App).

22. Special legacies to other persons are not to be considered in determining the net estate of a decedent, to one-half of which the surviving spouse, who elects, under the provisions of this section (119 v 397), to take under the statute of descent and distribution and not under the will is entitled, such legacies being payable only out of the remaining one-half of the net estate as so ascertained: *Barlow v. Winters Nat. Bank & Co.*, 41 OLA 457, 59 NE(2d) 212 (App).

23. Where the estate of a decedent, including the interest therein of the surviving spouse who has elected, under the provisions of this section (119 v 397), to take under the statute of descent and distribution and not under the will, is committed to a trustee for management, such surviving spouse is entitled to a proportionate share of the income of the trust estate: *Barlow v. Winters Nat. Bank & Co.*, 41 OLA 457, 59 NE(2d) 212 (App).

23.1 A court of equity will permit an election to take under the statute of descent and distribution and against a will to be rescinded if made without full knowledge of the elector's rights and the condition of the estate: *Smith v. First Nat. Bank*, 69 OLA 102, 124 NE(2d) 851 (CP).

23.2 Elections under this section, involve choice and intelligent choice involves a knowledge of both the facts and the law applicable thereto and where such election is made by a widow, without full knowledge of the condition of the estate, and of her rights, but in ignorance of both, it cannot be asserted that she has made any choice or election: *Smith v. First Nat. Bank*, 69 OLA 102, 124 NE(2d) 851 (CP).

23.3 Under this section the surviving spouse, not only of a testator who was domiciled in Ohio at the time of his death but also of a testator who was not domiciled in, but owned property in Ohio, and whose will has not previously been admitted to probate in any other county of Ohio or elsewhere, has the right to elect whether to take under the will or under the statute of descent and distribution: *In re Gould*, 1 OO(2d) 366, 140 NE(2d) 793 (PC).

23.4 The probate court will permit an earlier election where the surviving spouse waives the right to have the inventory and appraisal and schedule of debts filed prior to making the election: *In re Rogers*, 10 OO(2d) 205, 160 NE(2d) 442 (PC).

23.6 In order to prevent the application of an acceleration of the remainder or other interest the testator must use words which anticipate the situation in which the spouse would elect to take against the will or at least must use words which prohibit the acceleration in any event: *Funkhouser v. Dorfmeier*, 31 OO(2d) 42, 202 NE(2d) 226 (PC).

23.7 The requirement for an expressed prohibition against acceleration is not satisfied by the creation of a contingent remainder. The provisions of the amended statute do not limit its application to vested remainders: *Funkhouser v. Dorfmeier*, 31 OO(2d) 42,

202 NE(2d) 226 (PC).

23.8 Where testator died without issue, leaving a widow and certain brothers and sisters his only heirs at law, and the widow elected not to take under the will, but took her distributive share of the personal estate under the law, and subsequently died intestate without issue, leaving neither brother nor sister or their legal representatives, she took her distributive share of said personal estate by favor of the provisions of this section and GC § 8592 (repealed, 114 v 320 [475]), and not under any provisions of GC § 8574 (see now RC § 2105.06); hence the provisions of GC § 8577 (see now RC §§ 2105.01, 2105.10) are not effective to divert the descent of such personal property from her heirs generally: *Seney v. Schroth*, 25 CC(NS) 185, 35 CD 239.

24. The term "estate" as used in this section is the amount of the estate after the payment of debts and costs of administration, and not the gross estate: *Weller v. Weller*, 32 NP(NS) 329.

25. But the husband may, by a gift *inter vivos* during his last illness, dispose of all his personality to his daughter, that he might die intestate and thereby defeat his wife in sharing in the property. This is not a testamentary devise: *Hickman v. Huntington & Co.*, 7 NP 79, 9 OD 503.

26. Under a former statute (Swan's Stat 998, §§ 46, 47) the election of the widow had to be made within six months after probate of the will: *Stilley v. Folger*, 14 O 610.

DECISIONS UNDER FORMER GC § 10566

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See, in case notes under RC § 2107.42, decisions under former GC §§ 10569, 10572; in case notes under RC § 2107.43, decisions under former GC § 10571.

No provision for wife

34. A widow for whom no provision is made in the will of a deceased husband, has the same rights in his personal estate as she would have where provision is made for her which she rejects: *Hutchings v. Davis*, 68 OS 160, 67 NE 251 [reversing, sub nomine, *In re Hutchin's Estate*, 21 CC 720, 12 CD 29]; *Doyle v. Doyle*, 50 OS 330, 34 NE 166; *Coon v. DeMoore*, 2 CC(NS) 444, 15 CD 776 [affirmed, without report, *Coon v. Coon*, 71 OS 537].

What constitutes election

39. Election in fact, without formal entry on the records: *Baxter v. Bowyer*, 19 OS 490 [see also *Campbell v. Greenwalt*, 67 OS 520]; *Stockton v. Wooley*, 20 OS 184; *Nimmons v. Westfall*, 33 OS 213; *Colored Industrial School v. Bates*, 90 OS 288, 107 NE 770, *AnnCas* 1916C, 1198 [affirming *Bates v. Creed*, 2 App 59, 15 CC(NS) 433, 26 CD 338; for opinion below, see *Creed v. Bates*, 14 NP(NS) 81, 31 OD 552].

40. Acts must be of an unequivocal character: *Colored Industrial School v. Bates*, 90 OS 288, 107 NE 770, *AnnCas* 1916C, 1198 [affirming *Bates v. Creed*, 2 App 59, 15 CC(NS) 433, 26 CD 338; for opinion below, see *Creed v. Bates*, 14 NP(NS) 81, 31 OD 552].

41. The act of a testator's widow in acquiescing in his will after his death, the will having been made in accordance with the mutual understanding of testator and his wife while they were both alive, and her act in receiving payments from an executor as payments made to her under the will of her deceased husband, is sufficient evidence to justify the trial court in finding that the widow elected to take under the will; and after her death her heirs cannot be heard to claim that she had not elected to take under the will and that accordingly she had in law taken her dower and distributive share: *Ewalt v. Ames*, 6 App 374, 27 OCA 465, 29 CD 133, 62 Bull 389 (Ed).

42. A widow's declarations, conduct or actions do not amount to an election to take, where it is not shown that she was acquainted with the contents of the will, or that she knew the benefits flowing to her under the will were less liberal than the law would give her, or because for a time she recognized the will and accepted benefits thereunder, where it appears that she had very little knowledge of the value of her husband's estate or as to the disproportionate share given her by the will: *Ward v. Sark*, 19 NP (NS) 401, 27 OD 229.

43. The election by a widow to take under the law, instead of under the will of her late husband which bequeathed to her for life the entire income of his estate from every source derived, accelerates the remainder and causes it to vest at once in accordance with the terms of the will: *Dymond v. Dymond*, 12 NP(NS) 506, 22 OD 563.

Revocation

48. An election, formally made and entered upon the journal at the instance of the widow, cannot afterwards, even within a year from the service of citation, be set aside at her pleasure: *Davis v. Davis*, 11 OS 386.

49. A widow is not estopped from denying that she in fact elected to take under the will of her deceased husband, or from asking that an alleged election by her be canceled and set aside, where the probate judge did not at the time of said election explain to her the provisions of the will and her rights, both thereunder and by law, in the event of her election or refusal to elect to take: *Ward v. Sark*, 19 NP(NS) 401, 27 OD 229.

Election as a bar

54. For a case where the widow became entitled to all the personal property whether she elected to take under the will or not, see *Gardner v. Gardner*, 13 OS 426.

55. Election not to take under the will deprives the widow of bequests made to her by the will in lieu of dower: *Jones v. Lloyd*, 33 OS 572.

56. An election to take under the will, after sale of decedent's realty, subject to dower, does not bar a creditor of the surviving spouse: *Hessenmueller v. Mulrooney*, 4 NP 50, 6 OD 123.

—Not to year's support

61. A widow electing to take under the will is not thereby barred of her right to a year's support: *Collier v. Collier*, 3 OS 369 [followed and approved, *Spangler v. Dukes*, 39 OS 642].

62. Where a widow, without following the statutory form for making an election, sets up no claim for dower, but actually and in fact takes under the will, and for a series of years has the use and occupancy of the property so devised, she is barred of her dower, and estopped to deny her election to take under the will: *Thompson v. Hoop*, 6 OS 481.

63. Where, by the terms of a will, it is plainly

shown to be the intention of the testator to bar his widow of a first year's support, and a provision is made for her in lieu thereof, if she elects to take under the will she is not entitled to the allowance: *In re Estate of Witner*, 7 NP 143, 10 OD 30.

64. If testator gives to his widow the entire income of his estate, and does not provide expressly that such income is in lieu of the first year's allowance, the election of the widow to take under the will does not bar her of such allowance: *In re Messang*, 20 NP(NS) 60; sub nomine, *In re Massang*, 26 OD(NP) 533.

—Property not disposed of by will

69. An election to take under a will does not bar a widow of her right to the distributive share of personal estate not disposed of in the will: *Bane v. Wick*, 14 OS 505.

70. Where a widow elects not to take under the will of her deceased husband, which creates a trust in her favor, her renunciation, in the absence of any other disposition of the property covered by the said trust, accelerates the enjoyment of the property by the remainderman, subject to the dower interest of the widow therein but without terminating another independent trust created by said will: *Blocher v. Trick*, 8 App 222, 28 OCA 46, 30 CD 98.

71. A widow who has rejected the provisions made for her in her husband's will and elected to take under the law, is not entitled to a distributive share in the proceeds of real estate, which by the terms of the will was not to be sold until her death, but which, upon order of the probate court, has been sold before that time: *March v. McClintic*, 24 CC(NS) 413, 34 CD 655.

72. Election by a widow to take under the will of her deceased husband does not preclude her inheritance of land as to which her husband died intestate and to which no reference was made in the will: *Bowers v. McGill*, 12 NP(NS) 124, 22 OD 407, 56 Bull 413 (Ed); see also 56 Bull 421 for same report.

—Dower

77. B died testate, leaving land encumbered by a mortgage for his debt, made by himself and wife, who survived him; she elected to take under the will; the proceeds of the land, added to the personalty, made a sum large enough to pay all debts (including the mortgage), the statutory allowance for one year, the cost of administration, dower, and leave a surplus for the devisees. Held: The widow, as against the devisees, is entitled to dower in the entire proceeds of the land: *Kling v. Ballentine*, 40 OS 391.

78. An election to take under the will bars dower even in intestate land: *Swihart v. Swihart*, 7 CC 338, 4 CD 624; but see *McDonald's Estate*, 2 NP 232, 4 OD 396.

79. A widow, who elects to take under the will, is not barred of dower in lands not disposed of by the will unless the will expressly provides that the devise to the widow is in lieu of her dower rights in such undivided lands: [*Swihart v. Swihart*, 7 CC 338, 4 CD 624 denied]; *Estate of McDonald*, 2 NP 232, 4 OD 396.

Estoppel

84. The election to take under the will does not estop the widow from setting up her right as heir to the estate, from contesting the validity of the will, nor from controverting the validity of devisees therein made: *Carder v. Commissioners*, 16 OS 353.

85. A widow who elects to take under the will of her husband, which devises to her all of his realty, does not thereby estop herself from setting up title to an undivided interest therein in her own right: *Barnes v. Christy*, 102 OS 160, 131 NE 352 [for a

later case in supreme court, see 107 OS 630].

86. Where the widow, with the full knowledge and acquiescence of the heirs and devisees of the testator, sets up no claim for dower, but actually takes possession and has the use and occupancy of the property devised to her under the will for a series of years after the probate of the will, the heirs or devisees are estopped to deny the election of the widow to take under the will: *Stockton v. Wooley*, 20 OS 184.

General principles

91. Under an election to take under a will, the widow holds no interest as doweress, but holds under the will only, and hence can proceed under GC § 11925 (RC § 5303.21), which allows a life tenant, but not a doweress, to ask sale of entailed lands: *Dukes v. Dukes*, 4 CC 507, 2 CD 676.

92. If the widow die before probate of the will and election by her to take thereunder, the property so devised will pass to the deceased widow's heirs: *Hawkins v. Barrow*, 15 CC 141, 8 CD 251 [affirming 35 Bull 97].

93. Where the widow takes possession and occupies land devised to her by her husband's will, with the knowledge of the heirs at law, for a series of years after the time in which she may make her election, she will be presumed to have made her election in fact: *Nimmons v. Westfall*, 33 OS 213.

94. If the records have been destroyed by fire after settlement of an estate, a court will presume that the above required citation was issued and that the widow elected to take the more valuable estate: *Weaver v. King*, 12 CC(NS) 129, 21 CD 199.

95. A release of dower by election is for the benefit of the heirs or those entitled to inherit and not a means of conveyance to strangers: *Hessenmueller v. Mulrooney*, 4 NP 50, 6 OD 123.

96. In order to bar a widow of her right of dower, her election must be made either by matter of record in the proper court, as required by statute, or actually and in fact under such circumstances as would create against her an estoppel of her right to claim under the law: *Millikin v. Welliver*, 37 OS 460; see also *Hayes v. Heyl*, 81 OS 563, 91 NE 1130.

—Compensation

101. An election to take under the law, or a failure so to elect, divests the provision made by the will, and such portion will be sequestered to compensate the disappointed devisees: *Jennings v. Jennings*, 21 OS 56; *Holdren v. Holdren*, 78 OS 276, 85 NE 537, 18 LRA(NS) 272 [for opinion on former hearing, see *Holdren v. Holdren*, 74 OS 520]; *Dunlap v. McCloud*, 84 OS 272, 95 NE 774, 35 LRA(NS) 851.

102. Where a testator devises all his real estate to certain individuals and his widow elects not to take under the will and demands assignment of her dower, if it appear that there is enough land to set off the dower without interfering with the lands specifically devised, this should be done; otherwise, the devisees who are disappointed by the widow's election to be endowed in the lands of her husband, are entitled to compensation out of rejected provisions made for her in the will; yet when the rejected provisions do not fully compensate, the resulting uncompensated loss should fall upon the residuary estate in preference to the specific devisees, unless a contrary intention appear from the will: *Dunlap v. McCloud*, 84 OS 272, 95 NE 774, 35 LRA(NS) 851.

—Citation to widow

107. When the widow appears in open court, without service of citation, and declines to make her election, she does not thereby waive the issuing and

service of citation, or estop herself from denying that a citation has been served: *Bowen v. Bowen*, 34 OS 164.

108. In an action against a widow for appropriating personal property which, plaintiffs claim, did not pass to her because she had not taken under the will, the petition must allege that she was cited and had elected not to take under the will: *Spreen v. Sandman*, 2 CC 441, 1 CD 577 [petition in error dismissed, *Spreen v. Sandman*, 26 Bull 247].

109. If a citation has not issued and formal election has not been made, a widower will be held to take under the law by virtue of former GC § 10571 (see now RC § 2107.39) unless it is shown clearly that he elected in fact to take under the will: *Colored Industrial School v. Bates*, 90 OS 288, 107 NE 770, *AnnCas* 1916C, 1198 [affirming *Bates v. Creed*, 2 App 59, 15 CC(NS) 433, 26 CD 338; for opinion below, see *Creed v. Bates*, 14 NP(NS) 81, 31 OD 552].

110. Where, due to an oversight, no citation has been issued to a widow to appear and elect whether she will take under her husband's will or at law, and she has made no election as prescribed by former GC §§ 10567, 10570, 10571 (see now RC §§ 2107.40, 2107.43, 2107.39), she is, despite lapse of time and presumptions arising therefrom, entitled to a citation and opportunity to make an election: *Adams v. Taylor*, 37 OLR 496 (App).

—Debts of testator

115. When wife takes, by provision of will, one-third of the realty for life, it is equivalent to dower, and she takes free from claims of creditors: *Baxter v. Bowyer*, 19 OS 490 [see also *Campbell v. Greenwalt*, 67 OS 520]; *Parker v. Parker*, 13 OS 95; *Jennings v. Jennings*, 21 OS 56.

116. Where a widow elected to take under the will, which, after certain bequests and devises, gave to the widow the residue of the estate "to be used by her for the payment of his debts," etc., it was held that the widow did not become personally liable for the debts, beyond the assets which came to her hands applicable to their payment: *Watts v. Watts*, 38 OS 480.

117. If testator leaves his personal property and certain real property to his wife, and thus shows an intention to exonerate the personal property from the payment of his debts, and his wife refuses to take under the will, the legatees and devisees who take under the will must assume the burdens imposed by the will, and they must pay the debts of testator, including the cost of administration, if the will provides that they are to make such payments, even though the effect will be to give the widow her distributive share of the personal property without payment of any part of testator's debts therefrom: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

[§ 2107.39.1] § 2107.391 [Citation to make the election.]

(A) The citation to make the election referred to in section 2107.39 of the Revised Code shall be sent to the spouse by certified mail. Notice that the citation has been issued by the court shall be given to the administrator or executor.

(B) The citation shall be accompanied by a general description of the effect of the election and the general rights of the spouse. The description shall include a specific reference to the proce-

dures available to the spouse under section 2107.40 of the Revised Code and to the presumption that arises if the spouse does not make the election within the one-month period. The description of the effect of the election and of the rights of the spouse need not relate to the nature of any particular estate.

(C) The surviving spouse electing to take under the will may manifest the election in writing.

HISTORY: 136 v S 145 (Eff 1-1-76); 136 v S 466. Eff 5-26-76.

For text of RC § 2107.39.1 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Forms

1 A&H Probate FORM 2107.39.1a et seq.

1 A&H Probate FORM 2107.39a et seq: Election by surviving spouse.

CASE NOTES AND OAG

[DECISIONS UNDER FORMER ANALOGOUS SECTION]

1. The year within which the election must be made by the widow begins to run from the time of the service of the citation: *Bowen v. Bowen*, 34 OS 164.

§ 2107.40 [Complaint; construction of will.]

At any time before the period of the election provided by section 2107.39 of the Revised Code has expired, the surviving spouse may file a complaint in the probate court making all persons interested in the will defendants, asking a construction of the will in favor of the spouse, and for the judgment of the court.

HISTORY: GC § 10504-57; 114 v 320 (357); 118 v 78; 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10567.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.40 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Construction of wills, procedure, RC § 2107.46.

See RC §§ 2107.39.1, 2107.46 which refer to this section.

Forms

1 A&H Probate FORM 2107.40a et seq.

Outline of Procedure

Construction of will. Leyshon No. 60; A&H No. 29.

Research Aids

O-Jur2d: Wills § 822

ALR

Failure of trustee to disclose self-dealing as ground for vacating order or decree settling account. 132 ALR 1522.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance. 15 ALR2d 610.

Control of discretion of trustee as to turning over entire principal of fund to beneficiary. 143 ALR 467.

Life insurance benefits as within power of courts to hasten enjoyment of trust funds. 145 ALR 1374.

Provisions of will or trust instrument contemplating advice, request, or consent of person other than one named as trustee as regards exercise of powers conferred upon latter. 120 ALR 1407.

Who takes under testamentary gift or "parents." 36 ALR3d 323.

Ohio Rules

Civil Rule 73(B) eliminates the choice of venue provisions of this section and makes it mandatory to bring the action in the Probate Division, Court of Common Pleas. See Staff Note to Rule 73(B) in Civil Rules volume to Page's Ohio Revised Code.

CASE NOTES AND OAG

DECISIONS UNDER FORMER GC § 10567

1. All persons interested in the will must be made defendants in an action by the widow for the construction thereof. This rule is followed in federal courts: *Stevens v. Smith*, 126 Fed 706 [certiorari denied, 193 US 671].

2. From the construction placed on the provisions of a will, at the suit of a widow under this section, error may be prosecuted to the supreme court from the judgment of the circuit court for reversal of the same: *Davis v. Coffman*, 55 OS 556, 45 NE 707 [for report of this case on merits, see 39 Bull 307].

3. Where property specifically devised must be taken for payment of testator's debts, his widow is entitled to be judicially advised whether, if she accepts the provisions made for her by the will, she will be obliged to contribute her proportion of the loss to the person from whom the property so devised is taken: *Allen v. Tressenrider*, 72 OS 77, 73 NE 1015.

§ 2107.41 Failure to make election; presumption. (GC § 10504-60)

If the surviving spouse dies before probate of the will, or, having survived such probate, thereafter either fails to make the election provided by section 2107.39 of the Revised Code or dies before the expiration of the time set forth by such section without having made such election, such spouse shall be conclusively presumed to have elected to take under the will and such spouse and the heirs, devisees, and legatees of such spouse who dies either before or after probate of the will without having elected, and those claiming through or under them shall be bound thereby, and persons may deal with the property of the decedent accordingly; provided that where applicable the provisions of section 2105.21 of the Revised Code shall prevail over the provisions relating to the right of election of a surviving spouse.

HISTORY: GC § 10504-60; 114 v 320 (357); 116 v 385 (390), § 1; 122 v 498, § 1; 125 v 411 (412). Eff 10-16-53. See former GC § 10571.

Comparative Legislation

- Ill.—Rev Stat, ch 3, § 15-1
 Ind.—Burns' Stat, § 29-1-3-2
 Ky.—KRS, § 392.080
 Mich.—MCLA, § 702.72
 Pa.—Purdon's Stat, Tit. 20, § 2512
 Fla.—FSA, § 732.212

Research Aids

- O-Jur2d: Wills §§ 824, 825
 Am-Jur2d: Wills § 1609

Law Reviews

Practical considerations in probate practice. Address by Judge Chase M. Davies of Cincinnati. 22 OBar (No. 19) 277.

Wills—surviving spouse's right of election—effect of death before probate—statutory revision (Case note.) 22 CinLRev 524.

Probate code amendments. Francis J. Eberly. 14 OS LJ 368.

See explanatory article in 4 OBar 245.

CASE NOTES AND OAG**INDEX**

- Citation not issued, election presumed, 4.1
 Competency of surviving spouse, 1, 7
 Death as affecting presumption, 2-4
 Due process not violated by presumption, 5
 Finality of presumption, 10
 Renunciation, 9
 Scope and construction, 6
 Void ab initio, 5.1

See also case notes under RC §§ 2107.43, 2107.45.

1. The provisions of former GC § 10571 (see now RC §§ 2107.39, 2107.43) that if the widow or widower fails to make an election within the time specified, it shall be deemed that she or he has elected to take under the will, have no application in a case where the widow was mentally incompetent at the time of the death of the testator and continued in such condition until her death two months later, during which period no action was taken by the probate court: *Ambrose v. Rugg*, 123 OS 433, 175 NE 691.

2. This section, which provides, inter alia, that if a surviving spouse dies before the expiration of the time limit provided by law without having made an election, such spouse shall be conclusively presumed to have elected to take under the will, does not by such provision deny due process of law and is constitutional: In re Knofer, 143 OS 294, 28 OO 203, 55 NE(2d) 262 [affirming 73 App 383].

3. Where the surviving spouse of a testator dies before the expiration of the time for making election, she shall be conclusively presumed to have elected to take under the will notwithstanding that during the period between the testator's death and her death she was continuously insane and incapable of making an election: In re Knofer, 143 OS 294, 28 OO 203, 55 NE(2d) 262 [affirming 73 App 383, 29 OO 93, 52 NE(2d) 667].

4. This section is not applicable if the surviving spouse referred to therein dies before the probate of the will of his spouse, and, in such case, after the probate of the will of the latter and the filing of the inventory, appraisement and schedule of debts thereunder, the probate court is authorized to make an election for the estate of the deceased surviving spouse as will be most advantageous to that estate: *Raleigh v. Raleigh*, 153 OS 160, 41 OO 209, 91 NE (2d) 241.

4.1 If a surviving spouse remains alive and competent and, within nine months after the appointment

of the first fiduciary charged with the administration of the estate under the will of the deceased spouse, no citation is issued and served upon him to elect whether to take under the will or under RC § 2105.06 and within such nine-month period he also fails voluntarily so to elect, he will be conclusively presumed to have elected to take under the will, regardless of whether or not the inventory, appraisement and schedule of debts are filed: In re Witteman, 3 OS(2d) 66, 32 OO(2d) 49, 209 NE(2d) 427.

5. This section, providing for a conclusive presumption of election, is not violative of due process, where the surviving spouse fails to elect by reason of continued insanity, and his guardian fails to make application for a commission to elect, within the time provided by GC § 10504-55 (RC § 2107.39): In re Iwinski, 83 App 463, 38 OO 491, 77 NE(2d) 375; In re Iwinski, 49 OLA 609.

5.1 A void election, as contrasted with a voidable one, is void ab initio, and if no valid election is made thereafter within nine months after the appointment of the executor, and nothing has occurred or failed to occur which would operate to extend such nine month period, the surviving spouse shall be conclusively presumed to have elected to take under the will of the decedent, as provided by this section: In re Wolfel, 3 OApp(2d) 11, 32 OO(2d) 75, 209 NE (2d) 594.

6. Under this section, as amended 116 v 116, if the surviving spouse fails to make an election, or dies at any time before the expiration of the time limit provided by law without having elected, the spouse "shall be conclusively presumed to have elected to take under the will": *Price v. Herbert*, 11 OO 138 (App).

7. This section applies solely to a competent surviving spouse, while GC § 10504-63 (RC § 2107.45) applies solely to an incompetent spouse: In re Jones, 15 OO 250 (PC).

9. Renunciation may be made after an election to take under the will, but to be operative it must be made within a reasonable time after the death of the testator: In re Hartman, 29 OO 256, 14 OSupp 112 (PC).

10. A surviving spouse is required to elect whether to take under the provisions of a will within nine months after the appointment of the executor or administrator, whether or not a citation be issued as provided by law, and upon failure to make such election a conclusive election to take under the will is made by law which cannot be subsequently negated by action of the surviving spouse: In re Hartman, 29 OO 256, 14 OSupp 112 (PC).

§ 2107.42 Election to take under the will; effect.

If a surviving spouse elects to take under the will, the spouse shall be barred of all right to an intestate share of the property passing under the will and shall take under the will alone, unless it plainly appears from the will that the provision for the spouse was intended to be in addition to an intestate share. An election to take under the will does not bar the right of the surviving spouse to an intestate share of that portion of the estate as to which the decedent dies intestate. Unless the will expressly otherwise directs, an election to take under the will does not bar the right of the surviving spouse to remain in the mansion of

the deceased consort, nor the right of the surviving spouse to receive the allowance for the support provided by section 2117.20 of the Revised Code.

HISTORY: GC § 10504-61; 114 v 320 (357); 116 v 385; 119 v 394; 136 v S 145. Eff 1-1-76.

See former GC §§ 10569, 10572.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.42 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Election to take bars intestate share, exceptions:

Ind.—Burns' Stat, § 29-1-3-1

Ky.—KRS, § 392.080

Mich.—MCLA, § 702.69

Pa.—Purdon's Stat, Tit. 20, § 2510

Fla.—FSA, § 732.211

Forms

1 A&H Probate FORM 2107.42a et seq.

Research Aids

Effect of election to take under will:

Allowance for support:

O-Jur2d: Wills § 836

Dower:

O-Jur2d: Wills § 835

Am-Jur2d: Wills § 1654

Exempt property:

O-Jur2d: Wills § 838

Generally:

O-Jur2d: Wills § 832 et seq.

Am-Jur2d: Wills § 1632 et seq.

Intestate share:

O-Jur2d: Wills § 834

Am-Jur2d: Wills §§ 1646, 1651

Mansion house:

O-Jur2d: Wills § 837

ALR

Effect of election to take under will on right of widow to statutory allowance or allowance for support. 97 ALR2d 1319

When widow is put to her election between provision made for her by her husband's will, and her dower, homestead, or community right. 171 ALR 649.

Widow's right of quarantine. 126 ALR 796.

Respective rights and obligations of testamentary trustee and one whom will permits to occupy property. 172 ALR 1283.

Law Reviews

Wills; decedents' estates; year's allowance. (Case note.) 5 OO 29.

Browsing among the later probate authorities. Address by Harry L. Deibel of the Cleveland bar. 22 OBar (No. 17) 243.

Does dower still lurk in elections to take under the will? Charles E. Stevenson. 30 CinLRev 172.

CASE NOTES AND OAG

1. Under the provisions of this section (114 v 357), if a surviving spouse elects to take under a will, such spouse shall be barred of all rights to an intestate share of the estate, and shall take under the will alone, unless it plainly appears from the will that the provision therein for the spouse was intended to be in addition to an intestate share: Jones v. Webster, 133 OS 492, 11 OO 184, 14 NE(2d) 928.

2. Under this section (114 v 357), a testator may,

by express direction in his will, bar the right of his widow to receive one year's allowance for the support of herself and children if she elects to take under the will: Bolles v. Toledo Trust Co., 144 OS 195, 29 OO 376, 58 NE(2d) 381 (overruled in part by Smyth v. Cleveland Trust Co., 172 OS 489, 18 OO(2d) 42, 179 NE(2d) 60.)

3. The exemption allowed to a surviving spouse by the provisions of GC § 10509-54 (RC § 2115.13) of the articles enumerated therein or a proper amount of cash in lieu thereof, must be allowed, if the selection allowed by the statute is made by such spouse even though such spouse later elects to take under a will conditioned that the surviving spouse be barred of all claims against the estate in order to take thereunder: Landfear v. Scharkofsky, 5 OApp 213, 3 OO 48, 197 NE 810.

4. Where the will of a husband, after making certain provisions for his wife, recites that "the foregoing devises and bequests to my said wife . . . shall be in lieu of her dower and all other interest which she may have in my estate," if the wife elects to take under the husband's will, such election shall bar her of her year's allowance and money exemption; and where, in such will, household goods are specifically bequeathed to the wife, such election shall bar the wife of her right under GC § 10509-54 (RC § 2115.13) to select such household goods as property exempt from administration: Atwood v. Miller, 24 OO 398 (PC).

5. When the surviving spouse elects to take under the will, she is entitled to an intestate share of that portion of the estate as to which the decedent dies intestate: Abram v. Wilson, 37 OO(2d) 288, 8 OMisc 420, 220 NE(2d) 739 (PC).

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. A widower electing to take under will of his wife is not barred of his right to statutory allowance of personal property not deemed assets of estate of wife, unless will expressly provides that provisions made for him are in lieu thereof (former GC § 10572): In re Guthrie, 28 NP(NS) 447; Brown v. Routzahn, 63 Fed(2d) 914 [reversing 58 Fed(2d) 329].

2. Where the testator provides in his will that the interest given to widow "shall be in lieu of her statutory allowances" and the widow fails to make an election within time, she will be barred of her right to the year's allowance, but not of her right to the set-off: In re Felman, 32 NP(NS) 73.

3. When a widow elects to take under a will which divides the real and personal estate of the testator between her and two children, giving to the widow and her heirs one-third of the real estate, and more than one-third of the personalty, she is not entitled to a distributive share of the personal property, under the statute, for the reason that the personal property is not intestate, although a subsequent clause of the will recites that the devises and bequests to the wife were not intended to be in lieu of her dower, either in his real or personal estate: Parker v. Parker, 13 OS 95.

4. The provisions above, prescribing the time and manner of election by widows, are inapplicable to the case of foreign widows. But the rule which this section prescribes for the construction of the terms of a will applies to all wills disposing of lands situated in this state. And as to such wills, whether foreign or domestic, the rule is that the widow cannot have both the testamentary provision and dower unless that plainly appears, by the will itself, to have been testator's intent: Jennings v. Jennings, 21 OS 56.

[DECISIONS UNDER LAW PRIOR TO SB 145
AMENDMENT]

INDEX

Dower and distributive share, 1
Right as heir, 7 et seq
Year's allowance, 17 et seq

Dower and distributive share

1. In order to bar a widow of her right of dower, her election must be made either of record in the proper court, as required by statute, or in fact under circumstances as would create against her an estoppel of her right to claim under the law: *Millikin v. Welliver*, 37 OS 460; see also *Hayes v. Heyl*, 81 OS 563, 91 NE 1130.

2. Where the widow elects to take under the will, she will be barred of dower in land of which her husband was seized as an estate of inheritance during coverture, and which was sold and conveyed on foreclosure of a mortgage executed by him, in which she did not join, unless it plainly appears by the will that she should have such provision in addition to her dower: *Corry v. Lamb*, 45 OS 203, 12 NE 660.

Right as heir

7. Where a husband possessed of nonancestral real estate dies testate, but without issue, property devised to his widow in fee, with no devise over in the event that she elected not to take under the will, does not become intestate property as to her, and she cannot take as heir at law the property thus devised to her in lieu of dower and her distributive share: *Armstrong v. Armstrong*, 11 CC(NS) 474, 21 CD 261.

10. A widow whose husband dies testate, leaving no children, who elects to take under the law, gets less than she would if he had died intestate. She is therefore interested in the will and may maintain an action to set it aside: *Moyses v. Neilson*, 7 NP 607, 9 OD 623.

11. Where the husband dies testate, leaving no children, the widow, who elects to take under the law, gets such interest in his estate as she would if he had died leaving children, but if he dies intestate, leaving no children, she gets a life estate in all his property or the entire estate, according to the source from which the property came to the husband: *Moyses v. Neilson*, 7 NP 607, 9 OD 623.

12. Election by a widow to take under the will of her deceased husband does not preclude her inheritance of lands as to which her husband died intestate and to which no reference was made in the will: *Bowers v. McGill*, 12 NP(NS) 124, 22 OD 407, 56 Bull 413 (Ed); see also 56 Bull 421 for same report.

Year's allowance

17. Where a will specifically gives the widow the income of all the testator's estate during her life, she is entitled to the income from the time of the testator's death, and debts of the testator and the expenses of administration must be paid from the corpus of the estate. In such case, where the will does not otherwise expressly direct, the widow is entitled to receive the year's allowance provided by former GC § 10572 (see now RC § 2107.42): *Hegner v. Hegner*, 9 App 147, 31 OCA 418 [motion to certify record overruled, 15 OLR 199, 62 Bull 291].

18. Where a widow accepts under the will, which contains a request that no appraisement of the estate be made, she does not thereby waive her right to a year's allowance: *In re Estate of Rierdon*, 5 NP 516, 5 OD 606.

19. Where the terms of the will plainly show that testator's intent was to bar his widow of a first year's support, and a provision is made for her in lieu thereof, if she elects to take under the will, she is

not entitled to the allowance: *In re Estate of Witner*, 7 NP 143, 10 OD 30.

20. If the testator gives to his widow the entire income of his estate, and does not provide expressly that such income is in lieu of the first year's allowance, the election of the widow to take under the will does not bar her of such allowance: *In re Messang*, 20 NP(NS) 60; sub nomine, *In re Massang*, 26 OD (NP) 533.

§ 2107.43 Election made in person.

The election of a surviving spouse to take under section 2105.06 of the Revised Code and thereby refusing to take under the will shall be made in person before the probate judge, or a deputy clerk who has been appointed to act as a referee under the provisions of section 2315.37 of the Revised Code, except as provided in sections 2107.44 and 2107.45 of the Revised Code.

When the election is made in person before such judge or referee, the judge or referee shall explain the will, the rights under such will, and by law, in the event of a refusal to take under the will.

HISTORY: GC §§ 10504-56, 10504-59; 114 v 320 (357); 122 v 498; 125 v 411 (EF 10-16-53); 136 v S 145 (EF 1-1-76); 136 v S 466. EF 5-26-76.

Analogous to former GC §§ 10570, 10571.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.43 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2107.43 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Forms

1 A&H Probate FORM 2107.39a et seq: Election by surviving spouse.

Research Aids

Manner of election:

O-Jur2d: Wills § 820

Am-Jur2d: Wills § 1622 et seq.

Right of spouse to explanation:

O-Jur2d: Wills § 821

ALR

Participating in court proceeding as election. 166 ALR 316.

Law Review

Probate code amendments. Francis J. Eberly. 14 OSLJ 368.

CASE NOTES AND OAG

1. While this section requires the judge or referee appointed by him to explain the will, the rights under such will and under the law, the right of the widow to elect to take under the law or under the will is an absolute right in the nature of a personal privilege which cannot be taken from her: *In re Callan*, 101 App 114, 1 OO(2d) 64, 135 NE(2d) 464.

2. Where a surviving spouse, in making her election to take against the will, relied upon the erroneous advice of her counsel as to what she would receive under the will, or at law, to her detriment, and the probate judge did not make any further explanation of her rights as required by this section, a court of equity, where there were no intervening rights of

third parties, will permit her to rescind such election: *Smith v. First Nat. Bank*, 69 OLA 102, 124 NE(2d) 851 (CP).

DECISIONS UNDER FORMER GC § 10571

1. A widow's written election under former GC § 10571 (see now RC §§ 2107.39, 2107.43), and recorded, is a valid election, if her rights under the will and the law had been fully explained to her before the election was executed: *Bell v. Henry*, 121 OS 241, 167 NE 880.

3. The signing by a widow of an acknowledged election to take under will and filing in the probate court is within former GC § 10571 (see now RC §§ 2107.39, 2107.43), and must stand as valid unless set aside for fraud: *Bell v. Henry*, 28 OLR 527.

5. If a citation does not issue under former GC § 10566 (see now RC § 2107.39) and an election is not made formally, the surviving spouse will take under the law, by virtue of this section, unless it is clearly shown that such surviving spouse elected in fact to take under the will: *Colored Industrial School v. Bates*, 90 OS 288, 107 NE 770, *AnnCas* 1916C, 1198 [affirming *Bates v. Creed*, 2 App 59, 15 CC(NS) 433, 26 CD 338; for opinion below, see *Creed v. Bates*, 14 NP(NS) 81, 31 OD 552].

6. A widow who elects not to take under the will of her deceased husband is entitled to only so much of the personalty belonging to the said estate as would have passed to her had her husband died intestate: *Harbeson v. Mellinger*, 2 App 75, 18 CC (NS) 504, 25 CD 195.

9. Under the provisions of former GC § 10571 (see now RC §§ 2107.39, 2107.41, 2107.43) when the citation is issued and served, and no election is made within one year from the said service, it shall be claimed that she or he elected to take under the will: *In re Citations*, 4 OLA 87.

12. The executor is not the proper plaintiff in a proceeding in mandamus to compel the probate judge to enter upon the records of his court an oral election actually made by the widow in open court, which the probate judge has determined judicially to be a valid election. Such petition will be dismissed unless amended by substituting the proper plaintiff: *State ex rel Zollinger v. Sloane*, 24 OD(NP) 119.

13. If the widow appears in open court and makes an oral election to take under the will, and the court finds in its judicial capacity that she has elected to take under the will, such election is complete under this section even though the probate judge does not enter such election in writing upon the records of the court: *State ex rel Zollinger v. Sloane*, 24 OD(NP) 119.

DECISIONS UNDER FORMER GC § 10570

Who may elect

1. The right to elect is a right to be exercised by the widow in person. If she die without having made her election, those who claim under her can only claim so much of her husband's personal estate as she was entitled to under the law: *Millikin v. Welliver*, 37 OS 460; see also *Hayes v. Heyl*, 81 OS 563, 91 NE 1130.

2. Not applicable where the will is not probated at the time of the death of the widow or widower: *Hawkins v. Barrow*, 15 CC 141, 8 CD 251 [affirming 35 Bull 97].

Probate court

7. A deputy clerk of the probate court is without right or authority to receive the election of the widow or widower to take under the will of a de-

ceased consort; and an election so made may be set aside in a court of equity. The duty of receiving such election is a judicial one and cannot be performed by a deputy clerk: *Mellinger v. Mellinger*, 73 OS 221, 76 NE 615.

Explanation of rights

12. The entry of an election by a widow to take under the will need not show affirmatively that the judge had explained to her the provisions of the will, etc., for in the absence of averment or proof to the contrary, such explanation will be presumed. But the probate judge has no right to cancel an election previously made and entered on his journal, at her instance, for an alleged mistake on her part as to the provisions and effect of such will, for such election, when made and recorded, can be vacated only on petition to the court of common pleas, or other court having general equity jurisdiction: *Davis v. Davis*, 11 OS 386.

13. It is not the duty of the probate judge to explain to a widow her rights as an heir, at the time of the election. He is to advise her as to the effects of the election on her rights as a widow: *Carder v. Commissioners*, 16 OS 353.

14. The explanation of the rights of the widow which the probate court is to make under this section is the explanation of her rights to dower and the distributive share of the personalty which cannot be taken away from her by will, and her rights under the will. It is not the duty of the probate court to explain to her her rights in case of the partial intestacy of the deceased spouse: *Bowers v. McGill*, 12 NP(NS) 124, 22 OD 407, 56 Bull 413 (Ed); see also 56 Bull 421 for same report.

16. If the will provides that A may occupy a certain farm for a certain period of time at a certain rental, and that he shall then have the option of purchasing it at a certain sum, A has no interest during such period except as tenant; and the fact that he made valuable improvements during such period, does not prevent the testator's widow from avoiding her election, if such election is made without full knowledge of her rights: *Ward v. Sark*, 19 NP(NS) 401, 27 OD 229.

Foreign wills

28. General Code § 10570 (see now RC § 2107.43) requiring an election by a widow to take under the will of her husband, applies to domestic wills so far as it relates to the time and manner of making an election: *Waterfield v. Rice*, 111 Fed 625, 49 CCA 504, 14 OFD 282.

§ 2107.44 Commission issued to take election of spouse. (GC § 10504-62)

On an application in behalf of a surviving spouse, the probate court may issue a commission, with a copy of the will annexed, directed to any suitable person, to take the election of such spouse. In such commission the court shall direct such person to explain the rights of such spouse under the will and under sections 2105.01 to 2105.21, inclusive, of the Revised Code.

HISTORY: GC § 10504-62; 114 v 320 (358); 122 v 498, § 1. Eff 10-1-53. Analogous to former GC § 10573.

Cross-References to Related Sections

See RC § 2107.43 which refers to this section.

Forms

1 A&H Probate FORM 2107.44a et seq.

1 A&H Probate FORM 2107.39a et seq: Election by surviving spouse.

Outline of Procedure

Election of spouse to take property, commission issued. Leyshon No. 71; A&H No. 44

Research Aids

Election by persons unable to appear:

O-Jur2d: Wills § 827

Manner of election:

O-Jur2d: §§ 820, 821

Am-Jur2d: § 1622 et seq.

CASE NOTES AND OAG

1. Revised Code § 2107.44 permits the election of a surviving spouse to be taken by a commissioner appointed by the court upon application on behalf of a surviving spouse: *Baker v. Hutyera*, 56 OO(2d) 230, 27 OMisc 19, 267 NE(2d) 604 (CP).

§ 2107.45 Election made by one under legal disability. (GC §§ 10504-63, 10504-64)

When, because of a legal disability, a surviving spouse is unable to make an election as provided by section 2107.39 of the Revised Code, as soon as the facts come to the knowledge of the probate court, the probate court shall appoint some suitable person to ascertain the value of the provision made for such spouse by the testator and the value of the rights in the estate of such testator under sections 2105.01 to 2105.21, inclusive, of the Revised Code. Such appointment by the court shall be made at any time within the time allowed for election under section 2107.39 of the Revised Code.

When the person appointed returns the report of his investigation, the court shall determine whether the provision made by the testator for the surviving spouse in the will or the provision under sections 2105.01 to 2105.21, inclusive, of the Revised Code, is better for such spouse and shall elect accordingly. The court shall thereupon record upon its journal the election made for such spouse, which election, when so entered, shall have the same effect as an election made by one not under such disability.

HISTORY: GC §§ 10504-63, 10504-64; 114 v 320 (358); 125 v 903 (963). **EFF 10-1-53.** Analogous to former GC §§ 10574, 10575.

Cross-References to Related Sections

Construction and operation of wills, RC § 2107.46.

See RC § 2107.43 which refers to this section.

Comparative Legislation

Spouse insane, election by guardian:

Ill.—Rev Stat, ch 3, § 15-4

Ind.—Burns' Stat, § 29-1-3-4

Ky.—KRS, § 396.180

N.Y.—EPTL, § 5-1.1

Pa.—Purdon's Stat, Tit. 20, § 5144

Fla.—FSA, § 732.210

Forms

1 A&H Probate FORM 2107.45a et seq.

1 A&H Probate FORM 2107.39a et seq: Election by surviving spouse.

Outline of Procedure

Election by spouse under will when under legal disability. Leyshon No. 72; A&H No. 45

Research Aids

O-Jur2d: Wills § 826

Am-Jur2d: Wills § 1614

ALR

Control of discretion of trustee as to turning over entire principal of fund to beneficiary. 143 ALR 467.

Life insurance benefits as within power of courts to hasten enjoyment of trust funds. 145 ALR 1374.

Provisions of will or trust instrument contemplating advice, request, or consent of person other than one named as trustee as regards exercise of powers conferred upon latter. 120 ALR 1407.

Failure of trustee to disclose self-dealing as ground for vacating order or decree settling account. 132 ALR 1522.

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance. 15 ALR2d 610.

Who may make election for incompetent to take under or against will. 21 ALR3d 320.

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1. Legatees under a will have no right to contest an election not to take under a will by the probate court on behalf of a surviving spouse who because of legal disability is unable to make such election on his own behalf: *In re Strauch*, 15 OS(2d) 192, 44 OO(2d) 158, 239 NE(2d) 43 [affirming 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95].

1.1 The executor and testamentary trustee under a deceased husband's will, as well as a legatee under the will, have interests which conflict with what is "better" for the incompetent widow and, therefore, they have no standing to contest the court's election on behalf of the spouse pursuant to the provisions of RC § 2107.45: *In re Cook*, 19 OS(2d) 121, 48 OO(2d) 113, 249 NE(2d) 799.

1.2 The election provided by statute for a surviving spouse to choose whether she desires to take under her husband's will or under the statute of descent and distribution is solely for the benefit of the surviving spouse, and where that spouse is under a legal disability the probate court must elect on her behalf the provision which is better for her, con-

sidering only her interests: In re Cook, 19 OS(2d) 121, 48 OO(2d) 113, 249 NE(2d) 799.

1.3 Only the guardian of such spouse or some other party acting on behalf of such spouse may question that determination: In re Cook, 19 OS(2d) 121, 48 OO(2d) 113, 249 NE(2d) 799.

2. An order made by a probate court in a special proceeding under GC §§ 10504-63 and 10504-64 (RC § 2107.45), relative to the election by a surviving spouse under legal disability, determining whether the provision in the will or the provision by law is better for the spouse, and electing accordingly, is a final order affecting a substantial right in a special proceeding, and appealable under GC § 12223-2 (RC § 2505.02): In re Knoffler, 73 App 383, 29 OO 93, 52 NE(2d) 667 [affirmed, 143 OS 294].

2.1 General Code § 11397 (RC § 2311.21), prescribing that no action or pending proceeding shall abate by the death of either or both parties thereto, applies only to actions or proceedings of an adversary character, and does not apply to a special proceeding under GC §§ 10504-63 and 10504-64 (RC § 2107.45), relative to election of a surviving spouse to take under a will: In re Knoffler, 73 App 383, 29 OO 93, 52 NE(2d) 667 [affirmed, 143 OS 294].

3. General Code § 10504-63 (RC § 2107.45) cannot be construed to preserve the right of a surviving spouse, an incompetent, to elect to take under the will or by law until such time as the facts of his incapacity come to the knowledge of the probate court: In re Iwinski, 83 App 463, 38 OO 491, 77 NE(2d) 375.

4. A probate court, in determining that the best interest of an eighty-three-year-old incompetent widow would be served by the court's exercising, in such widow's behalf, the widow's election to take against the will and under the laws of intestacy, is not, under such circumstances, abusing its discretion, where the value of the widow's interest under the law was two hundred sixty-seven thousand, seven hundred thirty-six dollars, as against eighty-three thousand, nine hundred dollars under will, though such election defeated the joint testamentary plan of both testator and spouse: In re Callan, 101 App 114, 1 OO(2d) 64, 135 NE(2d) 464.

5. When the probate judge, acting in pursuance of and in accordance with this section, has made election in behalf of an incompetent widow to take either under the will or under the law of intestacy, the election so made has the same effect as if made by one not under disability, and the widow's right thereby becomes absolute; and third parties are without right to complain: In re Callan, 101 App 114, 1 OO(2d) 64, 135 NE(2d) 464.

6. The election by the probate judge made in behalf of an incompetent widow to take either under the law or under the will is made solely for the benefit of the incompetent spouse and not for the benefit of third parties: In re Callan, 101 App 114, 1 OO(2d) 64, 135 NE(2d) 464.

7. The probate judge in determining in behalf of an incompetent widow whether to take under the will or under the law of intestacy must determine whether provision made by the testator for the surviving spouse in the will or provision under the law "is better for such spouse" and elect accordingly: In re Callan, 101 App 114, 1 OO(2d) 64, 135 NE(2d) 464.

9. An order of a probate court making an election for an incompetent surviving spouse under this section, is subject to the control of the court and may be vacated under RC § 2101.33, within term time: In re Strauch, 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95.

10. In making an election for a surviving spouse under this section, a probate court is to determine which is better as between the provision "in the will" and the provision under the statutes. The court may not consider provisions by the decedent or others outside the will and cannot consider the effect of an election upon legatees, heirs, next of kin or the tax collector: In re Strauch, 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95.

11. An incompetent surviving spouse's lack of financial need, her probable intent to honor the testator's intent, and the existence of a plan of disposition of assets are not permissible standards for making an election under RC § 2107.45: In re Strauch, 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95.

12. Where the provision in a will is a simple bequest worth \$8,820.50, and the statutory share is \$44,102.50, it is an abuse of discretion for a probate court to elect on behalf of the incompetent spouse to take under the will and against the statutory right: In re Strauch, 11 OApp(2d) 173, 40 OO(2d) 331, 229 NE(2d) 95.

13. Where testator refers in his will to direct gifts made during his lifetime to his wife for her care, support and comfort, such reference may not be construed as a "provision in the will" under GC § 10504-64 (RC § 2107.45), relative to the election by the probate court for such surviving spouse who is under legal disability because of incompetency: In re Morton, 6 OO 343 (CP).

14. In making an election under GC §§ 10504-63 and 10504-64 (RC § 2107.45), for a surviving spouse because of incompetency, the probate court, having plenary power at law and in equity fully to dispose of the matter, should put itself in the place of the surviving spouse and assume that such surviving spouse is one having at least ordinary business ability, and in addition the qualities of fairness, loyalty and respect for the memory and good deeds of the deceased spouse: In re Morton, 6 OO 343 (PC).

15. The death of an incompetent spouse within the time limit for making an election does not raise a presumption that she shall take under the will of her deceased husband: In re Jones, 15 OO 250 (PC).

16. Where the wills of a husband and wife were made in pursuance of a plan to minimize estate and inheritance taxes, and the wife's bequest of her entire estate directly to her children, rather than to her husband, was made to minimize the impact of federal estate taxes upon their joint estates, the probate court may properly make an election for the incompetent surviving husband to permit the wife's estate to pass directly to her legatees: In re Rieley, 28 OO(2d) 122, 194 NE(2d) 918 (PC).

[CONSTRUCTION AND OPERATION]

§ 2107.46 Action by fiduciary.

Any fiduciary may maintain an action in the probate court against creditors, legatees, distributees, or other parties, and ask the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, and the rights of the parties in interest.

If any fiduciary fails for thirty days to bring such an action after a written request from a party in interest, the party making the request may institute the suit.

HISTORY: GC §§ 10504-66, 10504-67; 114 v 320 (359); 118 v 78; 125 v 903 (963) (Eff 10-1-53); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10857, 10858.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2107.46 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Action to construe will before election to take under the will, RC § 2107.40.

Constructive service, by publication, RC § 2703.14 et seq.

Comparative Legislation

Action for construction:

Cal.—Probate Code, § 100

Ind.—Burns' Stat, § 29-1-6-5

N.Y.—SCPA, § 1420

Pa.—Purdon's Stat, Tit. 20, § 3373

Fla.—FSA, § 733.213

Forms

1 A&H Probate FORM 2107.46a et seq.

Outlines of Procedure

Construction of will. Leyshon No. 60; A&H No. 29

Research Aids

Action by fiduciary—jurisdiction:

O-Jur2d: Wills § 692 et seq.

Am-Jur2d: Wills § 1495 et seq.; Trusts § 565 et seq.

Appellate review:

O-Jur2d: Wills §§ 714, 716

Am-Jur2d: Appeal and Error § 139 et seq.; § 209

Parties:

O-Jur2d: Wills § 698 et seq.; Fiduciaries § 167; Trusts § 173 et seq.

Am-Jur2d: Wills §§ 1496-1498; Trusts § 600 et seq.

ALR

Ademption of legacy of business or interest therein. 65 ALR3d 541.

Construction and effect of will provision releasing or forgiving debt due testator. 76 ALR2d 1020.

Construction and effect of will provisions expressly relating to the burden of estate or inheritance taxes. 69 ALR3d 122.

Effect of doubtful construction of will devising property upon marketability of title. 65 ALR3d 450.

Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support. 41 ALR3d 255.

What passes under term "securities" in will. 27 ALR3d 1386.

What passes under terms "cash," "cash on hand," or "cash assets" in will. 27 ALR3d 1406.

Wills: separate gifts to same person in same or substantially same amounts, made in separate wills or codicils, as cumulative or substitutionary. 65 ALR3d 1325.

Wills: "stocks" as including bonds or other securities. 76 ALR2d 243.

Wills: Term "heirs" as restricted to meaning "children." 37 ALR3d 9.

Law Review

Destruction of a testamentary trust by agreement as incidental to the compromise of a will contest. (Editorial note.) 4 CinLRev 524.

Ohio Rules

See note following RC § 2107.40 relative to Civil Rule 73(B).

CASE NOTES AND OAG

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ACTIONS TO CONSTRUE WILLS

Scope of section

1. An action cannot be maintained in cases where no trust is involved: Collins v. Collins, 19 OS 468; Corry v. Fleming, 29 OS 147.

2. An action to construe a will which creates a charitable trust is equitable, and may be appealed to the court of appeals: Gearheart v. Richardson, 109 OS 418, 142 NE 890.

3. In an action brought by executors under favor of GC § 10504-66 (RC § 2107.46), asking for the construction of a will, the petition raises all the issues in the case, no other pleadings are required, and a default judgment cannot be rendered against a party in interest for failure to answer: Hood v. Garrett, 53 App 464, 7 OO 316, 5 NE(2d) 937.

4. In an action to construe a will it is error for the court to refuse relief on the ground that there is no present necessity for construing the will, the doubtful provisions thereof not being immediately

operative, where there exist other valid reasons for the construction of the will at that time: *Schreiner v. Cincinnati Altenheim*, 61 App 344, 15 OO 228, 22 NE(2d) 587.

5. A proceeding under an application to the probate court by a guardian for its direction as to the payment of a claim presented to such guardian is not an "action" within the meaning of GC § 10504-66 (RC § 2107.46), when the claimant is not made a party to such proceeding: *Sacks v. Johnston*, 76 App 143, 31 OO 438, 63 NE(2d) 246.

5.1. Where an action is in the nature of a proceeding to determine heirship and the fact that the wording of the will requires consideration is only incidental, an action should not be brought under this section: *Stewart v. Purget*, 34 OLA 343, 37 NE(2d) 549.

6. The legislative intent in the enactment of the declaratory judgments act was not to "scrap" the statutory remedies nor the common law remedies, for under it the court's jurisdiction is alternative in most cases: *Flowers v. Metcalf*, 4 OO 301 (PC).

7. In a case brought under this section, where a husband refuses to take under his wife's will, his rights may be settled by a suit thereunder: *Wilson v. Hall*, 6 CC 570, 3 CD 589 [affirmed, without report, *Hall v. Wilson*, 53 OS 679].

8. Means provided to determine the rights of legatees under former GC §§ 10853, 10854 and 10855 [repealed, 114 v 320 (475)], are not exclusive. An action may be brought under former GC §§ 10857 and 10858 (see now RC § 2107.46): *Davis v. Hutchings*, 15 CC 174, 8 CD 52 [reversed on another point, *Davis v. Davis*, 62 OS 411].

9. An action can be maintained by an executor under this section to obtain the true construction of a will, only in cases where a trust is invoked or where the executor has duties to perform, in carrying out the provisions of the will, which require the guidance of the court: *Chase v. Isherwood*, 1 NP 31, 5 OD 1.

10. If there is anything to construe, a suit to construe will lie: *Hollister v. Howe*, 4 NP 168, 6 OD 157.

Jurisdiction

16. Where a trust is created for the benefit of an incorporated religious society, and there are two bodies claiming to be that society, a court of equity may require the claimants to interplead, and may proceed to ascertain the true beneficiary without compelling either party to establish its corporate rights at law: *First Presbyterian Soc. v. First Presbyterian Soc.*, 25 OS 128.

17. This section confers upon the court of common pleas the exclusive jurisdiction to supervise or control the administration of a testamentary trust: *Pike v. White*, 22 CC(NS) 61, 33 CD 453 [affirmed, without opinion, May 4, 1915].

18. The probate court has no jurisdiction conferred upon it by law, to supervise or control the administration of a testamentary trust: *Pike v. White*, 22 CC(NS) 61, 33 CD 453.

19. Judgment construing will is not conclusive against beneficiary not party thereto and will not justify administration of estate contrary to will (former GC § 10857 [see now RC § 2107.46]): *In re Kachelmacher*, 40 App 282, 178 NE 314.

19.1 By this section, the probate court and the common pleas court are given concurrent jurisdiction of actions for direction or judgment in any matter respecting a trust, estate, or property of a decedent: *Green v. Ryan*, 95 App 345, 53 OO 311, 119 NE(2d) 668.

19.2 The probate court has jurisdiction of an action by an executrix for a judgment declaring that cer-

tain items of decedent's will bequeathing property to his former wife had been revoked by a decree granting decedent a divorce from his former wife: *Davis v. Wallace*, 27 OO(2d) 80, 192 NE(2d) 291 (App).

20. An action for construction of a will (former GC § 10857 [see now RC § 2107.46]), and determination of the rights of the trustee named therein, is a chancery case from which an appeal lies: *Beck v. Alliance First Nat. Bank*, 31 OLR 213.

21. An action brought in the common pleas court for the construction of a will, under favor of former GC § 10857 (see now RC § 2107.46), is a chancery case and appealable: *Washburn v. Guild*, 22 OLA 518.

22. Common pleas court has jurisdiction over guardian's action for judgment as to his duty respecting ward's estate, and must determine duty and decree performance therefore: *Madden v. Shallenberger*, 121 OS 401, 169 NE 450.

23. Proceeding by fiduciary for directions respecting estate not involving trust held not chancery case, and therefore not appealable to court of appeals (former GC § 10857 [see now RC § 2107.46]): *Crowley v. Crowley*, 124 OS 454, 179 NE 360.

Who may maintain action

26. A trustee in doubt as to his powers has the right to apply to a court of equity to define them and give judicial sanction to his acts, but in such case the court will only define the trusts and will not order a sale of property where no adverse right is asserted: *Wiswell v. First Congregational Church*, 14 OS 31.

27. An executor may maintain a civil action, under this section, in the court of common pleas, asking the direction of the court in any matter affecting the trust estate or property to be administered and the rights of the parties in interest: *Merrick v. Merrick*, 37 OS 126.

28. As to actions by next of kin to obtain construction before this section was passed, see *Bowen v. Bowen*, 38 OS 426.

28.1. One who as trustee under a will and as an individual is interested in a provision of the will authorizing the removal of certain of testator's real estate from the trust and the substitution of a sum of money to take its will may bring and maintain an action for a declaratory judgment in the probate court to secure a determination and declaration as to his obligations as trustee and as an individual with respect to such matter and as to the rights of the trust beneficiaries, where there is a present bona fide dispute between or among those concerned as to the interpretation of the will and doubt exists as to the proper interpretation: *Sessions v. Skelton*, 163 OS 409, 56 OO 370, 127 NE(2d) 378.

29. One who has no trust to administer under a will cannot maintain an action for the construction thereof: *Bantz v. Rover*, 14 CC(NS) 218, 24 CD 201 [citing and following *Collins v. Collins*, 19 OS 468; *Corry v. Fleming*, 29 OS 147].

30. Under former GC §§ 10857 and 10858 (see now RC § 2107.46) legatee under will was not entitled to file cross-petition for construction of will, where it was not shown that executor was requested in writing to file such action and failed for thirty days to do so; cross-petition is improperly filed where it does not show that construction sought will ever be important: *Snyder v. Heffner*, 33 App 379, 169 NE 460.

31. The declaratory judgments act, GC §§ 12102-1 to 12102-16 (RC §§ 2721.01 to 2721.15) is an independent act of the legislature, complete in its subjects of jurisdiction, and its remedy, not to be restricted or

modified by "another established remedy"; consequently the heir at law or legatee under the will can appeal directly to the court without the intervention of an executor or trustee, as in the provisions of GC §§ 10504-66 and 10504-67 (RC § 2107.46): *Flowers v. Metcalf*, 4 OO 301 (PC).

31.1 This section authorizes action by fiduciaries for directions of a court as to property held in trusts: *Fenn College v. Nance*, 33 OO(2d) 292, 4 OMisc 183, 210 NE(2d) 418 (CP).

Questions on which instructions may be asked

37. If the executors are unable to determine the meaning of certain provisions of the will, and if they cannot distribute the fund in their possession until such construction is ascertained, and if the duty of the executors to pay a collateral inheritance tax depends upon the question whether the will gives a fee to the widow or a life estate only, the executors may maintain an action to have such will construed under the provisions of former GC § 10857 (RC § 2107.46) as well as under the principles of equity jurisprudence: *Ohio Sav. Bank & Co. v. Clark*, 7 App 6, 28 OCA 1, 29 CD 433, 63 Bull 9 (Ed) [motion to certify record overruled, *Wolcott v. Ohio Sav. Bank & Co.*, 61 Bull 191].

38. Under former GC § 10857 (RC § 2107.46) an executor may bring an action to ascertain if there has been a valid gift inter vivos of shares of stock by the testator: *McCoy v. Gosser*, 8 App 145, 30 OCA 312 [motion to certify record overruled, *Gosser v. Burns*, 15 OLR 485].

39. For a proceeding by administrator to determine whether the purchase of United States money orders by his decedent amounted to a gift to the payee of such orders, see *McKelvey v. McKelvey*, 14 CC(NS) 331, 23 CD 117.

40. As long as the beneficiaries under a will are alive, the court will not, in an action to construe a will, determine the question of the duty of the executor in case one or more of such beneficiaries should die: *Neville v. Carlet*, 16 CC(NS) 544, 26 CD 469.

41. Under this section an executor and trustee may ask the judgment of the court as to whether a certain sum of money paid by the decedent during her lifetime should be treated as a gift or as an advancement: *Ferris v. Goodin*, 19 CC(NS) 477, 26 CD 110.

42. A guardian may bring a suit under this section to obtain the instruction of the court as to whether a claim, made upon the ward's estate, is legal: *Wing v. Hibbert*, 7 NP 124, 8 OD 65, 20 CC 404, 11 CD 190.

45. For a suit for instructions by the administrator of a broker, as to rights of customers, pledgees, etc., see *Bank v. Andrews*, 24 NP(NS) 361.

46. An administrator may institute an action in the common pleas court asking its judgment whether he should pay a certain year's allowance to the widow under former GC § 10656 (see now RC § 2117.20): *McCalla v. McCalla*, 46 Bull 280.

48. Statute authorizing fiduciary to sue for construction of will as respects trust, estate, or property to be administered does not authorize heir, legatee, creditor, or even fiduciary to ask court to determine owner of realty devised: *Wagner v. Schrembs*, 44 App 44, 184 NE 292.

49. Before a court will construe a will, it must appear that an immediate necessity therefore exists, such as a present or impending controversy, or that there is a provision of uncertain meaning under which the executor will be called to act soon: *Beck v. Alliance First Nat. Bank*, 31 OLR 213.

Pleading, procedure, etc.

54. Action under this section and next following is

appealable: *Swing v. Townsend*, 24 OS 1.

55. Where a will required an executor to erect a monument, and he applied under this section for a construction of the will, but in his petition did not allege that he had, or would in the future have, any money to be applied to such purpose, the court held that the facts did not call for any judgment of the court: *Rothgeb v. Mauck*, 35 OS 503.

56. A petition, in a cause under this section, to obtain a construction of a single item of a will, which does not set forth the entire will, is bad on general demurrer: *Devenney v. Devenney*, 74 OS 96, 77 NE 688.

57. Since equity entertained actions to construe wills before the enactment of former GC § 10857 (see now RC § 2107.46) and since former GC § 10857 (see now RC § 2107.46) provides for construction as fully as formerly was entertained in courts of equity, a proceeding to construe a will is a chancery case within the meaning of Art. IV, § 6 of the constitution of Ohio; and such case may be appealed from the common pleas court to the court of appeals: *Ohio Sav. Bank & Co. v. Clark*, 7 App 6, 28 OCA 1, 29 CD 433, 63 Bull 9 (Ed) [motion to certify record overruled, *Wolcott v. Ohio Sav. Bank & Co.*, 61 Bull 191].

58. General Code § 10504-66 (RC § 2107.46) gives the right of appeal from an order or judgment of a probate court in a proceeding by an executor to determine whether certain promissory notes were obligations belonging to the estate and whether they should be set forth in the inventory and appraisal: *In re Doppes*, 70 App 354, 25 OO 93, 42 NE(2d) 208 [affirming 21 OO 181 (CP)].

59. *Res judicata* applied re former action for construction: *Tiedtke v. Tiedtke*, 91 App 442, 49 OO 36, 108 NE(2d) 578.

60. In an action brought by a trustee of a charitable trust under this section, to construe the trust, and the common pleas court holds there is no trust, the trustee has the right to appeal to the circuit court in the interest of the *cestui que trust*: *Hunt v. Edgerton*, 9 CC(NS) 353, 19 CD 377.

61. Parties who are financially interested in the construction of a will, and whose rights will be affected by the decision of the court, are not competent to appear as witnesses in an action to construe such will. This includes persons who will take in any event but whose rights will be affected in one way if a portion of the fund is held to be income, and in another way if such portion of the fund is held to be capital: *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43, 58 Bull 125 (Ed) [on appeal from 13 NP(NS) 1; modified and affirmed in *Wilberding v. Miller*, 90 OS 28].

62. The probate court has jurisdiction to allow attorney fees to be paid out of the estate, for services in an action to construe a will creating a trust: *Schmalstig v. Conner*, 46 FSupp 531, 24 OO 427.

63. In an action to construe a will the question of the competency of witnesses will be limited to matters pertaining to the estate, without regard to the fact that such witnesses may be interested adversely in the final distribution: *Miller v. Miller*, 13 NP(NS) 1 [for opinion on appeal, see 15 CC(NS) 481, 24 CD 43, 58 Bull 125 (Ed); which was modified and affirmed, *Wilberding v. Miller*, 90 OS 28].

64. In an action to construe a will under former GC § 10857 (see now RC § 2107.46) an administrator of a devisee claiming under the will has the burden of proving the survivorship of such devisee: *Ware v. Kinch*, 29 OCA 353, 35 CD 547.

65. Under former GC § 10857 (see now RC § 2107.46) all persons affected must be brought into

court, but persons having a contingent interest may be in court by representation: *Parrott v. Parrott*, 21 NP(NS) 71, 29 OD 152.

66. It is sufficient to make the trustee and the donees in tail parties to a suit to construe a trust. It is not necessary to make parties those who may take on the death of such donee in tail: *Parrott v. Parrott*, 21 NP(NS) 71, 29 OD 152.

67. Causes of action by executor for money, checks, certificates of deposit, building and loan pass book, and other evidences of property which the executor alleged defendant had taken from residence of deceased, are properly joined, under GC § 11306 (RC § 2309.05) and former GC § 10857 (see now RC § 2107.46): *Russ v. Wilson*, 27 App 34, 160 NE 735.

68. Where the common pleas court has construed a will under the uniform declaratory judgments act, GC §§ 12102-1 to 12102-16 (RC §§ 2721.02 to 2721.15), the court of appeals has no jurisdiction on appeal, as the action is not a chancery case: *Whiting v. Bertram*, 51 App 40, 3 OO 292, 199 NE 367.

69. Petition by widow as sole devisee of residuary legatee under former GC §§ 10857 and 10858 (see now RC § 2107.46), for construction of will of original testator, alleging that trustee, dividing rents and profits of estate among residuary legatees, refused to distribute any part of income to her after her husband's death, was held to state a cause of action under former GC § 10581 (see now RC § 2107.52): *Webb v. Biles*, 27 App 197, 161 NE 218.

70. The administrator of an estate should make his inventory, including statutory set-offs, notwithstanding the claimed existence of antenuptial contract that would defeat such set-offs; the order of probate court requiring such inventory is not an adjudication that there is no such antenuptial contract, nor is it an interpretation of such contract: *Keever v. Brown*, 36 App 1, 172 NE 626.

70.1 In an action to construe a will, brought under favor of this section, the petition raises all issues of fact, but this general rule does not preclude the court from considering issues raised on the further pleadings of interested parties: *Balduf v. Evans*, 95 App 292, 53 OO 208, 118 NE(2d) 848.

71. In action by administrator of deceased wife, asking instruction of court as to proper distribution of funds on deposit with building and loan company, such deposit being in joint names of deceased wife and her husband, also deceased, building and loan company and personal representative of deceased husband are necessary parties: *Chamberlain v. Snyder*, 7 OLA 233.

72. Where an executor, under authority of GC § 10504-66 (RC § 2107.46), brings an action for instructions respecting the disposition of the estate to be administered, and appeal is taken to the common pleas court, an appeal from the judgment of the common pleas court involves the ordinary exercise of jurisdiction as set forth by the constitutional provisions applicable to courts of appeals: *First Nat. Bank v. Rawson*, 54 App 285, 8 OO 13, 7 NE(2d) 6.

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CONSTRUCTION AND OPERATION OF WILLS

[For index to case notes under heading "Actions to Construe Wills," see p. 157]

CASE NOTES AND OAG

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Construction and operation of wills, 1 et seq
 Ademption, 430 et seq

Nature

1. Foreign wills construed by foreign laws; but property left undisposed of follows direction of Ohio laws: *Brewster v. Benedict*, 14 OS 368.

2. The laws of Ohio control construction of wills disposing of lands situated in this state: *Jennings v. Jennings*, 21 OS 56.

3. Rules for construing wills are less rigid than those for construing other instruments, especially in

case of wills which appear to have been prepared by laymen and not by attorneys: *Moon v. Stewart*, 87 OS 349, 101 NE 344, 45 LRA(NS) 48, AnnCas 1914A, 104.

4. For a summary of the rules for the construction of a will in Ohio, see *Miller v. Cline*, 5 App 425, 25 CC(NS) 492, 30 CD 638.

5. A will is ambulatory in its nature, and takes effect only from the death of the testator: *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

Object

10. The cardinal rule of construction is to give effect to testator's intention: *Decker v. Decker*, 3 O 157; *Townsend v. Townsend*, 25 OS 477; *Linton v. Laycock*, 33 OS 128; *Barr v. Denney*, 79 OS 358, 87 NE 267; *Union Sav. Bank & Co. v. Alter*, 103 OS 188, 132 NE 834; *Knepper v. Knepper*, 103 OS 529, 134 NE 476; *Tax Commission v. Oswald*, 109 OS 36, 141 NE 67; *Owens v. Humbert*, 5 App 312, 25 CC(NS) 522, 27 CD 307, 61 Bull 259 (Ed); *Punch v. Clayton*, 10 App 145; *Huffman v. Berry*, 15 App 372; *Stark v. Marsh*, 29 OCA 417, 35 CD 358 [motion to certify record overruled, *Little v. Stark*, 16 OLR 307, 63 Bull 350]; *Cotty v. Arthur*, 23 NP(NS) 513.

11. A testator may make use of such words as he pleases to express his intention, and if clearly manifested, it will be carried into effect, if it is not unlawful, or does not create an estate forbidden by law: *King v. Beck*, 15 O 559; *Carter v. Reddish*, 32 OS 1; *Linton v. Laycock*, 33 OS 128.

12. And with settled rules of construction as collateral aids to a correct interpretation, a will must speak for itself, and the intention of the testator gathered from what appears on its face: *Worman v. Teagarden*, 2 OS 380; *Black v. Hill*, 32 OS 313.

13. Will should not be construed technically but sensibly and liberally, in order to effect testator's intentions; neither should it be so construed as to destroy all benefit from a devise, if it can consistently be avoided: *Thompson v. Thompson*, 4 OS 333; *Brasher v. Marsh*, 15 OS 103.

14. If it appear from the will itself that testator's real meaning will be frustrated by a strict execution of the testator's directions, a more liberal construction will be given: *Gilpin v. Williams*, 17 OS 396 [for later opinion in this case, see 25 OS 283].

15. Must follow intention unless statutes prevent: *Shaw v. Hoard*, 18 OS 227.

16. In construing wills, the controlling principle is the ascertainment of testator's intent. But where that remains in doubt, resort must be had to settled rules of construction for aid in the solution of the difficulty: *Linton v. Laycock*, 33 OS 128; *LaRoche v. LaRoche*, 10 App 242, 29 OCA 113, 30 CD 519, 63 Bull 285 (Ed) [motion to certify record overruled, 16 OLR 320, 63 Bull 398].

17. Although courts, in general, favor that construction under which estates will vest at time of testator's death, yet this, like every other rule of construction, will be controlled by testator's intent, as gathered from the whole will: *Hamilton v. Rodgers*, 38 OS 242.

18. The changed value of money and property, the changed circumstances and needs of the beneficiary, do not justify a court in modifying the provisions of a will to meet the changed circumstances and conditions: *Union Sav. Bank & Co. v. Alter*, 103 OS 188, 132 NE 834.

18.1 When will clearly reveals general plan or intention as to disposition of property, and situation arises which is not within the express terms of the will, such general plan may be regarded as existing

but incompletely expressed, the failure to provide for situation inadvertent rather than intentional, and the gift implied for the purpose of completing the general plan: *Casey v. Gallagher*, 11 OS(2d) 42, 40 OO(2d) 55, 227 NE(2d) 801.

19. The inquiry is not, what thought did the testator wish to express by the language used, but what thought has he expressed by the words and sentences used in his will: *Miller v. Cline*, 5 App 425, 25 CC(NS) 492, 30 CD 638.

20. Real estate belonging to decedent may be sold and the corpus as well as the income used for the support of an imbecile son, when the language of the will indicates a purpose to provide for the care of such son regardless of the interests of the remaindermen: *Riley v. Riley*, 7 NP(NS) 100, 19 OD 150.

General principles

25. A construction which treats an interest as vested will be preferred to one which postpones vesting: *Brasher v. Marsh*, 15 OS 103; *Linton v. Laycock*, 33 OS 128; *Bolton v. Ohio Nat. Bank*, 50 OS 290, 33 NE 1115; *Stark v. McEwen*, 15 App 188 [motion to certify record overruled, 19 OLR 392]; *Alter v. Alter*, 31 OCA 113, 35 CD 671 [on appeal from 22 NP(NS) 517, 31 OD 290].

26. Every part of a will is construed from its four corners: *Wagner v. Schrembs*, 44 App 44, 184 NE 292; *First Citizens Trust Co. v. Harris*, 13 OLA 163.

Intention to be deduced from language

32. Words of exclusion will not control descent, as to property not devised: *Crane v. Doty*, 1 OS 279.

33. Grammatical accuracy need not be observed in construing a will, but it should be read with a view to the situation and circumstances of the testator, in reference to the subjects of his disposition and the objects of his bounty: *Worman v. Teagarden*, 2 OS 380.

34. If the context of the will requires it, the word "or" may be read "and": *Ward v. Barrows*, 2 OS 241; *Persinger v. Britton*, 10 App 164, 29 OCA 316.

35. A court will not speculate as to the intention of a testator whose will was written in a foreign language and the scholars who were called as witnesses did not agree in their translations, but in such a case the provisions of the statutes for distribution of the property of the descent will be applied: *Walker v. Burtscher*, 5 App 388, 26 CC(NS) 172, 61 Bull 407 (Ed) [motion to certify record overruled, 14 OLR 268].

36. In construing a will, effect must be given to every word, if possible: *Tax Commission v. Oswald*, 109 OS 36, 141 NE 67; *Edwards v. Edwards*, 14 App 49, 31 OCA 561.

37. The words which are found in the statutes will be presumed to be used in their ordinary meaning: *Buehrle v. Commissioners*, 14 App 334.

38. The fact that the residuary clause is inserted before a power of sale does not change the meaning of the will: *Huffman v. Berry*, 15 App 372.

39. The intention of a testator as expressed in the items of his will cannot be changed by the numbering of the various items of the will or the order in which they are arranged: *Huffman v. Berry*, 15 App 372.

40. Testator's intention must be ascertained from language in will: *Wagner v. Schrembs*, 44 App 44, 184 NE 292.

41. The intention of a testatrix must be gathered from the entire will, unaffected by extrinsic facts, unless there is some ambiguity therein: *Stevens v. Wildesen*, 54 App 185, 7 OO 497, 6 NE(2d) 793.

42. In construction of wills the intention of testator is the polar star for guidance of the court. Such intention must be ascertained from every part of the will construed from its four corners: *Hollister v. Witherbee*, 9 OO 37 (CP).

43. The intention of the testator is to be derived from the will itself, and when ascertained it must govern, even though it is contrary to the technical rules of law: *Lacey v. Birdsall*, 15 CC(NS) 60, 23 CD 460 [affirmed, without opinion, sub nomine, *Birdsill v. Lacey*, 88 OS 606].

44. The court must determine the intention of the testator from the language which is used in the will, and must not speculate as to what the real intention of the testator probably was as indicated by the surrounding circumstances: *Sadler v. Sadler*, 23 CC (NS) 353, 27 CD 445 [motion to certify record overruled, 13 OLR 420, 60 Bull 432; and citing *Townsend v. Townsend*, 25 OS 257].

45. In construing a will, punctuation is not conclusive: *Kellough v. Moses*, 32 OCA 49, 35 CD 685.

46. Under a provision in a will in the event that "at the death of my said wife in case she should have no children or child by me living, then and in that case if said farm was not sold by my said wife they shall each inherit said farm equally, share and share alike, and in case that my said wife shall not have any children living and she be the owner of said farm and homestead." The word "no" before the words "children or child" must be disregarded in order to give the will any meaning and to carry out the intention of the testator: *McMillan v. McMillan*, 12 NP (NS) 593, 23 OD 69 [affirmed by circuit court, without opinion].

47. In the construction of a will, the court must ascertain the intention of the testator from the language which he used in his will, together with such extrinsic evidence as is admissible: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

48. The intention of a testator must be ascertained from the words contained in the will: *Teepen v. Schlachter*, 18 NP(NS) 33, 28 OD 545 [affirmed, *Schlachter v. Teepen*, 24 CC(NS) 30, 29 CD 650; citing *Townsend v. Townsend*, 25 OS 477].

49. In construing a will, the court is limited to the language used by the testator; and the court cannot add or omit any words so as to reach a result different from that which would be reached from a fair construction of the words actually used: *Kilgour v. Hey*, 19 NP(NS) 81.

50. Bad grammar does not render invalid the evident intentions of testator: *Brown v. Hunsicker*, 22 NP(NS) 168, 31 OD 24.

Evidence in aid of construction

55. Parol evidence cannot be admitted to contradict or explain the contents of a will: *Painter v. Painter*, 18 O 247.

56. While the will cannot be construed by evidence received aliunde, parol evidence may be received for the purpose of counteracting fraud in the devise, and in some particular cases, to attach a trust to the estate devised, but in such cases courts will act with the extremest caution: *Collins v. Hope*, 20 O 492.

57. Will to be construed in the light afforded by the circumstances under which it was made and the subjects to which it relates: *Thompson v. Thompson*, 4 OS 333.

58. Technical words must be taken in their technical sense—otherwise, in their ordinary sense—unless it appear from the context that they were used in some secondary sense. All parts of the will must be construed together, and effect given, if possible, to every word of it. To ascertain identity, extrinsic facts may be shown, insofar as they can be made ancil-

lary to the right interpretation of the words, but for no other purpose: *Townsend v. Townsend*, 25 OS 477.

59. Where words are fairly and legitimately applicable to one thing as its name, and are equally applicable to another thing as words of description, parol evidence is admissible to show in which of the two senses testator was in the habit of using the words: *Boggs v. Taylor*, 26 OS 604 [for another case involving same subject matter, see *Boggs v. Taylor*, 29 OS 172].

60. For to allow language to be varied or contradicted, or omissions supplied, or apparent ambiguities removed by parol testimony, would in effect be the repeal of the law requiring the will to be in writing, and introduce all the uncertainty, fraud and perjury which it was the intention of the law to prevent: *Black v. Hill*, 32 OS 313.

61. In construing will, extrinsic evidence may be received to show the circumstances under which it was made: *Black v. Hill*, 32 OS 313.

62. While a will should be read and construed by the light of the circumstances under which it was executed, yet those circumstances can affect its construction only when known to testator at the time of execution. Where the will provides that, if the widow claims dower in lieu of provision made, the property included in the provision shall be shared equally among the heirs, the word "heirs" means next of kin under the statutes of distribution exclusive of the wife: *Jones v. Lloyd*, 33 OS 572.

64. A case involving a question of the construction of a will may be a guide as to the general rules of construction, but otherwise such case will have but little weight unless in another case which is directly in point in its essential facts, circumstances, and phraseology: *Moon v. Stewart*, 87 OS 349, 101 NE 344, 45 LRA(NS) 48, AnnCas 1914A, 104 [affirming *Moon v. Harness*, 15 CC(NS) 139, 23 CD 337].

65. The testimony of an attorney is not competent to vary the terms of a written instrument prepared by him as such, and in a proceeding to construe a will the attorney who wrote the will, and with whom the testator consulted concerning it, is not competent to testify concerning a communication made to him by his client touching his estate, the objects of his bounty or the meaning and effect of provisions contained in the will: *Knepper v. Knepper*, 103 OS 529, 134 NE 476.

66. In construing a clause in a will, testimony by the scrivener as to instructions given him by the testator at the time the will was written, or as to what the testator said at that time regarding his intention in the disposition of his property, is wholly incompetent: *Zackman v. Dick*, 1 App 36, 15 CC(NS) 593, 24 CD 450, 11 OLR 17.

67. Adverbs of time, such as "when," "then," "after," "thereafter," "from and after," and the like, all refer to the exact instant when the life estate ends; and in a devise of a remainder they are construed to relate to the time at which the enjoyment of the remainder begins and not to the time at which it vests: *McCarthy v. Hansel*, 4 App 425, 25 CC(NS) 283, 28 CD 608 [citing *Linton v. Laycock*, 33 OS 128].

68. Extrinsic evidence is not admissible for the purpose of ascertaining the intention of a testator, if the language used in the will is not ambiguous: *Mater v. Croft*, 6 App 13, 26 CC(NS) 182, 29 CD 9 [reversing and remanding judgment of common pleas court; judgment on retrial was also reversed, and motion to certify record overruled, *Croft v. Mater*, 15 OLR 115, 62 Bull 176].

69. For the purpose of adding to or controlling the

terms of a will dispositive terms or expressions dehors the will, cannot be considered: *Leopold v. Weaver*, 9 App 379, 29 OCA 567 [motion to certify record overruled, *Weaver v. Leopold*, 16 OLR 455, 64 Bull 40].

70. A misdescription in a will of property which is the subject of a bequest gives rise to a latent ambiguity where the misdescription is not apparent until the facts are shown concerning the property which testator intended to bequeath, and extrinsic evidence is admissible to apply the will to its proper subject matter: *Walsh v. Walsh*, 13 App 315, 32 OCA 513.

71. Testimony showing that the son of the testator was heavily in debt is competent for the purpose of the testator in making no provision for said son and giving his entire estate to his son's wife and their children, thereby protecting the estate against the creditors of the said son: *Kuester v. Yeoman*, 14 CC (NS) 264 [sub nomine, *Kuster v. Yeoman*, 22 CD 476, 56 Bull 337 (Ed); affirmed, without opinion, sub nomine, *Yeoman v. Kuester*, 88 OS 592].

72. If the same word is used in different parts of the will with reference to the same subject matter, it will be presumed that it is always used in the same sense, unless the context shows a contrary intention: *Sadler v. Sadler*, 23 CC(NS) 353, 27 CD 445 [motion to certify record overruled, 13 OLR 420, 60 Bull 432].

73. Precedents are of little value in the construction of a will: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

74. Rules of construction are of value only for the purpose of ascertaining the intention of the testator: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

75. Technical words which are employed in a will, will not be given their technical sense, if the context shows that they were used with a different meaning: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

76. A will which states that testator is not indebted to any of his children, and if any claim by them is made and reduced to judgment, such shall be deducted from the share given in the will, is binding upon the children: *Sheets v. Hunter*, 37 Bull 283; sub nomine, *Scheets v. Hunter*, 56 OS 761, 49 NE 1116.

Surrounding circumstances

81. Terms of wills and circumstances surrounding testators are so unlike that the decision of one case is not apt to aid in the determination of subsequent cases: *Cassidy v. Hynton*, 44 OS 530, 9 NE 129.

82. Circumstances existing when the will was made may be considered in ascertaining the intention of testator: *Stark v. McEwen*, 15 App 188 [motion to certify record overruled, 19 OLR 392]; *Jewett v. Jewett*, 21 CC 278, 12 CD 131 [affirmed, without opinion, 67 OS 541].

83. Language of will must be construed in light of circumstances under which testator used it: *Wagner v. Schrembs*, 44 App 44, 184 NE 292.

84. Testatrix' intention is of paramount importance, but it must be determined from language of will and applied to facts existing at time will was written, or possibly at testatrix' death: *Nelson v. Minton*, 46 App 39, 187 NE 576, 38 OLR 287.

85. In determining the testatrix' intention, conditions surrounding testatrix at the time of the execution of the will, as well as the phrasing of the will itself, may be considered: *Allen v. Bellefontaine*, 47 App 359, 191 NE 896, 40 OLR 320.

86. Former GC § 10579 (see now RC § 2107.50), provides that after-acquired real estate, as well as personal property, shall pass under the will "if such shall clearly and manifestly appear by the will to

have been the intention of the testator." While this intention must "appear by the will," still testator's circumstances and surroundings may be considered, but they must be the circumstances surrounding her at the date of the will, and not long afterward: *Newton v. McKinstry*, 16 CC(NS) 219, 28 CD 536.

87. A gift over to two sisters of a life tenant, not naming them, will be construed as a gift to the three sisters who were living when the will was made: *Rea v. Griffin*, 21 NP(NS) 129, 29 OD 174 [appealed to court of appeals another ground; judgment of court of appeals reversed, *Rogers v. Rea*, 98 OS 315].

Will and codicil

92. In construing a will with codicils, the whole is to be taken as parts of one instrument. If both are signed and attested at same time, the codicil may be considered as part of the original will: *Negley v. Gard*, 20 O 310.

93. A will which devises realty in fee by clear and unequivocal language cannot be cut down by a codicil thereto in language not equally clear and certain: *Clark v. Clark*, 13 App 164, 31 OCA 472.

94. A will provided, "The remainder of my estate, real and personal, shall be divided equally between my children or their heirs share and share alike." A codicil provided "The sum of \$88 lawful money of the U. S. bearing interest at six per cent from the first day of July, 1895, till paid shall be paid to my daughter Carolina White, her heirs or assigns, out from the share of the inheritance of my son, Henry White, deceased. The residue of said share shall be the only bequest to the heirs or assigns of said Henry White." It was held that under the terms and provisions of the will and codicil, the widow of Henry White is entitled to receive the share which would have gone to her husband if he had survived the testator, less the sum of eighty-eight dollars and interest thereon as provided in the codicil: *White v. White*, 19 CC(NS) 200, 26 CD 239 [affirmed, without opinion, 88 OS 589].

95. A will and codicil must be construed together as though they were parts of the same instrument: *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473]; *Sadler v. Sadler*, 23 CC(NS) 353, 27 CD 445 [motion to certify record overruled, 13 OLR 420, 60 Bull 432; and citing *Collier v. Collier*, 3 OS 369].

96. In Ohio a will and a codicil are to be regarded as different parts of the same instrument; and a codicil may operate as a republication of a defectively executed will: *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion to certify record overruled, 61 Bull 152].

Inconsistencies

101. Where one devise is as specific as the other, if they are repugnant, the latter must prevail: *Young v. McIntire*, 3 O 498.

102. When an instrument is open to two constructions, the one consistent and the other repugnant to the law, or the one will give effect to the whole instrument and the other will destroy a part, the former must always be adopted: *Pruden v. Pruden*, 14 OS 251; *Linton v. Laycock*, 33 OS 128.

103. The rule which destroys a remainder in personal property, when an absolute power of disposition is given to the first taker, does not apply in any case where a total repugnancy between the remainder and prior interest does not exist: *Pruden v. Pruden*, 14 OS 251.

104. But a power of disposition reserved to the first taker, in favor of particular objects, or for the accomplishment of particular purposes, does not create

such repugnancy, although such objects or purpose may call for an appropriation of the whole property, and a gift of what may remain unappropriated is valid and legal: *Pruden v. Pruden*, 14 OS 251.

105. To justify the rejection of a word, the repugnancy must arise on the face of the will: *Davis v. Boggs*, 20 OS 550.

106. Where property is devised by two descriptions, either of which is sufficient in form, but it is shown that one of them is erroneous and the other correct, the former should be rejected, and the property will pass by the latter description, according to the maxim, *falsa demonstratio non nocet*: *Merrick v. Merrick*, 37 OS 126.

107. Conflicting provisions of a will must be reconciled if possible, so as to conform to the manifest general intent: *Foster v. Clifford*, 87 OS 294, 101 NE 265, AnnCas 1915B, 65 [reversing *Clifford v. Foster*, 14 CC(NS) 391, 23 CD 429; which affirmed 10 NP (NS) 446]; *Heath v. Borst*, 13 App 115, 32 OCA 377.

108. Ambiguous language in a will should be construed as referring to the reason for making a will, rather than as a condition precedent to its taking effect: *McMerriman v. Schiel*, 108 OS 334, 140 NE 600.

109. Of two equally probable constructions, that is to be preferred which will give effect to the whole instrument: *Tax Commission v. Oswald*, 109 OS 36, 141 NE 67.

110. Under a will by which testator devises to his wife all his property to have and to hold "so long as she continue my widow and until my youngest child shall be of age," and testator further provides "When the youngest child arrives at full age or in case my wife should again marry" his property is to be divided between his wife and children according to the law for the distribution of estates where no wills have been made, it is held that the first clause gives a life estate to the widow if she does not marry; and in order to reconcile the second clause with the first it is said that the word "and" will be substituted for "or." Accordingly partition cannot be had during the life of the widow, even after the youngest child has come of age: *Hammel v. Gould*, 3 App 227, 20 CC(NS) 468, 27 CD 70.

111. Where an estate in fee simple is devised in clear and unequivocal terms, such estate will not be cut down or limited by a subsequent clause less conclusive: *Persinger v. Britton*, 10 App 164, 29 OCA 316.

112. Conflicting provisions in a will should be reconciled so as to conform to the manifest general intent, and it is only in cases where such provisions are wholly and absolutely repugnant that either of them should be rejected: *Heath v. Borst*, 13 App 115, 32 OCA 377.

113. A fee simple estate devised by a will in clear and positive language will not be cut down by a later provision in the will which is ambiguous: *Stark v. McEwen*, 15 App 188 [motion to certify record overruled, 19 OLR 392].

114. The word "no" may be rejected as an evident error in a clause which provides that if testator's wife "should have no child or children by me living then and in that case if such farm was not sold by my said wife they shall each inherit said farm equally, share and share alike": *McMillan v. McMillan*, 12 NP(NS) 593, 23 OD 69 [affirmed by the circuit court, without opinion].

115. Where a provision in a will is equivocal or of doubtful or uncertain meaning, the terms of the residuary clause will be so construed as to prevent intestacy: *Robinson v. Robinson*, 13 NP(NS) 613, 30 OD 666.

116. If a clause in a will is susceptible of two constructions, one of which is in harmony with the remaining provisions of the will and the other of which is at variance with them, the court will assume that the correct construction is the one which will harmonize this one with the rest of the will: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

117. For a case construing apparently conflicting testamentary provisions, see *Brown v. Brown*, 22 NP (NS) 410, 31 OD 407.

Presumption against intestacy

122. The rule that a testator will not be presumed to have died intestate as to any part of his estate to which his intention seems to have been directed, applies only to the construction of a will the language of which is equivocal: *Gilpin v. Williams*, 17 OS 397 [for later opinion in this case, see 25 OS 283].

123. A will must be read as a whole and effect given to all its provisions, in order rightly to understand either or any of them, and the testator will not be presumed to have intended to leave any of his estate undisposed of: *Davis v. Corwine*, 25 OS 675; *Huffman v. Berry*, 15 App 372.

124. In construing a will it will be presumed that the testator was acquainted with the statutes of descent and distribution which would control in case of intestacy: *Foster v. Clifford*, 87 OS 294, 101 NE 269, AnnCas 1915B, 65 [reversing *Clifford v. Foster*, 14 CC(NS) 391, 23 CD 429; which affirmed 10 NP (NS) 446].

125. Where the language in a will is equally susceptible of two different constructions, one of which will defeat and the other sustain its provisions, the doubt should be resolved in favor of the construction which will give effect to the will rather than the one which will defeat it: *McMerriman v. Schiel*, 108 OS 334, 140 NE 600.

126. The relic of a deceased husband or wife, who leaves a will bequeathing a life estate only, permitting the fee to go where the statute sends it, dies intestate as to the real estate inherited from such deceased husband or wife, and in consequence the title to such real estate passes under the provisions of former GC § 8577 (see now RC §§ 2105.01, 2105.10) and not under GC § 8574 (see now RC § 2105.06): *Goff v. Moore*, 3 App 170, 20 CC(NS) 224, 26 CD 587 [for opinion below, see *Goff v. Moore*, 11 NP (NS) 543, 24 OD 552].

127. It is well-settled rule of law that where a person dies testate he is presumed to have intended to dispose of his whole estate unless the contrary clearly appears from the will: *Punch v. Clayton*, 10 App 145.

128. Courts will construe will to avoid intestacy, if possible, but cannot prevent a lapse, where words constituting testate disposition are lacking: *Nelson v. Minton*, 46 App 39, 187 NE 576, 38 OLR 287.

Construction as to interests of heirs

134. A will will be given that construction which is most favorable to the heir at law: *Bane v. Wick*, 19 O 328; see also *Smith v. Berry*, 8 O 365, and *Reynolds v. Shirley*, 7 O (pt.2) 39.

135. Negative words cannot disinherit an heir: *Crane v. Doty*, 1 OS 279; *Mathews v. Krisher*, 59 OS 562, 53 NE 52; *Leopold v. Weaver*, 9 App 379, 29 OCA 567 [motion to certify record overruled, *Weaver v. Leopold*, 16 OLR 465, 64 Bull 40].

136. A fee simple can be cut down only by language as clear and decisive as that by which it was given in the first instance: *Parker v. Parker*, 13 OS 95; *Collins v. Collins*, 40 OS 353; *Borgmann v. Borg-*

mann, 16 App 292 [motion to certify record overruled, 20 OLR 367].

137. A fee simple is not cut down by the power of an executor to sell: *Hoyt v. Day*, 32 OS 101; *Borgmann v. Borgmann*, 16 App 292 [motion to certify record overruled, 20 OLR 367].

138. The fact that a devisee under a will is limited to a life estate does not exclude him, as heir, from any further interest which might come by reason of intestacy: *Chaffin v. Dixon*, 13 App 1, 31 OCA 97, 417 [motion to certify record overruled, *Dixon v. Chaffin*, 18 OLR 44, 65 Bull 217].

139. The will of Jacob Henry White, after providing for the payment of his just debts and funeral expenses and one dollar to each of his three children, willed his property as follows: "Third. All the rest of my property and estate I give and devise and bequeath to my beloved wife, Frances S. White, giving her full right and power to adjust and settle all claims due me at my death. Fourth. At the death of my said wife, Frances S. White, I will that all property and estate remaining after settling all claims due, such as expenses of last sickness and funeral expenses, and all that remains of my estate, to be divided equally, between my son, William White, Dora Stock, and the heirs of my son John White. That is to say, one-third of the remaining parts of my estate to William White, and one-third part of my estate to Dora Stock, and one-third part of my estate to the children of my son John White." It was held that the widow took a life estate in the fund left by her husband, from which should be paid the expenses of her last sickness and funeral expenses and the remainder to those named in her husband's will: *White v. Freeman*, 18 CC(NS) 559, 33 CD 212.

140. It is a generally accepted rule that courts favor an equal distribution of an estate between children of the same blood as the parent from whom the estate descended: *Buehler v. Buehler*, 2 NP(NS) 430, 14 OD 693.

141. In case of a doubtful construction of a will, it may be presumed that testator intended to treat all members of a class with equality: *Gillis v. Long*, 8 NP(NS) 1, 19 OD 253.

Description of property

146. If two gifts to the same person are connected by such words as "and also," a limitation in the second gift will be construed as applying to the first gift: *Noble v. Ayers*, 61 OS 491, 56 NE 199; *Kellogg v. Moses*, 32 OCA 49, 35 CD 685.

147. In the construction of wills a presumption prevails, especially in items not residuary, that where a more general description is coupled with an enumeration of things, the description shall cover only things ejusdem generis. This, however, is only a rule of presumption and must yield to the testator's intent as gathered from the whole instrument, but where the presumption is favored and supported by the evident intention of the testator as developed from a consideration of all the parts of the instrument, then such rule of presumption should be applied to the matter in question: *Creamer v. Harris*, 90 OS 160, 106 NE 967, LRA 1915C, 653, AnnCas 1916C, 1137.

148. One may leave a will and yet die intestate as to part of his property: *Holmden v. Craig*, 16 CC(NS) 157, 31 CD 461 [affirmed, without opinion, 83 OS 483].

—Specific illustrations

153. Where devise was of crops growing and matured at time of death, corn in crib passed to executors: *Edwards v. Rainer*, 17 OS 597.

154. A devise to A of a certain described tract, and also" another tract "for life," gives a life estate only in each tract: *Noble v. Ayers*, 61 OS 491, 56 NE 199.

155. If a testator devises and bequeaths to his widow that part of his estate which is "secured" to her by the laws of Ohio, "in the cases where wives survive husbands who died intestate," this does not mean the part which she would receive if he died intestate, but the part of which he cannot deprive her by his will: *Foster v. Clifford*, 87 OS 294, 101 NE 269, AnnCas 1915B, 65 [reversing *Clifford v. Foster*, 14 CC(NS) 391, 23 CD 429; which affirmed 10 NP(NS) 446].

157. An item of a will providing "I give to my sister . . . the full one-third of my estate," means a full one-third of the estate in fee subject only to a proportionate amount of the debts of the estate and costs of administration, and not one-third of the remainder of the estate after paying bequests and setting aside trust funds provided for in previous items of the will: *Stark v. McEwen*, 15 App 188 [motion to certify record overruled, 19 OLR 392].

158. The term "sinking fund" may be used with reference to accumulations of the principal of an estate to be derived from the sale of property for the purpose of reinvestment, and it is not necessarily limited to its ordinary meaning of accumulations of income to be used in the discharge of indebtedness: *Babcock v. Monypeny*, 18 CC(NS) 53, 24 CD 434 [affirmed, without opinion, 86 OS 365].

159. A bequest of "all my personal property of every kind whatsoever, except what is hereinafter by this will disposed of to other parties," does not carry with it money in the bank bequeathed by a subsequent clause of the will to two churches, which by reason of the statute against bequests within a year of testator's death, cannot take thereunder: *Andrew v. Kling*, 18 CC(NS) 134, 32 CD 639.

160. Under a will bequeathing to "my youngest son, A, the farm that I now live on, to have and hold the same during life, then to go to his heirs," a grantee of one of the heirs took no interest in the land capable of being asserted, where the death of his grantor occurred before the estate took effect: *Lisle v. Miller*, 21 CC(NS) 317, 25 CD 127.

161. A bequest by a wife of all her property both real and personal to her husband, includes a policy of insurance on the life of her husband (who was still living), made payable to her, her executors, administrators and assigns: *Schlachter v. Teeppen*, 24 CC(NS) 30, 29 CD 650 [affirming *Teeppen v. Schlachter*, 18 NP(NS) 33].

162. A devise of land which fixes the area and two of the sides and which provides that it shall have an outlet on a given road and that it should be laid out in the best shape possible is sufficiently certain: *Rea v. Griffin*, 21 NP(NS) 129, 29 OD 174 [appealed to court of appeals; judgment of court of appeals reversed, *Rogers v. Rea*, 98 OS 315].

164. A provision in a codicil that a devisee is to furnish testator's daughter A "with a comfortable home" means that A is to occupy a dwelling together with such devisee, and is to be furnished with the ordinary necessities and comforts of life, such as the devisee enjoys: *Shocknessy v. Wright*, 24 OD(NP) 574.

—After-acquired realty

See also case notes under RC § 2107.50.

169. A will containing the general residuary clause, "the balance and remainder of my property of every kind and description I give and bequeath, etc.," covers after-acquired real estate: *Strock v. Strock*, 6 App 275, 26 CC(NS) 561, 28 CD 145.

170. A disposition by will of "all the rest and residue of my estate and property," makes it "clear and manifest" that the testator intended that any real estate she might acquire after making the will should pass under it: *Newton v. McKinstry*, 16 CC(NS) 219, 28 CD 536.

Description of beneficiaries—heirs

176. "Heirs" construed "children": *Parish v. Ferris*, 6 OS 563; *Stevenson v. Evans*, 10 OS 307; *Jones v. Lloyd*, 33 OS 572; *Weston v. Weston*, 38 OS 473; *Durfee v. MacNeil*, 58 OS 238, 50 NE 721; *Cultice v. Mills*, 97 OS 112, 119 NE 200 [affirming court of appeals, which, on appeal, reached same conclusion as *Mills v. Mills*, 20 NP(NS) 501, 28 OD 382]; *Denley v. Wheeler*, 24 NP(NS) 357.

177. "Legitimate heirs" construed to mean legitimate issue living at the time of the death of the testator: *Parish v. Ferris*, 6 OS 563 [followed and approved, *Niles v. Gray*, 12 OS 320].

178. A provision that specific real property be sold, and the proceeds divided equally between testator's brothers and sisters and their heirs, "the children of any that may be dead to have the shares of their deceased parents," was held to mean that the proceeds of the sale should be divided equally between the brothers and sisters living and the issue of those dead. Heirs not used in a technical sense: *Richey v. Johnson*, 30 OS 288; see also *Moree v. Andrews*, 78 OS 388, 85 NE 1129.

179. A devise of the whole estate to an only child, but if such child died without issue surviving her, then to testator's heirs at law, was held to devolve the estate, upon the death of the child, upon the widow: *Weston v. Weston*, 38 OS 473.

180. For construction of a will providing that the proceeds of certain property should be "divided equally, share and share alike, between my aforesaid heirs," see *Huston v. Crook*, 38 OS 328.

181. "Heirs" construed, from testator's language in the will, to mean each relative to whom he had given a legacy: *McKelvey v. McKelvey*, 43 OS 213, 1 NE 594.

182. A bequest of the residuary estate, to be divided among testator's lawful heirs, share and share alike, must be divided among all heirs regardless of the degree of their relationship to the testator. They take per capita and not per stirpes: *Mooney v. Purpees*, 70 OS 57, 70 NE 894.

183. The rule that in the interpretation of a will the testator must be presumed to have meant what he said requires that a devise of a remainder "to the heirs at law" of a beneficiary for life be regarded as including an adopted child of the beneficiary, although there was not, when the will was executed or when testator died, any statute for the adoption of children: *Smith v. Hunter*, 86 OS 106, 99 NE 91.

184. In a will which devised one-half of an estate to the lawful heirs of the testator and one-half to the lawful heirs of his wife, after the death of his only son without issue, and which contained specific provisions as to the disposition of the shares of his sister (if she should survive the testator) and of the sister and brother of his wife; the persons included in the designation "lawful heirs" to whom "my estate shall go," are to be ascertained as of the date of the death of the testator or his wife respectively per stirpes, the representatives of deceased brothers and sisters to take the share that would have gone to their ancestor if living, except where the will itself otherwise provides: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming on rehearing *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43; which was modified in memorandum opinion, *Wilberding v.*

Miller, 88 OS 609; and was on appeal from *Miller v. Miller*, 13 NP(NS) 1].

185. Where a testator devises real estate to a son during his natural life and to his heirs, and in other provisions of the will the word "heirs" is used by the testator in the sense of "children," the word "heirs" in the devise to the son should be held to mean "children," and not to have been used in its technical sense to designate anyone capable of inheriting: *Cultice v. Mills*, 97 OS 112, 119 NE 200 [affirming *Mills v. Mills*, which, on appeal, reached same conclusion as 20 NP(NS) 501, 28 OD 382].

186. The phrase "nearest of kin," when employed in a last will and testament, in the absence of language in the will manifesting a different intention, is to be so construed as to embrace within its meaning such as would inherit under the statutes of descent and distribution, and in the order and proportion therein provided: *Godfrey v. Eppele*, 100 OS 447, 128 NE 886, 11 ALR 317.

187. Where an absolute estate in land has been conveyed to A and her "heirs," it cannot be reduced to a life estate by a construction of a subsequent clause which would make the word "heirs" read "children," unless the clause placing a limitation on the estate is as clear and unequivocal as the clause making the grant of a fee simple title: *Zackman v. Dick*, 1 App 36, 15 CC(NS) 593, 24 CD 450.

188. Under a gift to testator's children, subject to the life estate of testator's wife, the heirs take by descent and not by devise: *Woodruff v. Woodruff*, 3 CC(NS) 616, 13 CD 408 [reversing *Woodruff v. Snowden*, 7 NP 520, 10 OD 123].

189. The word "heirs" where used by a testator having living children will be regarded as synonymous with children: *Kuester v. Yeoman*, 14 CC(NS) 264 [sub nomine, *Kuster v. Yeoman*, 22 CD 476, 56 Bull 337 (Ed); affirmed, without opinion, sub nomine, *Yeoman v. Kuester*, 88 OS 592].

190. A testator devised the residue of his estate, "to the surviving children (or their heirs) of my sister Elizabeth, and my sister Mary, and my brother Arthur, share and share alike." It was held that, there being nineteen living children of Elizabeth, Mary and Arthur surviving at testator's death, and a grandchild of Elizabeth, child of her son who died before testator, that the residue of testator's estate should be divided into twenty equal parts and one part distributed to each of the children of Elizabeth, Mary and Arthur and one part to the grandchild of Elizabeth: *Teagle v. Teagle*, 17 CC(NS) 538, 32 CD 276.

191. In a devise to my son A "during his natural lifetime only, and at his death to the heirs of his body in fee simple," the words "in fee simple" are inconsistent with the preceding limitation "to the heirs of his body" and have the effect of enlarging the grant to one of fee simple in the heirs of the body of A. The words "heirs of the body" used in such devise are words of purchase and a mere designatio personarum, and are not words of limitation. They, accordingly, take by purchase; and the estate in remainder becomes operative after the death of A, and when his heirs are ascertainable: *McCrea v. McCrea*, 5 App 351, 22 CC(NS) 433, 29 CD 623.

192. The word "heir" is popularly used of one to whom property goes either by descent or by will: *Hessenmueller v. Sirilo*, 23 CC(NS) 313, 34 CD 256.

193. The word "heirs" means, in its technical sense, the ones upon whom the law casts the estate, at common law, immediately upon the death of the ancestor; and in a will such technical meaning is to be regarded as that intended by the testator, unless the context shows a contrary meaning: *Barlow v. Otsott*, 25 CC

(NS) 347, 35 CD 267.

194. The fact that the word "heirs" is used with reference to one who has left children, is not of itself sufficient to show that the word "heirs" is used to mean children: *Barlow v. Otsott*, 25 CC(NS) 347, 35 CD 267.

195. In a provision in a will, "It is my request that the balance of my estate be equally divided between my living heirs and the living heirs of my wife, A, share and share alike," the words "living heirs" refer to the persons to whom the property would have descended had the testator died intestate; not to persons who might be heirs if no nearer heirs were shown to exist. The words "share and share alike" show how the gift is to be divided; but do not enlarge the class "heirs": *Stearns v. Stearns*, 26 CC(NS) 158, 30 CD 351.

196. Under a bequest of one-third of my estate "to the heirs at law of my deceased brother B. W.," the widow of said deceased brother shares as an heir in all personality, including proceeds of property reduced to cash by direction of the testator: *Wilson v. Allaman*, 27 OCA 282, 29 CD 147 [affirming 20 NP (NS) 129].

197. A widow is not an heir per stirpes of her deceased husband: *Robbins v. Pigg*, 29 OCA 153, 35 CD 682 [motion to certify record overruled, *Pigg v. Robbins*, 16 OLR 80, 63 Bull 196].

198. The words "pro rata" and "heirs" defined under the will: *Corbley v. Patterson*, 3 NP 315, 3 OD 702.

199. A devise to "my legal heirs," followed by the statement that by legal heirs the testatrix meant her brothers and sisters, will be deemed to include a half-sister and a stepbrother, where it appears that she had but one full sister and no brother, but her half-sister and her stepbrother had always been called "sister" and "brother" by her: *Griffitt v. Wetzel*, 17 NP(NS) 49, 25 OD 257.

200. The word "heirs" in a will is prima facie used in its technical sense: *Denley v. Wheeler*, 24 NP (NS) 357.

—Children

205. A devise making "my two granddaughters (naming them) each heirs with my own children," is dispositive and evidences an intention on the part of the testatrix in this case to devise her property in equal shares to such grandchildren and her own children: *Moon v. Stewart*, 87 OS 349, 101 NE 344, 45 LRA(NS) 48, AnnCas 1914A, 104 [affirming *Moon v. Harness*, 15 CC(NS) 139, 23 CD 337].

206. Where a testator throughout his will has used the words "issue," "children" and "heirs" technically, accurately and understandingly, and in such use has recognized the distinction between the issue and heirs, a bequest to a trustee in trust for the period of ten years for the use and benefit of the children of testator, naming them, with a direction "that my trustees shall pay the same one-eighth part thereof to my son F. A. and his heirs," and a similar provision as to each of the other children, will be construed as a gift to F. A., and the other children of testator absolute, subject only to the provisions of the trust, and the words "and his heirs" will be construed as words descriptive of the estate and not as designating another class of beneficiaries: *Union Sav. Bank & Co. v. Alter*, 103 OS 188, 132 NE 834.

207. The term "all my sisters, nieces, nephews and my brother Frank," as used in a will, refers to the persons previously mentioned in said will as beneficiaries, and these beneficiaries having now all died the time for distribution has arrived, and the trustees

under the will should now proceed to divide the property among the "then surviving children of my aforesaid nephews, nieces and of my brother Frank": *Barbour v. Gallagher*, 2 App 205, 15 CC(NS) 73, 23 CD 607 [affirmed, without opinion, *Goodloe v. Barbour*, 87 OS 510].

208. A gift to "the surviving children of my sister A, and my sister B, and my brother C, share and share alike" is a gift to the children of A, the children of B, and the children of C: *Teagle v. Teagle*, 17 CC(NS) 538, 32 CD 276.

209. Under a bequest of "the balance" of testator's estate to be "divided among the children living of Isaac and Jacob Falor, and Alice and Henry Reaves, of Swan, Iowa, share and share alike, providing they are living at my death," Alice and Henry Reaves share and share alike with the children living of Isaac and Jacob Falor: *Falor v. Slusser*, 18 CC(NS) 309, 29 CD 513.

210. In a devise to A and his children, "children" is a word of purchase: *Clark v. Clark*, 13 App 164, 31 OCA 472.

211. The term "children" is usually a word of purchase and not of limitation. But when used as synonymous with heirs, it is a word of limitation: *Moreshead v. Rodetzky*, 5 NP 256, 7 OD 225.

212. A devise to Mr. and Mrs. A and children, includes children of Mrs. A by her former marriage if Mrs. A is a sister of testator, and he knows the facts about her marriage and her children: *Hinkson v. Adkins*, 25 NP(NS) 16.

213. A gift to Mr. and Mrs. A and children does not include a child born to Mr. and Mrs. A after testator's death: *Hinkson v. Adkins*, 25 NP(NS) 16.

Description of estate given—words necessary to pass fee

218. A devise to A, coupled with a bequest to B, of a sum of money, to be invested in land by A for B's benefit, upon B's attaining a certain age, many years elapsing between the time of the devise and the date it was to be executed, confers a title in fee to A, and reposes in him a special trust the abuse of which will not affect the title of his vendees: *Coonrod v. Coonrod*, 6 O 114.

219. A devise of real estate to wife, to raise young children, with a time limitation of continuing widowhood, and upon her ceasing to be a widow, not to be disposed of until majority of youngest child, gives to the devisees a conditional freehold for the widow's life, and a contingent remainder to all the younger children, notwithstanding the remarriage of the widow: *Davison v. Wolf*, 9 O 74; *Howe v. Fuller*, 19 O 51, decided on same principle.

220. A devise of all of testator's estate to wife, for support of herself and family, and after her death to be divided by the executors among testator's children, with a direction to executors to lease the real estate and pay net proceeds to the wife, conveys to the executors more than a naked power; it gives them the title: *Boyd v. Talbert*, 12 O 212.

221. Devise to A and his heirs, in trust for B for life, and to such uses as she shall appoint, and to the use of her heirs, creates in equity, a fee simple in B: *Armstrong v. Zane's Heirs*, 12 O 287.

222. A devise in fee to A with a gift over if he dies "without issue," etc., "without children" means, prima facie, without issue or children living at A's death: *Parish v. Ferris*, 6 OS 563 [reversing 3 DecRep 353, 2 AmLReg 101]; *Niles v. Gray*, 12 OS 320; *Taylor v. Foster*, 17 OS 166; *Piatt v. Sinton*, 37 OS 353 [affirming *Piatt v. Sinton*, 5 DecRep 547, 6 AmLRec 483, 7 DecRep 381, 2 Bull 273]; *Durfee v. MacNeil*, 58 OS 238, 50 NE 721; *Anderson v. United Realty*

Co., 79 OS 23, 86 NE 644, 51 LRA(NS) 477 [affirming 9 CC(NS) 473, 19 CD 267, and affirmed, 222 US 164].

223. Personal property may be bequeathed with a gift over on the event of the death of the first legatee without issue living at the time of his death: *Martin v. Lapham*, 38 OS 538; *Briggs v. Hopkins*, 103 OS 321, 132 NE 843.

224. Under a devise to A and B, and on the death of either, to the survivor, and on the death of both without issue to C, the devise passes to B on A's death with issue, and on B's death without issue it passes to A's issue: *Shaw v. Hoard*, 18 OS 227.

225. A devise for life, coupled with the power to sell and convey, entitles the devisee to convey in fee, and the deed is a sufficient execution of the power: *Bishop v. Remple*, 11 OS 277.

226. "I give and bequeath to my daughter the remaining part of my real property," sufficient to create a fee: *Niles v. Gray*, 12 OS 320.

227. "To my wife, M, with power to distribute among my children; to divest on her marriage." M does not take a fee: *Stableton v. Ellison*, 21 OS 527; *Huston v. Craighead*, 23 OS 198.

228. A devise to a widow for her natural life, and giving her the management and power to dispose of the estate, and after her death, to the testator's children. Held: That the will did not give an absolute right to the personal property, nor a fee simple in his real estate, but gave a life estate, and she could not give the property to some of her children: *Huston v. Craighead*, 23 OS 198.

229. Where a devise was to A, provided he would take upon himself the support of L, which A did, it was held that a transfer of the estate by A to W was good, and that W held it absolutely, and could not be charged with the support of L: *Huey v. Thomas*, 23 OS 645.

230. Testator devised certain real estate to his granddaughter, S, and her issue, with a devise over, if S died before the age of twenty-one, leaving no issue then living, to two daughters of testator for life, and then to their issue, respectively. S died after twenty-one but had no issue. Held: "Issue," as used in connection with the devise to S, was a word of limitation and not of purchase, and S took an estate in fee tail. Also, as S's death did not occur until after she became twenty-one, the devise over to the daughters never took effect: *Harkness v. Corning*, 24 OS 416.

231. Where a testator made a devise to his son, John, "through his natural life and then to his heirs," and in another part of the will used the word "heirs" in the sense of "children." Held: That the son took a life estate only, with remainder to his children or issue, and not to his heirs generally, and that upon his death, without issue, the devise in remainder failed, and the estate reverted to the heirs of the testator: *Bunnell v. Evans*, 26 OS 409.

232. A devise to H for life, remainder to her children, remainder over to her brothers and sisters in default of issue surviving her or if such issue should die under twenty-one without issue, does not vest an estate in fee while H is living, where all her children are over twenty-one and have no issue: *Bates v. Zinsmeister*, 26 OS 461.

233. A devise of one-half of tract of land to testator's wife, and the other half to various persons, specifying the share of each, with power given to executor to sell and convey to the purchaser or purchasers thereof, if necessary for purpose of distribution among the devisees, conveys a fee to devisees by name in the shares specified, and is not a bequest of the proceeds of the land: *Hoyt v. Day*, 32 OS 101.

234. A devise of money for life, to be left on deposit at interest, the interest to be drawn and used by devisee, carries an absolute right to the interest: *Gillen v. Kimball*, 34 OS 352.

235. A devise of the "profits and benefits" of land does not convey a fee. Under the direction to sell in this case, the land was regarded for distribution as personality: *Collier v. Grimesey*, 36 OS 17.

236. Will construed to mean that the devisees took the estates as tenants in common: *Corwine v. Mace*, 36 OS 125.

237. Where there was a devise of a certain farm to testator's two sons, upon condition "that they shall not be allowed to sell and dispose of said farm until the expiration of ten years from the time my son, Charles, arrives at full age, except to one another, nor shall they mortgage or incur the same," was held to give the devisees a vested estate in fee simple. The restraint attempted to be imposed was against public policy: *Anderson v. Cary*, 36 OS 506.

238. A devise of all one's property, of every description, whether real, personal, or mixed, after paying all just debts, is a devise of the fee, without the aid of a statute declaring such to be the effect of the devise: *Piatt v. Sinton*, 37 OS 353.

239. A devise to two children with provision that in case either die without heirs capable of inheriting, its share should go to the survivor, vests an estate in fee in each, contingent upon death without children. And if one child does so die without children, the husband of that child will not take in preference to the surviving child: *Durfee v. MacNeil*, 58 OS 238, 50 NE 721.

240. Under a will which provides, "I give, devise and bequeath to my beloved wife, A B, so long as she remains my widow, my entire property both real and personal, wherever it may be situated. I do further devise to my said wife, in case she may desire so to do, the power to sell any of my real estate and deed or deeds to the purchaser thereof execute and deliver and thereby convey any or all of my real estate in fee simple to the purchaser or purchasers thereof and to their heirs and assigns forever," the widow takes only an estate for life, subject to be terminated on remarriage; and if she did not remarry, the real estate so devised to her passes on her death to the next of kin of the testator as an estate of remainder in fee simple: *Fetter v. Rettig*, 98 OS 428, 121 NE 696.

241. A devise to testator's wife of "all the proceeds of his real estate," not the real estate itself, but the proceeds thereof, is equivalent to a devise of the corpus of the real estate itself: *Isherwood v. Isherwood*, 16 CC 279, 8 CD 409 [on appeal from *In re Isherwood*, 7 NP 332, 5 OD 143; and affirmed, without report, *Isherwood v. Isherwood*, 57 OS 660, 38 Bull 280].

242. Where testator by will devises to his children specified realty in absolute language without words of limitation, and later in the same item attempts to limit or qualify the estate by providing "all of which real estate I give and bequeath unto the said Jane and Harvey unto them and their children, which real estate I design for their use, not to be disposed of by sale, neither by them nor their immediate children; in case either of the above children should die then the other to possess the whole," there arises a repugnancy, the language forbidding alienation is void, such qualifying provision is in the nature of a precatory declaration, and the devisees take a fee simple estate: *Heath v. Borst*, 13 App 115, 32 OCA 377.

243. Under a will devising realty to a wife "and to her children," each takes an equal undivided portion as tenant in common. The addition of the word "to"

after the word "and" is superfluous: *Clark v. Clark*, 13 App 164, 31 OCA 472.

244. The phrase "to our son David and his heirs of nearest kin," used in a will with nothing else manifesting a different intention, devises an estate in fee tail in the son David: *Edwards v. Edwards*, 14 App 49, 31 OCA 561 [explaining Augsberian Confession v. Sheffield, 90 OS 467].

245. A devise to testatrix's husband of specific real property "out of which no debt, legacy or other charge shall be paid or taken," and the rest of testatrix's real property to have and to hold during the term of his natural life, conveys an estate in fee simple in the property first mentioned, and a life estate in the balance: *Silk v. Merry*, 3 CC(NS) 91, 13 CD 218.

246. Words of inheritance are not necessary to transmit real property by will under former GC § 10580 (see now RC § 2107.51). The omission of words of limitation in a devise of land will not defeat the fee therein in the devisees named: *Halley v. Hengstler*, 3 CC(NS) 161, 13 CD 504 [affirmed, without report, 70 OS 452].

247. A widow who has received real estate under her husband's will "to be to her and to her disposal during her life," may dispose of the same by her will: *McRoberts v. Barnard*, 18 CC(NS) 225, 32 CD 697 [affirmed, without opinion, 81 OS 560].

248. A will devising real estate to one person generally and with absolute power of disposal, invests that person with a fee simple estate, notwithstanding the fact that the will further provides that whatever may be left of such real estate upon the death of such devisee shall pass to someone else: *Tracy v. Blee*, 22 CC(NS) 33, 28 CD 461.

249. A devise of fifty acres of land to the testator's widow to have and to hold for her benefit and support, gives the widow a fee: *Chase v. Isherwood*, 1 NP 31, 5 OD 1.

250. A bequest in trust for daughters to be "set off" to them on arrival at age, but still to be held in trust after coming of age, and said partition, the rents and profits only to be paid to them during life with the fee simple to their "heirs," gives them a life estate only: *Kiersted v. Smith*, 8 NP 378, 10 OD 279.

251. A devise to testator's daughter, A, and the heirs of her body, devises a fee tail. The children of such daughter, during the life of their mother, have no interest in such property which they can release or quitclaim by deeds given upon a nominal consideration and purporting to convey "all my right, title, interest and estate in and to the foregoing described real estate, whether vested or contingent, which I now have or may hereafter have or derive from the will of my late grandfather, B, giving and bequeathing said real estate to my mother A, and the heirs of her body": *Carter v. Grossnickle*, 11 NP(NS) 465, 22 OD 680 [affirmed, without opinion, *Grossnickle v. Carter*, 88 OS 577].

252. A devise of real estate in Ohio to A, "for the term of her natural life, and at her decease to go to the heirs of her body in fee," made by a resident of Ohio, after 1840 does not create an estate tail in A, but vests in A an estate for life, with remainder to the issue of her body. The rule in *Shelley's case* cannot be applied to declare such a devise an estate tail: *Williams v. Haller*, 13 NP(NS) 329.

253. Where a devise of land in fee simple has been created in clear and unmistakable terms, it cannot be reduced to one in tail by subsequent language which goes no further than to create a doubt as to the estate intended: *Kilgour v. Hey*, 19 NP(NS) 81.

254. In a will providing, "I give, devise and bequeath to my wife all my personal property and real

estate and I give the full control of all my property as above mentioned and shall be in her own name after my death or if she wishes to do so and after her death it shall be divided equally among my legal heirs," gives to the wife the fee to the land: *Brown v. Hunsicker*, 22 NP(NS) 168, 31 OD 24.

255. A bequest "to my legally adopted daughter" of "all my property, real, personal and mixed, the same to be hers in fee simple," is a bequest of a fee simple to all said property, and not of a mere life estate, notwithstanding a different provision is made of said estate in a subsequent item of the will, to become effective in the event of the death of said daughter occurring before that of the testator or in case of failure on her part to claim said estate: *Brooks v. Iler*, 20 NP(NS) 180, 28 OD 624.

256. Under former GC § 10580 (see now RC § 2107.51), a devise of realty to A for life and remainder in fee simple to B, but if B dies without issue then to the next of kin of testatrix, held to mean if B dies during the lifetime of A, and if B survives A, then B's title becomes absolute in fee simple: *Cavanaugh v. Rexer*, 23 NP(NS) 60, 31 OD 493 [affirmed by court of appeals; motion to certify record overruled, *Rexer v. Cavanaugh*, 18 OLR 225, 65 Bull 469].

257. If testator has made a gift of land without specifying the interest conveyed, it will be presumed that testator passes a fee simple, if testator possessed such estate; but the subsequent provisions of such will may reduce the interest of the devisees to a life estate, if the language is positive and clear: In re *Youtsey*, 15 OLR 125.

258. A devise in absolute terms to A, and in a later clause of the will a limitation over in case of A's death without issue, is not a life estate and remainder, but a fee and executory devise and the first devisee may have partition: *Patterson v. Earhart*, 29 Bull 313, 11 DecRep 787, 6 OD(NP) 16.

—Vested and contingent interests

263. "To children, provided they reach a legal age," vested right on death of testator subject to be divested: *Foster v. Wick*, 17 O 250.

264. Where devise is to children, and if they should die before they reach twenty-one, or without lawful issue by marriage, then estate to go to wife; one child arrived at full age but died without issue. Held: The property went to her heirs and not to the widow: *Ward's Lessee v. Barrows*, 2 OS 241.

265. A gift to one in fee with a gift over in case of death without issue, passes a fee subject to a condition subsequent; and on the happening of such condition, the interest of the owner in fee terminates: *Parish v. Ferris*, 6 OS 563 [reversing 3 DecRep 353, 3 AmLReg 101]; *Niles v. Gray*, 12 OS 320; *Taylor v. Foster*, 17 OS 166; *Taylor v. Foster*, 22 OS 255; *Smith v. Hankins*, 27 OS 371 [affirming 13 DecRep 653, 1 CSCR 449]; *Piatt v. Sinton*, 37 OS 353 [affirming 5 DecRep 547, 6 AmLReg 483, 7 DecRep 381, 2 Bull 273]; *Durfee v. MacNeil*, 58 OS 238; *Grandin v. Millikin*, 9 App 372; *Walker v. Walker*, 20 CC 409, 11 CD 291.

266. A vested estate in fee simple may be created which will be divested in favor of another upon the happening of a condition: *Jeffers v. Lampson*, 10 OS 101; *Collins v. Collins*, 40 OS 353; *LaRoche v. LaRoche*, 10 App 242, 29 OCA 113, 30 CD 519, 63 Bull 285 (Ed) [motion to certify record overruled, 16 OLR 320, 63 Bull 398].

267. After debts to wife, after wife to two sons, and their heirs and assigns forever. Held: After death of testator, the fee was vested, one moiety in each son, subject to be divested if he died during life of mother: *Jeffers v. Lampson*, 10 OS 101.

268. Where testator declares his "wish and desire" to be that all his real estate be equally divided between his eight children named. Held: The clause expressing the "wish and desire" was dispositive and gave a vested interest to all the children: *Brasher v. Marsh*, 15 OS 103.

269. Where testator devised certain lands to his daughter for life, with remainder to her children, then unborn, forever, without other disposition of the inheritance, the reversion in fee descended to and vested in the heirs of testator at his death, subject, however, to divest in the event that the devisee for life should die leaving children surviving her: *Gilpin v. Williams*, 25 OS 283 [for former hearing in this case, see 17 OS 396].

270. Where the will directed executor to sell real estate and pay proceeds to a trustee for the benefit of legatees, the legal title descended to the heirs, subject to the execution of the power of sale, but the right of possession passed to the executors: *Elstner v. Fife*, 32 OS 358.

271. The law favors vesting of estates, and in construing devises of real estate, the estate will be held to be vested in the devisee at the death of the testator, unless a condition precedent to such vesting is so clearly expressed that the estate cannot be regarded as so vested without directly opposing the terms of the will. Words of seeming condition will, if possible, be held to have the effect of postponing the right of possession only and not the present right of the estate: *Linton v. Laycock*, 33 OS 128; *Alter v. Alter*, 31 OCA 113, 35 CD 671 [on appeal from 22 NP(NS) 517, 31 OD 290]; *In re Youtsey*, 260 Fed 423.

272. A devise to trustees, to pay certain annuities out of the income, and after "final cessation" of said annuities, to distribute the estate in a specified manner, vests no estate in the beneficiaries until the time for distribution and the "final cessation" of annuities, mentioned in the will, takes place either upon the death of all the annuitants or upon the surrender or release of their annuities: *Hamilton v. Rodgers*, 38 OS 242.

273. Where testatrix devised part of residuary estate to two grandchildren, providing that in case both died without issue, the property coming to them should be given to the other grandchildren of the testatrix, it was held that if both children survived testatrix, their title became absolute, and on their subsequent deaths without issue passed to their legal heirs: *Baker v. McGrew*, 41 OS 113.

274. Under the will of A a life estate with power to consume was bequeathed to his widow, and at her death "should there be remaining of my estate and property a sum greater than five thousand dollars, I give and bequeath the remainder thereof to my son B." It was held that the son took a vested rather than a contingent remainder, and his daughter must therefore claim as his heir at law and subject to his debts: *Tharp v. United States Fidelity & Co.*, 2 App 28, 21 CC(NS) 321, 25 CD 416.

275. A gift over on the termination of a life estate with a provision that if such remainderman dies before the termination of the life estate, his share is to go to his children, and if he has no children, to a designated beneficiary, passes a vested remainder: *McCarthy v. Hansel*, 4 App 425, 25 CC(NS) 283, 28 CD 608; *LaRoche v. LaRoche*, 10 App 242, 29 OCA 113, 30 CD 519, 63 Bull 285 (Ed) [motion to certify record overruled, 16 OLR 320, 63 Bull 398].

276. Where the primary devise in fee simple takes effect upon such devisee arriving at majority, and the secondary contingent estate is to the children of the first devisee upon his death, the latter estate will be limited to the contingency of the death of the first devisee during his minority and before the fee simple

devise to him becomes effective: *Persinger v. Britton*, 10 App 164, 29 OCA 316.

277. Where the vesting of a legacy is not postponed by the will, the death of the legatee, before payment, does not cast the legacy back into the estate, but it becomes payable to the personal representative of the deceased legatee in the manner provided in the will: *Phillips v. Cole*, 11 App 431, 30 OCA 49.

278. Where testator devises realty to his wife during her lifetime, and upon her death to his children, share and share alike, and the will provides that "if any of my children shall have died leaving children surviving them, then the children of said deceased child shall take the share that the parent would be entitled to if living," the phrase "shall have died" relates to the death of the testator's wife, since the testator in another item of his will, bequeathing personalty, shows his intention by providing, "if any of my children shall have died before my decease." Such will creates in each of testator's children a vested estate in the realty, subject to be divested upon the death of his child prior to that of his widow; and a conveyance by one of testator's children of his interest in the testate property, transfers a defeasible right or title to the property that is divested when such child dies before the termination of the life estate: *Hudson v. Kellerman*, 12 App 424 [motion to certify record overruled, 18 OLR 24, 65 Bull 185].

279. A devise to A for life with a provision that within five years A shall erect a monument to decedent at a value not less than five hundred dollars out of the income of such property vests a life estate in A, charged with the fund for the building of a monument: *Rice v. Rice*, 20 CC(NS) 173, 31 CD 269.

280. A testator directed his executors, after the termination of a life estate, to sell certain real estate and divide the proceeds, one-fourth each to four devisees, subject to the conditions and restrictions thereafter mentioned in the will. Another clause in the will provided that if any of the heirs and legatees mentioned in the will should die before distribution of his estate and without leaving children, their share should revert back to the estate and be equally divided amongst the remaining legatees. Another clause provided that the share of certain legatees should be held in trust by his executors with power to invest the same in real estate, of which the legatees were to have the use during their natural lives and at their deaths to pass to their children in such manner as they, by will, or as the law might direct. The executors having sold the real estate at the termination of the life estate, divided the proceeds, and invested the share of two of the devisees jointly in other real estate, and one of the devisees on whose behalf said last named real estate was purchased having died without children but leaving a will by which she attempted to dispose of her interest in said property. It was held that under the third item of the will an absolute estate was granted to each of the devisees named therein subject to be divested as to each by their death, leaving children; therefore, one of them dying without children had a right to dispose of her interest by will: *Campbell v. McCue*, 21 CC(NS) 67, 33 CD 269 [affirmed, without opinion, 78 OS 427; former judgment adhered to, without opinion, 79 OS 445].

281. Under a gift to A for life and A's issue on his death with a gift over to B in default of such issue, B takes a vested remainder if A is unmarried when such gift takes effect; and the death of B before A does not divest B's interest: *Stark v. Marsh*, 29 OCA 417, 35 CD 358 [motion to certify record overruled, *Little v. Stark*, 16 OLR 307, 63 Bull 350].

282. A bequest in the form of a direction to pay or to pay and divide at a future period vests immedi-

ately, if the payment be postponed for the convenience of the state, or to let in some other interest: *Alter v. Alter*, 31 OCA 113, 35 CD 671 [on appeal from 22 NP(NS) 517, 31 OD 290].

283. A gift to testator's children after the death of testator's widow is said to be contingent if the will contains a clause providing that if any of testator's children die before testator's widow, the share of such child should go to the other children, or to the legal representatives of the deceased's children per stirpes: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

284. The law favors the vesting of estates at the time of the death of the testator, unless it appears from the terms of the will that the vesting depended upon a condition precedent to its taking effect: *Laver v. Kreiter*, 19 NP(NS) 566, 27 OD 251 [on appeal, court of appeals reached same conclusion, 7 App 441, 29 OCA 157, 29 CD 554].

285. The law favors the vesting of estates; and unless the intention of testator to postpone the vesting of a devise or a bequest to some future time is clearly indicated in his will, such devise or bequest vests at testator's death: *In re Youtsey*, 15 OLR 125.

—Estates in futuro—remainders

290. Cross remainders are not raised by a devise "to my four sons, or the survivors of them and their heirs and assigns, to be equally divided when the youngest attains the age of twenty-one years": *Lawrence v. McArter*, 10 O 37.

291. Where a testator devises real estate to a son during his natural life and to his heirs, and in other provisions of the will the word "heirs" is used by the testator in the sense of "children," the real estate, upon the death of the son without children, does not pass to his widow, but the devise in remainder fails and the real estate will revert to the son's brothers and sisters or their representatives as heirs of the testator: *Cultice v. Mills*, 97 OS 112, 119 NE 200 [affirming *Mills v. Mills*, which, on appeal, reached same conclusion as 20 NP(NS) 501, 26 OD 382].

292. A devise to A with full power of sale, and with a gift over of whatever remains at A's death to B, gives to petitioner a life estate with power to sell, and a vested remainder in B, subject to be divested by the exercise of the power: *Tax Commission v. Oswald*, 109 OS 36, 141 NE 67 [approving and following *Johnson v. Johnson*, 51 OS 446].

293. Where by the terms of a will a fee is clearly given, a limitation over of the remainder is void as inconsistent with the fee granted: *Hull v. Chisholm*, 7 App 346, 28 OCA 142, 30 CD 182 [motion to certify record overruled, *Chisholm v. Hull*, 15 OLR 198, 62 Bull 291].

294. In the phrase "all the rest, residue and remainder of my real estate," the word "remainder" is used as synonymous with the words "rest and residue," and it is not used with the technical sense of a remainder of an estate in land depending upon a particular prior estate created at the same time and by the same instrument, and limited to take effect on the determination of that estate; even though such will was drawn by a lawyer, and the preceding paragraph gave a life estate to the husband of the testatrix: *Sadler v. Sadler*, 23 CC(NS) 353, 27 CD 445 [motion to certify record overruled, *Sadler v. Sadler*, 13 OLR 420, 60 Bull 432].

295. A remainder under a will is vested, although it is subject to divestment by the life tenant having issue surviving, and although the will provides that the remainder is to go "to my three grandsons, . . . the survivor or survivors of them": *Stark v. Marsh*, 29 OCA 417, 35 CD 358 [motion to certify record overruled, *Little v. Stark*, 16 OLR 307, 63 Bull 350].

296. Under a will which gives, devises and bequeaths "all my property, both real and personal, of which I may die possessed to my beloved wife, A, during her natural life, and at her death to be distributed in accordance with the laws of the state," the remainder is a contingent remainder which vests among those who are heirs at law of the testator at the time of the death of the life tenant: *Carnes v. McAfee*, 11 NP(NS) 517.

297. The estate devised by testator to his widow in this case, while it might under some circumstances amount to more than a life estate in value, is less than a life estate as that term is ordinarily understood, since the broad power and discretion confided in her to sell and use, is subject to the limitation that the income if sufficient, and proceeds from sales if necessary, can be used only for her own comfort, convenience and benefit, and neither the income nor principal can be used in building up a separate estate. Accordingly, the legatees have vested remainder in so much of the estate as remains unconsumed at the death of the widow: *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

—Executory interests

302. Bequest of money to married woman, with provision that if she should die without children, testator's living children should take. Executor claimed the right to hold the amount during her life. Held: If children of testator take at all, it is by way of executory devise, and not as legatees in remainder, and the married woman takes the bequest absolutely and is entitled to receive same: *Lapham v. Martin*, 33 OS 99.

303. An executory devise is a limitation of a future estate or interest in lands, or personalty, as the law admits in the case of a will, though it is contrary to the rules of limitations in conveyances at common law: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370 [citing *Thompson v. Hoop*, 6 OS 481].

304. An executory devise does not vest at the death of the testator: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

306. An executory devise based upon the contingency "should my daughter, Mary, die without issue her surviving," is dependent upon her death occurring before she arrives at the age of twenty years, the point of distribution provided in the will, and upon her arriving at the age of twenty years she takes an absolute fee simple title: *Cotty v. Arthur*, 23 NP(NS) 513.

—Absolute power to dispose of fee

311. If A devises land to B to use during life, with power to devise to whom she pleases, her devisee takes land unencumbered by her debts: *Jones v. Shields*, 14 O 359; see also *Meehan v. Burr*, 58 OS 689, 51 NE 1099.

312. A gift in general terms with the power to sell, and a gift over, on the death of the devisee, of the property which is not disposed of, passes a life estate with power to sell, and not a fee simple: *Baxter v. Bowyer*, 19 OS 490; *Johnson v. Johnson*, 51 OS 446, 38 NE 61; *Enyart v. Keever*, 52 OS 631, 44 NE 1135; *Greene v. Trustees*, 57 OS 628, 50 NE 1129; *Campbell v. Greenwalt*, 67 OS 520, 67 NE 1094; *Fetter v. Rettig*, 98 OS 428; *Raymund v. Williams*, 100 OS 544, 127 NE 925; *Tax Commission v. Oswald*, 109 OS 36, 141 NE 67. The same principle applies where full control, *Min Young v. Min Young*, 47 OS 501, 25 NE 168; or power to devise, *Robbins v. Smith*, 72 OS 1, 73 NE 1051 [affirming 5 CC(NS) 545, 17 CD 91, which affirmed 12 OD(NP) 164], is given.

313. A bequest of testator's whole estate to his widow with power to sell as she saw fit, but if any-

thing remained at her death, it should be distributed to certain other persons, gave to the widow power to convey the fee, and the deed, good as against the widow, was good against the second devisees: *Widows' Home v. Lippardt*, 70 OS 261, 71 NE 770.

314. Where a testator vests in his widow a life estate in his lands, with the provision that within a reasonable time after the death of his widow certain land shall be sold by the executors named in the will and the proceeds divided equally among his five children, or if any of his children should die before distribution the share of such child or children should go to his or their heirs, "so that the proceeds of said lot may vest in my children and their heirs forever," the power given to the executors with respect to conferring title is a power coupled with an interest and vests the fee in the executors: *Knisely v. Young*, 15 CC(NS) 49, 23 CD 439.

315. Under a devise, "I give and bequeath to my wife, Rebecca, all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be divided equally between our five children," the wife did not take a title in fee simple, but a life estate only, with the right to dispose of and convey for her support or consumption; and the rights of the remaindermen are not affected by a conveyance of the property in trust: *Shannon v. Shannon*, 13 NP(NS) 193, 23 OD 467 [affirmed, without opinion, by the circuit court, which was affirmed, without opinion, 85 OS 456].

Gifts by implication

320. To raise an estate by implication an interest or estate in the property devised, less than the whole, must be created expressly by the will, and the person to take by implication must be named or described in connection therewith: *Fisher v. Fisher*, 12 OLR 561, 60 Bull 41.

Gifts to a class

325. Bequest to the remaining daughters, each now living, does not include unborn child, even though *en ventre sa mere*: *Starling v. Price*, 16 OS 29.

326. Where a devise is to wife for life, after her death to be divided by executors equally among children, or the survivors of them; one child died before widow. Held: No interest vested in the deceased child under the will, and the child of the deceased child was not entitled to share: *Sinton v. Boyd*, 19 OS 30.

327. Where the proceeds of a fund are to go to a class of persons included within certain territorial limits constituting a township, the fact that the township has been divided into two will not defeat the devise, but the individuals of the class living in one subdivision share equally with those in the other: *Board of Education v. Ladd*, 26 OS 210.

328. Devise of land to testator's children, with a proviso that in case of death of either, without heirs, share of deceased to go to survivor, vests in each an estate in fee: *Durfee v. MacNeil*, 58 OS 238, 50 NE 721.

329. The term "all my sisters, nephews and my brother Frank" as used in a will refers to the persons previously mentioned in said will as beneficiaries, and these beneficiaries having now all died, the time for distribution has arrived, and the trustees under the will should now proceed to divide the property among the "then surviving children of my aforesaid nephews, nieces and my brother Frank": *Barbour v. Gallagher*, 2 App 205, 15 CC(NS) 73, 23 CD 607 [affirmed, without opinion, *Goodloe v. Barbour*, 87 OS 510].

330. The words "are deceased" as used in a will which provides "If my wife should marry or at her natural death, I devise and bequeath my property to

be equally divided among my children, except those children who are deceased," limit the devise to children living at the time of death of the widow: *Burd-sall v. Burdsall*, 15 CC(NS) 91, 23 CD 434.

—Survivorship

335. Unless contrary intention appears, words of survivorship should be referred to the period appointed for the distribution of the gift: *Sinton v. Boyd*, 19 OS 30; *Wood v. Wood*, 22 NP(NS) 302, 32 OD 40.

336. As to survivorship, see *Harkness v. Corning*, 24 OS 416; *Taylor v. Foster's Admr.*, 17 OS 166; *Niles v. Gray*, 12 OS 320; *Grandin v. Millikin*, 9 App 372; *Ware v. Kinch*, 29 OCA 353, 35 CD 547.

337. Words of survivorship *prima facie* refer to the time of testator's death; but if the time of distribution, or of vesting an estate, be postponed in the will to a later date, the words of survivorship will relate to such later period: *Renner v. Williams*, 71 OS 340, 73 NE 221; see also *Moree v. Andrews*, 78 OS 388, 85 NE 1129.

338. Under a will which devises property to testator's children by name and provides that if one of them should die without issue, his share should pass to the survivors, and a codicil which makes provision for an after-born child, such after-born child takes as one of the survivors on the death of one of the other children without issue: *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

339. Where a testator bequeaths his property to his wife during life, with the provision that after her death it shall be divided among his children, and in the event of the death of any of the children without issue or heirs their shares shall revert to the surviving heirs of the testator to be divided equally among them, the intervention of the life estate fixes survivorship as of the time of distribution and after termination of the life estate: *Wood v. Wood*, 22 NP(NS) 302, 32 OD 40.

Per stirpes and per capita distribution

344. A bequest of the residuary estate, to be divided among testator's lawful heirs, share and share alike, must be divided among all heirs regardless of the degree of their relationship to the testator. They take per capita and not per stirpes: *Mooney v. Purpus*, 70 OS 57, 70 NE 894.

345. If a father devises land to his son, subject to a condition, on which the land is to go to the heirs of the body of such son, and such condition happens, the heirs of the body take such devise as from the testator in their own right and not by representation from their father; and such land is free from the burden of debts owing by their father to the testator: *Rings v. Borton*, 108 OS 280, 140 NE 515. [See now RC § 2105.05.2.]

345.1 Where corpus of trust was to be divided on termination among "the lawful heirs of my said children, who are of my blood an equal share thereof to the heirs of each of my children," such devise required corpus be divided into three stocks, there being three children, and that each third be distributed among the heirs of each of testator's children who are of his blood, by division and subdivision of each third according to the relative degrees of consanguinity: *Casey v. Gallagher*, 11 OS (2d) 42, 40 OO(2d) 55, 227 NE(2d) 801.

346. The testator bequeathed the residue of his estate to the children of his two sisters, share and share alike. It was held that the division should be made among said children per capita and not per stirpes: *Holmes v. Fackelman*, 2 App 258, 20 CC(NS) 109, 28 CD 606.

347. As a general rule, where a testator has left undetermined the proportions in which his beneficiaries are to take, the courts favoring equality will direct the distribution to be per capita rather than per stirpes: *Broermann v. Kessling*, 6 App 7, 28 OCA 321, 30 CD 103.

348. Under a bequest of the residue to be equally divided between the living heirs of testator and those of his wife, share and share alike, the phrase "share and share alike" qualifies the provision for each set of heirs, and the distribution among each set of heirs of the half so devised is to be as of the date of the death of the widow, and to be per capita and not per stirpes: *Stearns v. Brandeberry*, 9 App 300, 29 OCA 349.

349. If testator provides that on the death of his wife, his executor shall convert the unconsumed property into money and shall "distribute the same, share and share alike between my nephews and nieces, the children of my brother, B and of my deceased brothers and sisters, to wit: C, D and E," such distribution is to be made per capita and not per stirpes; and if the widow rejects the provisions of the will, the trust must nevertheless continue, since it cannot be known whether children will be born thereafter to B; and a trustee will be appointed to invest such trust property: *March v. McClintic*, 24 CC(NS) 413, 34 CD 655.

350. A provision that the residue of testator's estate "be equally divided, share and share alike, among my legal heirs" requires a per capita distribution: *Jameson v. Glenny*, 10 NP(NS) 168, 20 OD 353.

351. A testator who provides, "all the remainder of my estate I desire shall descend and pass according to the laws of inheritance of the state of Ohio," intends that the residue of his estate shall be distributed the same as the personal property of an intestate would be distributed, and where such testator left surviving him two nephews and one niece and children of two other nieces, the residue of his estate will be divided in five parts of which the two nephews and the niece will each get one-fifth, and each set of children of the deceased nieces one-fifth to be equally divided among them: *Elliott v. Shaw*, 15 NP (NS) 81, 23 OD 662 [sub nomine, *Lee v. Elliott*, 58 Bull 321 (Ed)].

352. A devise of the proceeds of a certain fund to the legal heirs of the testatrix and of her husband, the child or children of such as are deceased to take the parent's share, without designating as in other items of the will the shares each set of heirs should take, will be construed to mean that the distribution should be per capita and not per stirpes: *Griffitt v. Wetzel*, 17 NP(NS) 49, 25 OD 257.

Gifts of income

357. A bequest to a certain person for the education and support of another person for life, of all net income of his estate, is absolute and may be subject to claims of creditors: *Thornton v. Stanley*, 55 OS 199, 45 NE 318.

358. A gift of the "income" of stock, prima facie, means income as determined by the corporation in distributing profits: *Lamb v. Lehmann*, 110 OS 59, 143 NE 279.

359. Under a gift of the entire net income of stock to one for life, with remainder to another, cash and property dividends are to be paid to the life tenant, and stock dividends become a part of the corpus, dividends on which are also to be paid to the life tenant, the principal being paid, on the death of the life tenant, to the remainderman: *Lamb v. Lehmann*, 110 OS 59, 143 NE 279.

360. A direction in a will that the executor and trustee "set apart and keep suitably invested sufficient

of my estate to produce a net yearly income" of a specified amount does not mean to hold the entire estate in trust, but only a fund, separate and apart, of sufficient amount to produce the income named: *Stark v. McEwen*, 15 App 188 [motion to certify record overruled, 19 OLR 392].

361. A wife without children died leaving a will whereby she devised the income of her real estate for five years to her husband and provided that at the end of the five years said real estate should become his in absolute ownership. The husband died within the five years. It was held that said real estate descended to the heirs of the husband: *Holmden v. Craig*, 16 CC(NS) 157, 31 CD 461 [affirmed, without opinion, 83 OS 483].

362. Where the income from property upon which an annuity is charged, is for several years insufficient to pay the full amount of the annuity, but in later years leaves a surplus after the payment of the annuity, the annuitant is entitled to have such surplus applied to the satisfaction of deficiencies in the annuity for the years it was not paid in full: *Neville v. Carlet*, 16 CC(NS) 544, 26 CD 469.

363. A provision in a will that the executor should apply the surplus money "at the rate of ten dollars a month during the winter months to buy flour and coal for the worthy poor" is void for uncertainty in designating the beneficiaries, and the additional fact that the surplus money amounts to eighteen thousand dollars from which the income would be over seven hundred dollars and that the executor is authorized to expend only thirty or forty dollars per annum shows that such gift is invalid: *Collings v. Davis*, 17 CC(NS) 221, 24 CD 84 [affirmed, without opinion, *Davis v. Collings*, 87 OS 504].

364. If it does not appear that legacies which are given to spendthrifts are intended to be cumulative, it will not be assumed that testator intended to give to such spendthrifts a greater portion of his estate than he gave to others who were related equally to the testator, and whose character and business capacity were not questioned: *Babcock v. Monypeny*, 18 CC(NS) 53, 24 CD 434 [affirmed, without opinion, 86 OS 365].

365. Where a will gives the income from an estate to a certain person for life, a stock dividend issued upon certain stocks belonging to the estate is capital and not income and does not go to the life tenant, but to the legatees in remainder: *Raymond v. Perkins*, 23 CC(NS) 385, 34 CD 296.

366. If a certain portion of the income of a trust fund is, by will, to be paid semi-annually to A for life and after the death of A to A's surviving children or their issue, and A dies between the dates for paying such income, the income thus accruing is to be treated as a part of the principal, although such proportionate shares of income do not constitute annuities: *Barbour v. Gallagher*, 2 App 205, 23 CC(NS) 490, 25 CD 433 [for earlier opinion, see 15 CC(NS) 73, 23 CD 607; which was affirmed, without opinion, *Goodloe v. Barbour*, 87 OS 510].

367. If no word of distinction is to be found in a will, a gift of "the income" must be construed as giving the entire income: *Schinkal v. Kolb*, 26 CC(NS) 30, 35 CD 68 [motion to certify record overruled, *Kolb v. Schinkal*, 13 OLR 22].

368. If a testator is domiciled in Ohio at a time of executing his will and at the time of his death, such will is governed by Ohio law, although he executed such will in New York when on a temporary visit to that place. Accordingly, a gift of income under such will may be assigned for value since such assignment is good at Ohio law although it is invalid at New York law: *Lozier v. Lewis*, 28 OCA 177, 30 CD 300 [affirmed, *Lozier v. Lozier*, 99 OS 254, 16

OLR 536, 64 Bull 95].

369. A bequest by a testator to his wife of all the income from his estate, real and personal, during her natural life, is a general bequest of the income from the residuary fund of his estate and begins to run from the moment of his death: *In re Messang*, 20 NP (NS) 60, 27 OD 481 [affirmed by court of appeals].

Conditions

374. No particular form of expression is necessary in a will to constitute a condition upon which an estate created by it may be defeated: *Worman v. Teagarden*, 2 OS 380.

375. When certain devises are void from remote limitation, the whole will is void: *Mears v. Mears*, 15 OS 90.

376. Testator made a devise to his son, charged with the payment of certain legacies, and provided that if he should be unwilling to accept the devise so burdened, the will should be void. Held: The son having accepted the provision, the will was valid: *Scott v. Kramer*, 31 OS 295.

377. Under a provision in a will requiring the executor to reject all claims presented by testator's children; and providing that if one of such children should recover upon a claim against the estate, such claim should be deducted from his share, and the amount recovered by an assignee of one of such children must be deducted from the share of the assignor: *Scheets v. Hunter*, 56 OS 761, 49 NE 1116, sub nomine, *Sheets v. Hunter*, 37 Bull 283.

378. A provision "in case that I meet with accident on this journey" is not a condition on failure of which the will does not take effect: *McMerriman v. Schiel*, 108 OS 334, 140 NE 600.

379. If a will contains two residuary clauses, and, taken as a whole, it shows that one of them is to take effect on the happening of a given event, after the execution of the will, such clause should be given effect if such event has happened: *Hasse v. Morison*, 110 OS 153, 143 NE 551.

380. Where land is devised by A to B, without qualification or condition except the proviso that, in the event B does not sell said land during his lifetime or make disposition thereof in his last will, the said land shall go to and become the property of persons named, the devise over is void; and in an action to set aside the will of B, it is not error to sustain an objection to testimony of the said secondary devisees on the ground that they are not persons having an interest in the will of B: *Robraham v. Gregg*, 2 App 108, 18 CC(NS) 338, 26 CD 142.

381. A provision in a will making the receipt of a legacy dependent on a separation of husband and wife is contrary to public policy and void, and the legatee takes the legacy absolutely: *Moore v. Gwynne*, 15 CC(NS) 31, 23 CD 463.

382. A testamentary provision that the property devised shall not be partitioned or sold until after the decease of the last survivor of the children of the testator is rendered void by the restraint which it imposes upon alienation, and an owner in fee simple of any part of the premises so devised may maintain an action in partition: *Murdock v. Lord*, 14 NP(NS) 156, 31 OD 593.

Classes of legacies and devises—specific

387. Giving a debt to be collected is a specific legacy, and the collection of the debt is an ademption of it: *Gilbreath v. Winter*, 10 O 64.

388. If a specific legacy is given to one who is an executor, title does not vest until such executor assents thereto: *Roebing Sons Co. v. Shawnee Val. Coal Co.*, 78 OS 408, 85 NE 1127 [affirming without opinion judgment of circuit court; for opinion below,

see 4 NP(NS) 113, 17 OD 8]; *Kuerze v. Western Ger. Bank*, 12 App 412, 31 OCA 296 [not considered on affirmance in 100 OS 547].

389. Under a will in which testatrix enumerates her personal property, worth about fifty dollars, in considerable detail, a gift of "one bureau and contents" will not pass a sum of money exceeding three hundred dollars which is found in such bureau: *Creamer v. Harris*, 90 OS 160, 106 NE 967, LRA 1915C, 653, AnnCas 1916C, 1137.

390. For the nature and effect of specific legacies, see *Colored Industrial School v. Bates*, 90 OS 288, 107 NE 770, AnnCas 1916C, 1198.

—Demonstrative

395. A bequest of "\$2,000 of the first mortgage bonds of the Gallipolis Gas & Electric Co.," is a demonstrative and not a specific legacy: *Nash v. Hamilton*, 8 App 66, 28 OCA 206, 29 CD 462, 63 Bull 49 (Ed).

—Residuary

400. If the language of the testator in the residuary clause of the will will admit of a limited application, as well as one of a more general character, a court of equity will give it that construction which is most favorable to the heir at law: *Bane v. Wick*, 19 O 328; *Carter v. Reddish*, 32 OS 1.

401. A legacy forfeited by breach of condition, forfeiting the share of those who go to law to break the will, passes to residuary legatees without express words: *Bradford v. Bradford*, 19 OS 546.

402. Construction of the language of a residuary clause of a will: *Forsythe v. Mintier*, 39 OS 349.

403. A residuary devisee or legatee is presumed in law to be in the position of the last lienholder, after all prior lawful claims and charges have been satisfied out of the estate: *Christian Assn. v. Davis*, 106 OS 366, 140 NE 114.

404. Where a testator provides in his will that "It is my request that the balance of my estate be equally divided between my living heirs and the living heirs of my wife, . . . share and share alike," there are two classes created and the heirs of the testator take one-half of the estate and the heirs of the wife at the time of her death take the other half: *Stearns v. Brandeberry*, 9 App 300, 29 OCA 349.

405. Where a testator by one item in his will gave and bequeathed the residue of his entire estate to his children, share and share alike, and in the next item provided that should any of such children die without issue the portion going to such child should vest in the surviving child or children; and one of the children died without issue after the death of the testator, leaving a husband surviving to whom she devised all her estate, such husband did not get any of the estate of the original testator: *Grandin v. Millikin*, 9 App 372.

406. Where a testator, after making specific bequests, devises the residuum of his estate to his wife and by codicil devises to her a life estate in after-acquired property, without disposing of the remainder upon the termination of the life estate, the remainder passes to the wife under the residuary clause of the original will: *Spriggs v. Fenner*, 10 App 89.

407. "Residue" means all of testator's estate not otherwise disposed of: *Huffman v. Berry*, 15 App 372.

408. A general residuary clause in favor of the husband of testatrix passes the interest of testatrix in an insurance policy upon the life of her husband which is made payable to herself: *Schlachter v. Teepen*, 24 CC(NS) 30, 29 CD 650 [affirming *Teepen v. Schlachter*, 18 NP(NS) 33, 28 OD 545].

409. Since a construction of a will which avoids intestacy is to be preferred, a clause which provides

"all of my effects and household goods not mentioned above is to be divided between" two named beneficiaries, and which is followed by other bequests, is to be construed as giving to the beneficiaries named therein all of the personal property of the testator not specifically bequeathed by such subsequent bequests: *Robinson v. Robinson*, 13 NP(NS) 613, 30 OD 666.

—Charges on realty

415. When, by the terms of the will, the real and personal property are blended into one common fund, this is decisive of the intention of the testator to charge the legacies on the real estate in case of a deficiency of personal assets; and where there are pecuniary legacies in a will, and a partial disposition of real estate by specific devises, followed by a general devise of the residue of the real and personal estate to other parties, such residuary clause is such a blending of the real and personal estate in one common fund as to justify the implication that the testator intended, in case of failure of personal assets, to make the legacy a charge upon the realty: *Moore v. Beckwith*, 14 OS 129.

416. Pecuniary legacies, to be paid, together with the debts of the estate, from personal assets and funds arising from the sale of certain real estate, are not in the nature of specific bequests and cannot compel contribution from specific bequests. Bequest of a right to take toll, and a trust to pay out of toll a sum monthly, is not in the nature of a demonstrative legacy, and cannot be charged on the estate: *Morris v. Harris*, 19 OS 15.

417. In the case of a devise of property to wife, to hold in trust to pay debts, and for the good of the family, until a certain period, it was held that the year's allowance was a debt of the estate: *Watts v. Watts*, 38 OS 480.

418. Where the residue of an estate is given to the wife to pay debts, she does not, by accepting under the will, become personally liable for the debts: *Watts v. Watts*, 38 OS 480.

419. Where, in a will, the devisee in fee simple of land was instructed to pay certain legacies, he becomes personally responsible, by accepting such devise, to the legatees. And after his death his estate is so liable and even though the legatees become, by descent, the owners of the land, the legacies must be paid from the personality of the deceased devisee as any other debt of his estate: *Case v. Hall*, 52 OS 24, 38 NE 618, 25 LRA 766.

420. Legacies not specifically charged upon real estate will, nevertheless, be held to be charged upon such real estate, and be a lien thereon where it appears that the testator, at the time the will was made and at his decease, had no moneys or personal estate of any kind out of which such legacies could be paid, unless a contrary intention is manifest from the whole will: *Theobald v. Fugman*, 64 OS 473, 60 NE 606 [reversing *Fugman v. Theobald*, 12 OCD 720, which was on appeal from 3 NP 65; sub nomine, *Fugmann v. Theobald*, 4 OD(NP) 65].

421. The intention of a testator to charge legacies on real estate specifically devised must clearly appear or be clearly deducible from the language of the will. But it is not necessary that the charge shall be made in express terms or that any particular language be used. The intention to charge will be given effect when it clearly appears from the provisions of the instrument: *Knepper v. Knepper*, 103 OS 529, 134 NE 476.

422. If a testator gives certain pecuniary legacies, and then, by specific devises and a residuary clause, he gives his entire estate to another, such estate will be charged with payment of such legacies: *Knepper*

v. Knepper, 103 OS 529, 134 NE 476.

423. Under a devise to A, the son of testator, "upon consideration that he pay to my daughter B, the one thousand dollars which I have bequeathed to her in item three, and which sum until paid I hereby make a charge upon said farm," which devise the son accepted the payment of such legacy to B is a charge upon the realty devised to A, and the testator's personal property is exonerated from payment of such legacy to the extent at least of the value of the realty devised to the son: *Lacey v. Birdsall*, 15 CC(NS) 60, 23 CD 460 [affirmed, without opinion, sub nomine, *Birdsall v. Lacey*, 88 OS 606].

424. A devise of real estate to testator's son A, "to have and to hold and the use thereof during his natural life, and should his wife, B, outlive him, then she shall have the use thereof during the remainder of her life, and at the decease of both, said property shall become and be the property of their children and their heirs forever," coupled with the direction that, "It is my will that my son, A, shall out of the income of aforesaid property, erect a monument upon the graves of myself and my husband, 'C,' within five years after my decease, at a value not less than five hundred dollars," vests in the son a life estate in said real estate, charged with the payment or accumulation of a fund of five hundred dollars for the building of a monument, and the son's interest in said real estate is subject to attachment: *Rice v. Rice*, 20 CC(NS) 173, 31 CD 269.

425. If a provision is made in a will for the support of A, and such provision is a lien upon testator's realty, A's act in joining in a conveyance of such realty operates as a waiver of A's lien, and as against mortgagees of other realty who claim under the devise, A cannot receive more out of the proceeds of such land than A would have received if A had not joined in such conveyance: *Schocknessy v. Wright*, 24 OD(NP) 574.

Ademption

430. Ademption is the extinction or withholding of a legacy in consequence of some act of the testator: *Ellard v. Ferris*, 91 OS 339, 110 NE 476, LRA 1916C, 613.

431. Where the subsequent gift is made to a child, or one to whom the testator stands in loco parentis, and the gift is of the same character or for the same purpose as the legacy, it will be presumed to be an ademption of the legacy pro tanto in the absence of an expressed intention to the contrary shown by the will or by extrinsic evidence: *Ellard v. Ferris*, 91 OS 339, 110 NE 476, LRA 1916C, 613.

432. Where the legacy is to a person other than a child of the testator, or to a person other than one to whom he stands in loco parentis, unless the gift is for the same specific purpose for which the legacy was intended, there is no presumption of such intention, but it must be clearly shown, either from the will itself, or by extrinsic evidence, that the ademption was intended by the testator: *Ellard v. Ferris*, 91 OS 339, 110 NE 476, LRA 1916C, 613.

434. Where the bonds described in a demonstrative legacy have been converted by the testatrix, the legacy is not thereby adeemed, but may be satisfied from any property or fund of the estate not specifically devised or bequeathed: *Blocher v. Trick*, 8 App 222, 28 OCA 46, 30 CD 98.

435. Testator having devised a life estate in his house and lot to a daughter, and "her share in the chattels and money that I may leave," the life estate is adeemed by his sale of the house and lot before his death, and she takes her share in the personality as a specific legacy and a like proportion in the resid-

uary estate as an heir at law: *Fisher v. Fisher*, 12 OLR 561, 60 Bull 41.

Interest on legacy

440. A will provided that executors should "pay or loan" the different heirs a part of the estate not exceeding a certain proportion of the same, and eventually should divide the estate equally, it being testator's desire that each child should have the benefit of the same amount of property. Held: The payments to said heirs were not intended to bear interest, nor to be refunded unless it became necessary to equalize shares: *Hosmer v. Sturges*, 31 OS 657.

441. A legacy draws interest from one year after the notice of the appointment and qualification of the executor: *Ebersole v. Cole*, 19 NP(NS) 507, 27 OD 175.

442. While the contest of a will, pending its determination, is an impediment to payment of a legacy thereunder, it does not stop the running of interest on the legacy from the date it would otherwise have become payable: *Ebersole v. Cole*, 19 NP(NS) 507, 27 OD 175.

Election by persons other than widow or widower

447. Where land is directed to be sold and the proceeds distributed, the distributees may elect to keep the land: *Holt v. Lamb*, 17 OS 374.

448. Where, in a will, testator attempted to devise the property of another to a third person, and, in the same instrument, disposed of a portion of his own estate in favor of the proprietor whose rights he assumed, equity requires the latter to elect, either to give up the benefit conferred on him by the will, or, if he accept it, to convey, in conformity with the will, that portion of his own property which it purports to affect. In the former case, the property given up does not become intestate property, but passes under the will to the disappointed donee to the extent that may be necessary for his compensation: *Bebout v. Quick*, 81 OS 196, 90 NE 162.

449. Where a will provides for the investment of a certain amount of money in real estate and then to be deeded to a devisee, such devisee, prior to such purchase of real estate, may elect to take in money instead of the land; after such election, there is no authority for the investment of the money in real estate: *Hegler v. Pridey* (supreme court, without report), 38 Bull 1.

Powers of executors

465. Power to sell land, given to executors by will, may be exercised by one executor, if one only accepts the office under the will. Such power does not authorize an exchange or barter, but a sale for money only: *Taylor v. Galloway*, 1 O 232.

466. Power to sell lands, given by will to an executor, cannot be executed by administrator with will annexed: *Wills v. Cowper*, 2 O 124.

467. As to what terms in a will will give executor full power over testator's estate, see *Steele v. Worthington*, 2 O 182.

468. Power given to an executor to sell lands when advantageous, and proceeds to be distributed to children as they come of age, is a power connected with a trust, and executor entitled to possession of land: *Dabney v. Manning*, 3 O 321.

469. A power conferred on executors in this language, "giving them full and complete power as I myself possess to dispose of my property," etc., is a power coupled with an interest: *Williams v. Veach*, 17 O 171.

470. Power given to executors by will to sell and convey land becomes legally inoperative and ceases to exist when the estate is settled, or all claims against

it are presumptively satisfied, by lapse of time, and no object of the testator remains to be attained: *Ward v. Barrows*, 2 OS 241.

471. As to duties of an executor, where the will directs him to continue a certain trade or business, see *Gaudolfe v. Walker*, 15 OS 251.

472. In the absence of clear and express authority in the will, an executor cannot carry on the business of the decedent; nor use the general assets therefor; nor charge such assets with debts: *Lucht v. Behrens*, 28 OS 231 [reversing *Behrens v. Lucht*, 13 DecRep 864, 2 CSCR 217]; *Mills v. Connor*, 104 OS 409, 135 NE 616.

473. Levy of attachment in an action against a devisee will not defeat or prevent the execution of a power of sale given by the testator to his executor, nor will such levy affect the title of the purchaser at the executor's sale: *Smyth v. Anderson*, 31 OS 144.

474. A devise to certain relatives with power to the executor to sell and convey the property so devised, if necessary, for the purpose of distributing it, was a devise in fee to the relatives, and the power of sale vested in the executor with a naked power only, not a power coupled with an interest, and could only be exercised, if necessary, for the purpose of making distribution: *Hoyt v. Day*, 32 OS 101.

475. Where testator bequeathed residue to his two daughters and their heirs "and in case the said daughter, Eliza, shall decease without lawful heirs of her body, her share to pass to the other sister and her heirs," it was executor's duty to make distribution as expressly directed, and such distribution was a complete administration of his trust. Whether the bequest over on the death of Eliza is void, because inconsistent with the bequest to her and her heirs, or is valid, was discussed but not decided: *Ratliff v. Warner*, 32 OS 334.

476. Where the will provided that if C, an executor, should die, or should "refuse to take upon himself the execution of the will," C's power should pass to W, and C made application to resign, in a Mississippi court, and his application was granted, but he afterwards resigned action as trustee. Held: The action of the Mississippi court did not affect C's power as trustee: *Veazie v. McGugin*, 40 OS 365.

477. Where the sole devisee of lands is appointed executor of the will of the testator and sells such lands in his individual capacity as devisee, the proceeds of such sale come into his hands as executor, and where the personal estate is insufficient to pay the debts of the testator he must apply the proceeds of the sale of such lands to the payment thereof: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, AnnCas 1914A, 190.

478. A direction in a will that the testator's moving picture business "shall be conducted during the life of the lease on said building" by two persons named, does not authorize them to execute a renewal lease on such building under an option held by the testator: *Mills v. Connor*, 104 OS 409, 135 NE 616.

479. Where a will directs the executors to have an appraisal made of all the property belonging to the estate at a certain date and gives to any devisee the right to take any one parcel of property, not exceeding his share in the estate, at its appraised value, the executors cannot, at a date subsequent to that fixed in the will, contract to sell a certain parcel to a third person, under a power given to them by will, without first having the appraisal made and offering the property to the devisees: *Bailey Co. v. Bradley*, 23 CC (NS) 59, 34 CD 102.

480. Where the will gives great discretion in the execution thereof, in the absence of fraud such discretion will not be interfered with: *In re Estate of*

Reynolds, 3 NP 292, 2 OD 11.

481. If a will confers upon the executor the power to sell realty, and such power is personal, the administrator with the will annexed does not possess such power. If, on the other hand, the will is a part of the trust, it passes to the administrator with the will annexed: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

Trusts

486. As to resulting trusts, see *Bigelow v. Barr*, 4 O 385.

487. "To certain trustees and their successors," the limitation over to successors void: *Miles v. Fisher*, 10 O 1.

488. Gift to a charitable use to receive a most liberal construction: *Zanesville Canal &c. Co. v. Zanesville*, 20 O 483; *Blume v. Thompson*, 15 NP(NS) 97, 23 OD 512.

489. Where the trust or charge is defined and limited, the purchaser must see to the application of the purchase money; otherwise, when it is general and unlimited: *Clyde v. Simpson*, 4 OS 445.

490. Where a will declared certain trusts in land, for the fulfillment of which the whole estate might be required, but the legal title descended to the heirs, who, in event of fulfillment or failure, would have beneficial interest. Held: The title was held by the heirs as trustees: *Birchard v. Edwards*, 11 OS 84.

491. Where a fund is created in trust for S for life, to be paid to her sons after her death, but they both died in her lifetime, leaving her as their next of kin, the trust has failed, and the beneficial interest having vested in S, equity will decree its payment to her: *Taylor v. Huber*, 13 OS 288.

492. Where the words of a will creating a trust clearly point out that trust and define its limitations, the same construction will be put on the will, whether it be regarded as executed or executory: *Gilpin v. Williams*, 17 OS 396 [for later opinion in this case, see 25 OS 283].

493. That all debts and charges "shall be paid out of testator's estate," will not throw the expense of administering property left in trust on the general estate: *Morris v. Harris*, 19 OS 15.

494. Where no trust is involved, and no advice to executor or trustee required, an action cannot be maintained for the mere purpose of obtaining the court's opinion as to the meaning or legal effect of a will: *Corry v. Fleming*, 29 OS 147.

495. Where testator directed his trustee to apply certain moneys so that they might be used for the interests of religion and for the advancement of the kingdom of Christ in the world, and then directed that the money be paid to certain religious societies, the will was not void for uncertainty, and an unincorporated society is capable of receiving a bequest of personality, not amounting to a trust: *American Tract Soc. v. Atwater*, 30 OS 77.

496. Where, by devise, an intermediate estate is created, and upon its termination the provision is that the land should be sold and proceeds equally divided among children, or their heirs, or that said children should divide the farm to suit themselves, this did not create a trust estate in executors: *Nimmons v. Westfall*, 33 OS 213.

497. A executed a written declaration of trust by which he recited that he did "hereby appoint B a trustee in trust to receive and hold, and after my death disburse the following sum of money and other valuable assets, to-wit, six thousand two hundred dollars (\$6,200.00), which sums are to be disbursed as follows, to-wit:" followed by a list of the beneficiaries among whom such sum was to be divided. The money was paid by a check "To B, trustee in trust

for A." It was deposited by B in B's name as trustee for A. The court held that B thereby became trustee for A and not for the persons to whom he was directed to pay such trust fund, and that A's death revoked B's authority to distribute such fund: *Worthington v. Redkey*, 86 OS 128, 99 NE 211 [reversing *Redkey v. Worthington*, 13 CC(NS) 177, 22 CD 63].

498. A corporation knowing that an executor had misappropriated stock certificates held by him as trustee for the granddaughter of the testatrix, required the executor to obtain the granddaughter's power of attorney, ratifying all his transactions with the stock. She was then twenty-two years old, but feeble, and not as capable of business as the average woman, and had been living with the executor's family as a daughter. She did not read the writing, did not know its contents, nor that he had converted and squandered her funds; he told her it empowered him to draw her funds and deposit them in another bank, and she trusted him implicitly as a father. It was held that the company is chargeable with notice of the fraud, being warned by him of his dread to disclose the truth to her. At that time she had no power over the corpus of the fund. For both these reasons the company cannot take benefit of the writing: *Mook v. Akron Sav. &c. Co.*, 87 OS 273, 101 NE 278.

499. Where stock in a corporation was bequeathed in trust, with power to sell and reinvest the proceeds, under direction to pay the entire net income to the wife of testator during her life, and the company with the consent of all its stockholders afterwards transferred to a new company all of its assets, including a large surplus, which it had accumulated in its business and had invested in its plant, machinery and other assets used in the business (much of which was done during the life of the testator), each stockholder receiving two shares in the new company for one in the old company, the entire stock received by the trustees, in the new company, belongs to the corpus of the trust fund: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming, on rehearing, *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43; which was modified in memorandum opinion, *Wilberding v. Miller*, 88 OS 609; and was on appeal from *Miller v. Miller*, 13 NP(NS) 1].

500. If a trustee attempts to divide trust property in accordance with the terms of the trust, so that the issue of any of the deceased legatees should take the legacy given to such deceased legatees, full effect will be given to such intention: *Bigham v. Harlan*, 91 OS 440, 110 NE 1054.

501. Former GC § 10596 (RC § 2109.26) does not apply where the will has conferred personal discretion upon the individual who is named as trustee: *Rogers v. Rea*, 98 OS 315, 120 NE 828 [reversing court of appeals, which was on appeal from *Rea v. Griffin*, 21 NP(NS) 129].

502. For a charitable trust which is invalid because the method of creating the administrative board is too vague and the method of executing the charity is too ambiguous, see *Dirlam v. Morrow*, 102 OS 279, 131 NE 365 [affirming judgment of court of appeals, which affirmed *Morrow v. Dirlam*, 22 NP(NS) 565, 30 OD 27].

503. A testamentary trust to A as trustee for B, C and D, the income to be paid to each for life without the control of the husband over any one of them, and with power to devise such share of the corpus, with a gift over to the children of each who dies intestate, gives an absolute title to the income, but only a life estate in the corpus. The trust does not terminate on the death of the husband of each beneficiary; and the trust will continue as long as beneficiary is alive: *Robbins v. Smith*, 72 OS 1, 73 NE 1051 [affirming

5 CC(NS) 545, 17 CD 91, which affirmed 12 OD(NP) 164].

504. A gift to township trustees for a home for aged and destitute people of such township, or those who, by reason of misfortune, cannot care for themselves, is valid: *Gearhart v. Richardson*, 109 OS 418, 142 NE 890.

505. Where under the terms of a will general authority is given to the trustees of the estate to make such advancements to any of the sons of testator as may seem wise to said trustees, and one of the five sons is given no interest in the estate of his father and is not entitled to share in its distribution, such son cannot compel the executors to give him a statement of the advancements made to him and to his brothers by his father or permit an examination of decedent's books to obtain such statement: *DuBrul v. DuBrul*, 8 App 281, 30 OCA 158, 29 CD 646.

506. The purchase of stock in a corporation, upon which dividends may possibly be paid, is not in compliance with the provisions of a will which provides that the trust funds shall be put and forever kept at interest: *In re Couden*, 9 App 207.

506.1. Deviation is sanctioned by a court of equity to permit a departure from the terms of a trust where compliance is impossible or illegal, or where changed circumstances, not known or anticipated by a donor, would defeat or substantially impair the purposes of the trust: *Fenn College v. Nance*, 4 OMisc 183, 33 OO(2d) 292, 210 NE(2d) 418.

507. Under a will which provides a definite time for ending a trust and making a conveyance of all the property in fee simple, a gift over in case said beneficiaries die without leaving issue applies only to death before such period terminating the trust; and when such period arrives, the surviving beneficiaries take absolutely, and neither has any contingent interest in the property of the other: *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

508. Income arising after the termination of the trust under which an estate has been held follows the property and should be distributed in accordance with the provisions of the will: *Barbour v. Gallagher*, 15 CC(NS) 73, 23 CD 607 [affirmed, without opinion, *Goodloe v. Barbour*, 87 OS 510; for later opinion, see *Barbour v. Gallagher*, 2 App 205, 23 CC(NS) 490, 25 CD 433].

509. Where testator gave the residue of his estate to trustees, to hold one-third part, with all the income therefrom, for the use of his widow for her life, one-third for the use of his son for his life, and one-third for the use of his daughter for her life, and after the death of his wife the property given for her use to be held for the use of his son and daughter in equal shares; it was held that it was not to create separate trust estates but that the whole trust estate should be kept as one entire fund and the income divided among the legatees: *Neville v. Carlet*, 16 CC(NS) 544, 26 CD 469.

510. If a clause in a will authorizes the executor "to safely invest all monies," and such executor is shown to have received assets of greater value than the property which he owns at the time of his death, it will be presumed that he acted lawfully and in pursuance to his authority, and that he held such property in trust for the beneficiaries under such will: *Hoehn v. Hoehn*, 17 CC(NS) 113, 32 CD 53.

511. A clause in a will providing, "the surplus money he (the executor) shall apply at the rate of ten dollars a month during the winter months, to buy flour and coal for worthy poor," where said surplus money amounts to eighteen thousand dollars, is incapable of execution, invalid and insufficient to create

a charitable trust. This provision does not warrant the creation by construction of a perpetual and increasing charitable trust. Furthermore, the beneficiaries are not restricted to any locality but embrace the whole world: *Collings v. Davis*, 17 CC(NS) 221, 24 CD 84 [affirmed, without opinion, *Davis v. Collings*, 87 OS 504].

512. A direction in a will that "a further trust shall be raised out of my estate" shows that such trust is to be "raised" after the trust created by the former clauses of the will. The expression "raised out of my estate" refers to the act of separating the proportion or share therein specified from the body of the estate: *Babcock v. Monypeny*, 18 CC(NS) 53, 24 CD 434 [affirmed, without opinion, 86 OS 365].

513. If a trust is created in realty which is situated in another state, the validity of such trust is determined by the laws of such state, but such foreign law is not otherwise to be regarded as affecting the construction of the will: *Babcock v. Monypeny*, 18 CC(NS) 53, 24 CD 434 [affirmed, without opinion, 86 OS 365].

514. A trust created in a will for the purpose of providing for the inmates of a county infirmary such luxuries as they would not have in the regular administration of the institution, is not illegal or impossible of accomplishment: *Starr v. Forbes*, 18 CC(NS) 176, 32 CD 670.

515. Whether the directors of the county infirmary and their successors could act as trustees of a trust created by will for the benefit of the poor of the county was considered but not decided, since such gift was valid, even if the directors were not proper trustees, and equity could appoint a trustee to administer such trust: *Starr v. Forbes*, 18 CC(NS) 176, 32 CD 670.

516. Under a will creating a trust for the testator's widow's life in property devised to a son and daughter, and directing "the same to be parted and divided between them share and share alike as they may agree; said division not to be made until after the decease of my said wife Matilda, but the property to remain intact until that event, and until then the rents of the real property shall go into my estate for the purpose of paying the eight hundred dollars per year to my said wife," etc., "and in case either my son or daughter should die before a division of my estate, leaving no heir or heirs, that in that case the whole of said property shall go to the survivor of them," unless all the beneficiaries of the trust consent, it is beyond the power of the parties or of the court to enforce a division of the estate until after the widow's death: *People Sav. Bank v. Gardner*, 18 CC(NS) 204, 32 CD 692.

517. Under a will authorizing a trustee to "hold, manage, control, and from time to time, as need be, reinvest"; so long as he acts in good faith, he is not subject to the control of the beneficiaries, nor of the courts, in the reasonable exercise of the discretion of any power conferred upon him: *Alter v. Alter*, 31 OCA 113, 35 CD 671 [on appeal from 22 NP(NS) 517, 31 OD 290].

518. Where a testator gives an absolute and vested bequest, but provides for a postponement of the enjoyment thereof, and when an exigency, nonexistent at the creation of the trust, arises, which is one not then anticipated by the testator, a court of equity may substitute another course of management of the trust fund, in order to bring about a more complete realization of the proposed bounty. It may order an acceleration of the enjoyment of the income or principal of a trust which neither expressly nor impliedly authorizes such a course to be taken: *Alter v. Alter*, 31 OCA 113, 35 CD 671 [on appeal from 22 NP(NS) 517, 31 OD 290].

519. If a trust fails because personal discretion was given to the trustee and he has died before testator, subsidiary provisions as to collection of items for such trust fund will also fail: *Rea v. Griffin*, 21 NP(NS) 129, 29 OD 174 [appealed to court of appeals on other grounds; judgment of court of appeals reversed, *Rogers v. Rea*, 98 OS 315].

§ 2107.47 Protection of purchaser against later will. (GC § 10504-68)

The title, estate, or interest of a bona fide purchaser, lessee, or encumbrancer, for value, without knowledge of a will, in land situated in this state derived from the heir of a decedent or from the beneficiary under a will shall not be defeated by the production of the will of such decedent, or of a later will, unless, in the case of a resident decedent, such will is offered for probate within six months after the settlement of the estate, or in the case of a nonresident decedent, unless such will is offered for record in this state within eighteen months from its final probate and establishment in the state or territory in which it was admitted to probate.

HISTORY: GC § 10504-68; 114 v 320 (359); 125 v 903 (964). Eff 10-1-53. Analogous to former GC § 10576.

Cross-References to Related Sections

Computation of time, RC § 1.14.

Research Aids

O-Jur2d: Wills § 266
Am-Jur2d: Wills § 1053

ALR

Probate of will or proceedings subsequent thereto as affecting right to probate later codicil or will, and rights and remedies of parties thereunder. 157 ALR 1351.

CASE NOTES AND OAG

1. A will made in a sister state must be recorded in Ohio before title to land vests in the devisee: *Executors of Wilson and Abraham v. Tappan*, 6 O 172.
2. The time limited for admitting foreign wills to record here commences running from the date of the probate of the will: *Carpenter v. Denoon*, 29 OS 379.
3. The object of this section, in addition to a penalty for careless delay, is to secure prompt administration, and to protect the title and innocent parties dealing therewith: *Mitchell v. Long*, 9 NP(NS) 113, 20 OD 38.

§ 2107.48 Foreign will cannot be contested here. (GC § 10504-69)

There shall be no proceeding in this state to contest a will executed and proved according to the law of a state or territory of the United States, or of a foreign country, relative to property in this state; but if such will is set aside in the state, territory, or country in which it is executed and proved, it shall be invalid in this state as to persons claiming under it who have notice of its being set aside, and invalid as to all other persons from the time an authenticated copy of the final

order or decree setting it aside is filed in the office of the probate judge of the county in which the will is recorded.

HISTORY: GC § 10504-69; 114 v 320 (359). Eff 10-1-53. Analogous to former GC § 10577.

Cross-References to Related Sections

Foreign wills, RC § 2129.05.

Comparative Legislation

Contest of foreign wills:
Ill.—Rev Stat, ch 3, § 8-1
Ind.—Burns' Stat, § 29-1-7-29
N.Y.—SCPA, § 1603
Fla.—FSA, § 734.101

Research Aids

O-Jur2d: Wills § 333; Conflict of laws §§ 98, 107
Am-Jur2d: Wills § 1055 et seq; Conflict of laws § 54 et seq.

ALR

Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state. 169 ALR 554.

CASE NOTES AND OAG

1. This section has reference to such foreign wills as, when made and proved in conformity to the foreign law, are, by the laws of this state, valid to dispose of property therein situated, and does not apply to cases arising under former laws, of wills valid where made, but inoperative here because not executed according to our law: *Jones v. Robinson*, 17 OS 171.
2. This section only takes away the right to contest a will duly executed and proved in the foreign state, according to the law thereof, and if a will, not so executed and proved, was improperly admitted to probate in Ohio, it could still be contested here: *Barr v. Closterman*, 2 CC 387, 1 CD 546.

§ 2107.49 Rule in Shelley's case abolished. (GC § 10504-70)

When lands, tenements, or hereditaments are given by deed or will to a person for his life, and after his death to his heirs in fee, the conveyance shall vest an estate for life only in such first taker and a remainder in fee simple in his heirs. If the remainder is given to the heirs of the body of the life tenant, the conveyance shall vest an estate for life only in such first taker and a remainder in fee simple in the heirs of his body. The rule in Shelley's case is abolished by this section and shall not be given effect.

HISTORY: GC § 10504-70; 114 v 320 (359); 119 v 348, § 1. Eff 10-1-53. Analogous to former GC § 10578.

Comparative Legislation

Devise for life with remainder:
Cal.—Probate Code, § 126
Ky.—KRS, § 391.090
Mich.—MCLA, § 554.28
N.Y.—Real Property, § 6-5.8
Pa.—Purdon's Stat, Tit. 20, § 2517

Research Aids

Rule in Shelley's Case:

O-Jur2d: Shelley's Case, Rule in §§ 1, 2; Estates §§ 47, 125, 148, 174

Am-Jur2d: Estates § 102 et seq.

ALR

Modern status of the Rule in Shelley's Case. 99 ALR2d 1161.

Law Reviews

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifield of the Steubenville bar. 8 CinLRev 174.

Some aspects of the uniform property act in Ohio. Article by T. Latta McCray of the New York bar. 8 OSLJ 147.

Future interests; rule in Shelley's case abolished in Ohio; application of this section. (Case note.) 21 OO 234.

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

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CASE NOTES AND OAG

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Scope and effect

1. The rule of construction above prescribed reverses the rule in Shelley's case. It applies to all wills, wherever made, whatever may be the rule governing that subject in the place of testator's domicile: Jennings v. Jennings, 21 OS 56.

2. The exception created by this section, in the application of the rule in Shelley's case, is limited to wills and has no application to deeds of trust: Neff v. Abert, 9 App 286.

4. Fact that niece designated as heir of devisee under former GC § 8598 [see now RC § 2105.15] was not such at testator's death, held not to exclude her from provisions of will devising property to daughter for life and at her decease to her heirs in fee, notwithstanding former GC § 10578 [see now RC § 2107.49]: Laws v. Davis, 34 App 157, 170 NE 601.

5. The purpose and effect of this section, as to construction of devises for life limited to heirs, was to abrogate the rule in Shelley's case as to wills, and not to establish a hard and fast rule of construction that must resolve all doubtful cases into devises of estates for life with remainder over: Halley v. Hengstler, 3 CC(NS) 161, 13 CD 504 [affirmed, without report, 70 OS 452].

6. The rule in Shelley's case is a rule of property and not a rule of construction to be applied in the determination of the meaning of language in a grant or devise, and since the abolition of this rule in Ohio, as to wills, in 1840, it cannot be invoked, either as a rule of property or construction, to determine the character of the estate devised: Williams v. Haller, 13 NP(NS) 329, 27 OD 343.

Rule in Shelley's case

13. Rule in Shelley's case was applicable to wills in Ohio before 1840: McFeely's Lessee v. Moore's Heirs, 5 O 464.

14. A will bequeathing an estate to A and his heirs

forever, in trust for B, a feme covert, for life, and to such uses as, notwithstanding any coverture, she shall appoint, and after her death to the use of her heirs, is an equitable fee simple in the first cestui que trust: Armstrong v. Zane's Heirs, 12 O 287. (Note that the will in this case was made and testator had died before 1840, the date of the passage of the above statute.)

15. Before the rule in Shelley's case was, as to wills, abolished, a testator devised certain lands to his son for life, and at his death to go to his heirs, and, there being nothing else in the will to show that the testator used the word "heirs" to designate a more limited class—as children. Held: That, as the lands passed under the will precisely as they would have descended at law, the son took an estate in fee simple in the lands so devised: Brockschmidt v. Archer, 64 OS 502, 60 NE 623.

16. A will in which the testator devises real estate to his son for life "and at his death the same shall pass to and vest in fee simple in his heirs," where the meaning of the word "heirs" is problematical, will be construed as giving the son no more than a life estate and vesting the fee in those persons comprising his heirs, as determined by the statute of descent and distribution in effect at the time of his death: Holt v. Miller, 133 OS 418, 11 OO 85, 14 NE(2d) 409 [affirming 11 OO 357].

—After the statute—wills

22. Rule in Shelley's case not applicable to wills taking effect since 1840 (Swan's Stat, 999, § 47): King's Heirs v. King's Administrator, 12 O 390.

23. Where a testator made a devise to his son, John, "through his natural life and then to his heirs," and in another part of the will used the word "heirs" in the sense of "children." Held: That the son took a life estate only, with remainder to his children or issue, and not to his heirs generally, and that upon his death, without issue, the devise in remainder failed, and the estate reverted to the heirs of the testator: Bunnell v. Evans, 26 OS 409.

24. In the above case, the word "heirs" was construed as a word of limitation, enlarging the life estate to a defeasible estate in fee simple: Carter v. Reddish, 32 OS 1.

25. Where a testator invests his widow with a life estate in his property, with power to dispose of the remainder to his heirs, an attempted appointment of it in such manner as to secure to herself a substantial pecuniary benefit from its disposition not authorized by the testator, is an abuse of such power of appointment, and is void: Shank v. Dewitt, 44 OS 237, 6 NE 255.

26. Will devising land to testator's daughter for her natural life, and at her death to the issue of her body then living, held to require distribution per stirpes among living children and grandchildren, the children of a deceased child, where no intention to make per capita distribution appeared, in view of policy of law in favor of per stirpes distribution: Watson v. Watson, 34 App 311, 171 NE 257.

28. A will devising realty to the testator's son "during his natural life and then to his heirs," was held to give the son a life estate, and the son's adopted children inherit, not from their father, but take under the will as heirs: Hummel v. Davis, 22 OLR 49.

29. The fact that a devisee under a will is limited to a life estate does not exclude him, as heir, from any further interest which might come by reason of intestacy; therefore, where testator devises to one of his four children a life estate in certain realty with remainder to the heirs of the body of such child, the will containing no residuary clause and no other dis-

position of the premises being made, upon the death of testator there is a contingent remainder to the heirs of the body of the life tenant, and a reversion in fee vests in the heirs at law of testator, subject to be divested upon the birth of children of the life tenant, and such life tenant, dying without heirs of his body, **can transmit by will his one-fourth interest in the reversion:** *Chaffin v. Dixon*, 13 App 1, 31 OCA 97, 417 [motion to certify record overruled, *Dixon v. Chaffin*, 18 OLR 44, 65 Bull 217].

30. Where testator, by foreign will, devises Ohio land to his daughter "during her natural life, and at her decease to go to her lawful heirs," these words created only a life estate in such Ohio lands, although under the rule prevailing in such other state they would have conveyed a fee simple: *Hosler v. Haines*, 7 CC(NS) 261, 18 CD 79 [but case reversed, without report, *Haines v. Hosler*, 76 OS 588].

31. A devise of real estate in Ohio to A, "for the term of her natural life, and at her decease to go to the heirs of her body in fee," made by a resident of Ohio, after 1840, does not create an estate tail in A but vests in A an estate for life, with remainder to the issue of her body. The rule in *Shelley's* case cannot be applied to declare such a devise an estate tail: *Williams v. Haller*, 13 NP(NS) 329, 27 OD 343.

32. For a will construed as conferring a life estate with remainder over to testator's grandchildren as a class, see *Pritchard v. Byrer*, 24 NP(NS) 129 [affirmed by court of appeals; motion to certify record overruled, 19 OLR 713].

33. Under the provision of this section, to the effect that a gift by will to a person for his life and after his death to his heirs in fee shall vest an estate for life only in the first taker, and a remainder in fee simple to his heirs, a will which makes a gift to A, without there specifying the interest which A is to take, but which provides further, "All of the foregoing devises to the several devisees as named are to be to them for their natural lives and on their decease are to go to the heirs of their bodies," gives to A a life estate only, and the remainder to the heirs of the body of A: *In re Youtsey*, 15 OLR 125.

34. Under former GC §§ 8622, 10578 (see now RC §§ 2131.08, 2107.49), a devise of lands to testator's children for their natural lives, directing that on their death the property should go to the heirs of their body, but if any should die without leaving heirs of their body, the lands, subject to the rights of curtesy or dower of the spouses of such children, should revert back and be divided equally between those living or their heirs per stirpes, would pass to a son of the testator an estate for his life, and to his issue an estate in fee simple upon his death: *Youtsey v. Niswonger*, 258 Fed 16, 169 CCA 154.

—Deeds

39. Where granting clause of deed stated to L. M., "during her life and then to her children that may be living and their heirs and assigns forever," clearly conveyed a life estate to L. M., with contingent remainder to such children as survived her, their heirs and assigns, and such estate was not enlarged by habendum clause providing "to L. M., her children and their heirs and assigns forever," the children of a child of L. M., who predeceased L. M., have no interest in the realty since the interest of their parent never became vested: *Ferris v. Schuhholz*, 107 App 63, 7 OO(2d) 397, 152 NE(2d) 285.

39.1. Language of a deed, which was in the nature of a testamentary disposition, liberally construed as if used in a will: *Hoagland v. Marsh*, 4 CC 31, 2 CD 402.

40. The rule in *Shelley's* case is a rule that is a part of

the law of Ohio as to deeds. It is a rule of property and not a rule of construction. It has been abolished as to wills by statute since 1840: *In re Dennis*, 30 NP(NS) 118.

41. Where the granting clause of a deed is in the usual form and gives, grants, bargains, sells and conveys the premises therein described unto the grantee, B, his heirs and assigns, and the habendum clause reads, "To have and to hold said premises for and during his natural life, with reversion at his death to his children, heirs of his body, and their heirs and assigns, and if he dies leaving no children or legal representatives, then the above is to be and remain the property of the brothers and sisters of B, their heirs and assigns, forever," the rule in *Shelley's* case applies and the grantee takes an estate in fee simple: *Akers v. Akron, C. & Y. R. Co.*, 20 CC(NS) 352, 31 CD 354 [affirmed, without opinion, 90 OS 432].

Intention to give fee

46. Where will devised real estate to testator's children and after their death to their bodily heirs in fee simple, remainder vested only after death of life tenants in their surviving children, and attempt by contingent remainderman to dispose of interest in estate before death of life tenant was of no effect: *Pollock v. Brayton*, 28 App 172, 162 NE 608 [see also 29 App 296, 163 NE 573].

46.1. Where property is devised by a mother to her son for life, and then to the heirs of his body, and if he die, without heirs of his body, the remainder to revert to the grantor, if living, and if not living, then the remainder to the grantor's heirs at law, it is incumbent upon the widow of the grantee-son, in an action to have quieted her title to such premises, to prove by a preponderance of the evidence that upon the death of the grantee-son without having had issue he had an absolute estate in fee simple in such premises which could pass to her as her heir or which could pass to her under the provisions of his will, i.e., that the grantor-mother had not successfully conveyed or devised away the reversion: *Kohler v. Ichler*, 116 App 16, 21 OO(2d) 221, 186 NE(2d) 202.

46.2. Where a testator devised the remainder of his estate in trust, stating that his children surviving him are to share in the net income of the trust estate so long as each shall live, but the will makes no provision as to the disposition of the trust estate subsequent to the death of the last surviving child, and four of the testator's children survive him, then (1) the will is not so uncertain that the testator's intent cannot be determined, (2) a valid testamentary trust is established, and (3) there is no merger of interests between the lifetime beneficiaries and the ultimate remaindermen which would void the trust: *Moysey v. Moysey*, 71 OO(2d) 191, 42 OMisc 27, 326 NE(2d) 870 (CP).

47. This statute was passed in pursuance of the policy of this state making the intention of a testator of paramount importance: *Davis v. Saunders*, 8 NP 161, 11 OD 259.

48. Where the intention of the will is to give to the first devisees an estate for life only, that controls, the rule in *Shelley's* case being abolished as to wills, cannot be appealed to to ascertain intention: *Kiersted v. Smith*, 8 NP 378, 10 OD 279.

49. Where the manifest intention of the testator was to grant his daughter a life estate only, but such devise was contained in a will executed and probated prior to the passage of the act abrogating (as to wills) the rule in *Shelley's* case, that rule applied, and the devise vested a fee simple in the daughter: *Kimball v. Kimball*, 13 OD(NP) 555.

50. This section, excluding the rule in *Shelley's* case from wills, does not defeat an intentional use of the word "heirs" as a word of limitation: *Patterson v. Earhart*, 29 Bull 313, 6 OD(NP) 16.

§ 2107.50 Property acquired subsequent to will. (GC § 10504-71)

Any estate, right, or interest in any property of which a decedent was possessed at his decease shall pass under his will unless such will manifests a different intention.

HISTORY: GC § 10504-71; 114 v 320 (359). **EF** 10-1-53. Analogous to former GC § 10579.

Comparative Legislation

After acquired property:

- Cal.—Probate Code, § 121
- Ind.—Burns' Stat, § 29-1-6-1
- Ky.—KRS, § 394.340
- Mich.—MCLA, § 702.3
- N.Y.—EPTL, § 3-3.1
- Pa.—Purdon's Stat, Tit. 20, § 2514
- Fla.—FSA, § 732.605

Research Aids

- O-Jur2d: Wills §§ 57, 58
- Am-Jur2d: Wills § 1356 et seq.

ALR

Real property disposed of and reacquired by testator after execution of will covering it as passing thereunder. 103 ALR 1217.

Effect of residuary clause to pass property acquired by testator's estate after his death, 39 ALR3d 1390.

Enlarged interest acquired by testator after execution of will as passing by devise or bequest. 18 ALR2d 519.

Law Review

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifield of the Steubenville bar. 8 CinLRev 174.

CASE NOTES AND OAG

1. In an action to construe a will the court may consider testimony relative to facts and circumstances surrounding the execution of the will by the testatrix, the extent of her estate, her associations, her solicitude or lack of solicitude for those who would be the natural objects of her bounty, and matters which may have motivated her in excluding her daughter from participating in her estate: *Fitzgerald v. Beil*, 20 OO 18, 33 OLA 423, 6 OSupp 119 (PC) [affirmed 34 OLA 631, 39 NE(2d) 186].

2. This section should be liberally construed in favor of those seeking to take advantage of its provisions with respect to after-acquired personal property: *Fitzgerald v. Beil*, 20 OO 18, 33 OLA 423, 6 OSupp 119 (PC) [affirmed 34 OLA 631, 39 NE(2d) 186].

3. Neither RC § 2107.50 nor § 2107.51 makes reference to a power of appointment: *Dollar Sav. & Trust Co. v. Kirkham*, 50 OO(2d) 318, 21 OMisc 163, 255 NE(2d) 892 (CP).

3.1 A testamentary power of appointment is an estate, right or interest in property within the meaning of RC § 2107.50, and may be exercised by the general residuary clause of a donee's will, there being no different intention manifested: *Dollar Sav. & Trust Co. v. First Nat. Bank*, 61 OO(2d) 134, 32 OMisc 81, 285 NE(2d) 768 (CP 1972).

4. Under this section, an after acquired interest in real estate passes under a will provision devising a

partial interest in such real estate "unless such will manifests a different intention;" therefore a will which states, "I give and devise my one-half interest therein to my brother," manifests the intention that a one-half interest is all that testatrix devised: *Graves v. Graves*, 79 OLA 262, 155 NE(2d) 540 (PC).

DECISIONS UNDER FORMER GC § 10579

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- Common law rule, 9 et seq
- Scope and construction, 1 et seq
- Common law doctrine of implied revocation, 3
- Intention of testator, 4
- Statutory rule, 16 et seq

Scope and construction

1. Under this section, lands acquired after the making of a will which disposes of all the testator's property owned by him at the time of his death, for specified purposes, will pass under its provisions: *Pruden v. Pruden*, 14 OS 251; *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

2. The rule in *Pruden's* case, 14 OS 251, applies in a case where, at the time of making his will, the testator was interested in the property as a purchaser of a mortgage therein, of which property he subsequently became the owner in fee by conveyance of the equity of redemption: *Lee v. Scott*, 5 CC(NS) 369, 16 CD 799.

3. The doctrine of implied revocation of wills that formerly existed at common law does not obtain in Ohio as to after-acquired property devised by will, or to devised specific property conveyed by a testator after the execution of the will, and reconveyed to him before his death: *Ridenour v. Callahan*, 8 CC(NS) 585, 19 CD 65; *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

4. "Manifestly," as used in this section, should receive but little consideration in construing wills; and where it reasonably appears from the will that the testator intended to devise after-acquired lands, the intention should be given effect notwithstanding these intensives: *Carrel v. Carrel*, 14 CD 416.

Common law rule

9. Prior to the enactment of this section in its present form, it would seem that lands acquired subsequent to the execution of a will would not, in general, pass to a residuary devisee without a republication of the will: *Reynolds v. Shirley*, 7 O (pt2) 39.

10. But even then it was held that if the testator, at the time of the making of the will, was in possession of land under a verbal contract of purchase, the devise of such land was good notwithstanding the fact that the legal title thereto was acquired after the execution of the will; for the acquisition of the title did not act as a revocation of the will, and the legal title therefor passed to the devisee and not to the heir: *Smith v. Jones*, 4 O 115.

11. A will executed in 1821, devising all and singular the testator's real estate and personal property, passes real estate acquired by descent after its execution and before his death: *McClaskey v. Barr*, 54 Fed 781, 7 OFD 556.

Statutory rule

16. Lands acquired subsequent to the execution of the will do not pass thereby unless the testator's in-

tention to include therein such after-acquired property clearly and manifestly appears on the face of the will itself: *Wright v. Masters*, 81 OS 304, 90 NE 797, 135 AmSt 790.

17. Under a will which provides, "The balance and remainder of my property of every kind and description I give and bequeath to A and his wife, B, and to C and his wife D, share and share alike; that is, to A and his said wife the one-half of the amount left after all of the above gifts, and to C and his said wife the other half remaining after all of the above gifts," it is testator's intention, manifestly appearing on the will, that after-acquired realty shall pass: *Strock v. Strock*, 6 App 275, 26 CC(NS) 561, 28 CD 145.

18. Where a testatrix describing the estate devised uses interchangeably the terms "all my real estate" and "all the real estate of which I die seized," the same is sufficient to include after-acquired real property: *Blacker v. Litten*, 10 App 180, 29 OCA 423.

19. This section provides that after-acquired real estate, as well as personal property, shall pass under the will "if such shall clearly and manifestly appear by the will to have been the intention of the testator." While this intention must "appear by the will," still testator's circumstances and surroundings may be considered, but they must be the circumstances surrounding her at the date of the will, and not long afterward: *Newton v. McKinstry*, 16 CC(NS) 219, 28 CD 536.

20. A disposition by will of "all the rest and residue of my estate and property," makes it "clear and manifest" that the testatrix intended that any real estate she might acquire after making the will should pass under it: *Newton v. McKinstry*, 16 CC(NS) 219, 28 CD 536.

[§ 2107.50.1] § 2107.501 [Sale or condemnation award.]

(A) If specifically devised or bequeathed property is sold by a guardian, or if a condemnation award or insurance proceeds are paid to a guardian as a result of condemnation, fire, or casualty to the property, the specific devisee or legatee has the right to a general pecuniary devise or bequest equal to the net proceeds of sale, the condemnation award, or the insurance proceeds, and such a devise or bequest shall be treated as property subject to section 2107.54 of the Revised Code. This section does not apply if subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee or legatee is reduced by any right he has under division (B) of this section.

(B) A specific devisee or legatee has the right of the remaining specifically devised or bequeathed property, and:

(1) Any balance on the purchase price, together with any security interest owing from a purchaser to the testator at death by reason of sale of the property;

(2) Any amount of condemnation award unpaid at death for the taking of the property;

(3) Any proceeds unpaid at death on fire or casualty insurance on the property;

(4) Property owned by the testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised or bequeathed obligation.

HISTORY: 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

§ 2107.51 When whole estate to pass. (GC § 10504-72)

Every devise of lands, tenements, or hereditaments in a will shall convey all the estate of the devisor therein, unless it clearly appears by the will that the devisor intended to convey a less estate.

HISTORY: GC § 10504-72; 114 v 320 (360). Eff 10-1-53. Analogous to former GC § 10580.

Comparative Legislation:

Whole estate to pass:

Cal.—Probate Code, § 120

Ind.—Burns' Stat, § 29-1-6-1

Ky.—KRS, 394.340

Mich.—MCLA, § 702.2

N.Y.—EPTL, § 3-3.1

Pa.—Purdon's Stat, Tit. 20, § 2514

Fla.—FSA, § 732.6005

Research Aids

O-Jur2d: Wills § 678; Estates § 11 et seq.

Am-Jur2d: Estates § 18 et seq.

ALR

What passes under bequest of "personal estate." 53 ALR2d 1059.

Wills: admissibility of extrinsic evidence to determine whether fee or absolute interest, or only estate for life or years, was given. 21 ALR3d 778.

Law Reviews

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifeld of the Steubenville bar. 8 CinLRev 174.

Some aspects of the uniform property act in Ohio. Article by T. Latta McCray of the New York bar. 8 OSLJ 147.

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1. This section, providing when whole estate shall pass, is not effective to defeat the intention of the testator expressed or clearly implied: *Heath v. Cleveland*, 114 OS 535, 151 NE 649.

2. In case of devise of real estate to A, and in case of A's death before taking possession or without issue of his body, over, the word "or," in view of language of whole will, may be construed as "and," hence estate

does not pass to ulterior devisees unless both events occur: *Van Tilburg v. Martin*, 120 OS 26, 165 NE 539; *Ward v. Barrows*, 2 OS 241.

3. Where land is devised by language clearly indicating that fee simple is intended to be conveyed, and without words of limitation, devise cannot be limited by subsequent doubtful provision placing limitation thereon: *Baker v. Alexander*, 24 App 117, 156 NE 223.

4. Under the provisions of this section, in devises of real property, an absolute fee simple title passes if nothing appears in the will showing a contrary intent; the use of words of inheritance in the devise is the expression of an intent that the devisee shall have a fee simple title: *Jones v. Jones*, 48 App 138, 1 OO 111, 192 NE 811 [affirming 30 NP(NS) 81].

5. A devise to a wife of one-half of all the testator's real estate is a devise in fee; but such devise is controlled, and the interest reduced to an estate determinable when the youngest child arrives at full age, if the will contains a subsequent clause providing that at that time the property shall be disposed of and divided equally among the children: *Howe v. Fuller*, 19 O 51.

6. No words of perpetuity are essential in a will to pass an estate of inheritance; therefore, if the language used, as descriptive of the estate, is general, and sufficient to comprehend the property, without any words of limitation or provision in the will qualifying the interest devised, a fee in the land will pass: *Thompson v. Hoop*, 6 OS 480.

7. A devise "to my wife, Mary Ellison," which, at common law, imported a mere life estate, would, by this statute, pass a fee, unless the contrary intention appeared in the will: *Stableton v. Ellison*, 21 OS 527.

8. Construction of the words "dying without issue," upon certain conditions: *Bates v. Zinsmeister*, 26 OS 461.

9. Where the provisions of a will in each and all of its items are, when considered as an entirety, so obscure that, with the aid of all the light that can be shed on it by extraneous circumstances, no definite idea can be formed of the intention of the testator in any of the dispositions he has attempted to make, it should be held void for uncertainty, and the property left to descend and be distributed according to law: *Cope v. Cope*, 45 OS 464, 15 NE 206.

10. Under a will which bequeaths half of the residue to A and the other half to A in trust for B, to be paid to B in installments with a gift over to A in case B dies before such installments are paid, the entire estate is disposed of; and if A dies before B and B dies before such installments are all paid, the unpaid balance passes to the estate of A and is not intestate property: *Punch v. Clayton*, 10 App 145.

10.1 Where testator by will devises to his children certain specified realty in absolute language without words of limitation, and later in the same item attempts to limit or qualify the estate by providing "all of which real estate I give and bequeath unto the said Jane and Harvey unto them and their children, which real estate I design for their use, not to be disposed of by sale, neither by them nor their immediate children; in case either of the above children should die then the other to possess the whole," there arises a repugnancy, the language forbidding alienation is void, such qualifying provision is in the nature of a precatory declaration, and the devisees take a fee simple estate: *Heath v. Borst*, 13 App 115.

10.2 Under will devising to wife all property belonging to testator and reciting testator's request that property left at decease of wife shall be equally divided between others, wife took estate absolute and in fee simple, and provision for subsequent division of property was ineffectual: *Trumbull v. Stentz*, 30 App 34, 164 NE 57.

11. This section creates merely a rule of interpretation which must give way to the otherwise clearly expressed intention of the testator, but is to be applied where the language of the grant is such as to require interpretation: *First Presbyterian Church v. Tarr*, 63 App 286, 17 OO 57, 26 NE(2d) 597.

11.1 This section, which reads in part "Every devise . . . of lands . . . shall convey all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a lesser estate," provides a rule of construction to be employed only when it aids a court to ascertain the intention of testator: *Perdue v. Morris*, 93 App 538, 51 OO 232, 114 NE(2d) 286.

11.2 Where a testator devises a life estate in real property to his wife and, at her death, to his son, but "should he die leaving no children" then to another, the words, "should he die leaving no children," refer to the death of the son without issue during the lifetime of his mother, and, where the son survives his mother title to such property becomes absolute in him: *Trumbo v. Trumbo*, 106 App 382, 7 OO(2d) 112, 155 NE(2d) 62.

11.3 A devise of real property "for the use and purpose hereinafter stated" to a county "to be held and occupied by the county as and for a county experiment farm" and conditioned upon the acceptance of such property for such use and purpose, otherwise the property to go to other persons, vests in the county a fee simple absolute, where the county so accepts the property: *Taylor v. Dickerson*, 113 App 344, 17 OO(2d) 367, 178 NE(2d) 46.

11.4 When a fee simple estate is given in one clause of the will in clear and decisive terms, such estate cannot be cut down by raising a doubt upon the extent, meaning, and application of a subsequent clause, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the estate: *Kohout v. Kohout*, 4 OMisc 38, 31 OO(2d) 180, 203 NE(2d) 869.

12. This section proceeds upon the theory that the testator is presumed to have intended to complete the testamentary undertaking upon which he entered. When that presumption is plainly inapplicable, this statute does not govern. So it cannot avail to compel the courts to correct a false description of land: *Gillis v. Long*, 8 NP(NS) 1, 19 OD 253.

13. Words of perpetuity were never necessary in Ohio in a will to carry a fee, and now the above section goes further and passes a fee unless restrictive language expressly denies it: *Patterson v. Earhart*, 6 OD(NP) 16, 11 DecRep 787, 29 Bull 313.

14. If testator has made a gift of land without specifying the interest conveyed, it will be presumed that testator passes a fee simple, if testator possessed such estate; but the subsequent provisions of such will may reduce the interest of the devisee to a life estate, if the language is positive and clear: *In re Youtsey*, 15 OLR 125.

15. A devise of the whole of the proceeds of a farm to a society is a devise of the farm in fee. And where, in such case, the will prohibited a sale by the society, the prohibition is inoperative. And a quitclaim deed given by such society conveys an estate by purchase: *Minor v. Shippley*, 21 App 236, 152 NE 768, 23 OLR 551.

15.1 Where the item vesting a fee simple is clear and unambiguous, it cannot be modified by a subsequent attempt to lessen that fee already conferred: *Union Trust Co. v. Taylor*, 34 OLR 327.

15.2 Where an item in a will, standing alone, clearly conveys an absolute title without words of limitation, the devise cannot be reduced by subsequent vague and doubtful provisions: *Martin v. Martin*, 27 OLR 127.

15.3 A devise by a husband of all his real estate to his wife "to have and use for her own personal benefit and to distribute as she may direct," is an unconditional devise with power of disposition: *Evans v. Molyneux*, 26 OLR 102.

16. A devise of realty to minors "on their arriving at age," does not prevent an estate in fee simple vesting in such devisees: *Truxell v. Truxell*, 17 OLA 137.

17. A devise of all the testator's property to his wife "to be hers absolutely" conveys a fee simple estate which is not cut down to a lesser estate by a later item in the will providing "in case that my wife and I should die leaving no will I leave all my property real and personal to my children to be equally divided between them": *Goubeaux v. Westfield*, 18 OLA 54.

18. A will giving to the testator's wife all his property "so long as she bears my name," gives to the widow a life estate, subject to termination in case she remarries, and upon her death without remarriage, it descends to testator's heirs as intestate property: *Failor v. Schmiedel*, 18 OLA 106.

19. A devise of "all my real estate," to the testator's wife "to belong to" her "as long as she remains my widow" gives to the widow a life estate; *Mentzer v. Shondel*, 18 OLA 368.

20. Where testatrix, on devise of land to museum for scientific purposes and preservation of relics thereon, reserved no interest, she would have mere possibility of reverter: *Harvard College v. Jewett*, 11 F(2d) 119.

§ 2107.52 Death of devisee or legatee. (GC § 10504-73)

When a devise of real or personal estate is made to a relative of a testator and such relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, such issue shall take the estate devised as the devisee would have done if he had survived the testator. If the testator devised a residuary estate or the entire estate after debts, other legacies and devises, general or specific, or an interest less than a fee or absolute ownership to such devisee and relatives of the testator and such devisee leaves no issue, the estate devised shall vest in such other devisees surviving the testator in such proportions as the testamentary share of each devisee in the devised property bears to the total of the shares of all of the surviving devisees, unless a different disposition is made or required by the will.

HISTORY: GC § 10504-73; 114 v 320 (360). Eff 10-1-53. Analogous to former GC § 10581.

Comparative Legislation

Lapsed gifts:

- Cal.—Probate Code, § 92
- Ill.—Rev Stat, ch 3, § 4-11
- Ind.—Burns' Stat, § 29-1-6-1
- Ky.—KRS, § 394.400
- Mich.—MCLA, § 702.11
- N.Y.—EPTL, § 3-3.3
- Pa.—Purdon's Stat, Tit. 20, § 2514
- Fla.—FSA, § 732.603

Research Aids

- O-Jur2d: § 850 et seq.
- Am-Jur2d: § 1661 et seq.

ALR

Direction in will for payment of debts of testator, or for payment of specified debts, as affecting

debts or debts barred by limitation. 109 ALR 1441.

Time interval contemplated by provision of will or of statute of descent and distribution with reference to death of two persons simultaneously or approximately at same time. 173 ALR 1254.

Who are within descriptive terms "relation," "descendants," "child," "brother," "sister," etc., describing legatee or devisee, in statute providing against lapse upon death of legatee or devisee before testator. 63 ALR2d 1195.

Disposition of share of one of two or more life tenants or beneficiaries of income accruing between his death and the death of the last survivor of the beneficiaries under a will or other instrument which postpones the remainder until the latter event, without providing for such disposition. 71 ALR2d 1332.

Gift over to surviving members of a group of share of deceased member as creating absolute interest in last survivor. 166 ALR 1277.

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Statute to prevent lapse in event of death of devisee or legatee before testator as applicable to interest of beneficiary under trust who dies before testator. 118 ALR 559.

Devise or bequest to one "or his heirs" or one "and his heirs" as affected by death of person named before death of testator. 128 ALR 94.

Wills: antilapse statute as applicable to devise or bequest in terms of distributive share, under law, in estate of testator. 3 ALR2d 1419.

Devise or bequest to designated individual "or his estate," "or his children," "or his representatives," or the like (other than "or his heirs,"), as subject to lapse in event of individual's death before that of testator. 11 ALR2d 1387.

Applicability of anti-lapse statutes to class gifts. 56 ALR2d 948.

Testator's intention as defeating operation of anti-lapse statute. 63 ALR2d 1172.

Who are within terms "relation," "descendant," "child," "brother," "sister," etc., describing legatee or devisee, in statute providing against lapse. 63 ALR2d 1195.

Law Reviews

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Construction of the words "die without issue" under Ohio law. 18 CinLRev 311.

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Right of issue of devisee predeceasing testator to take devise. (Case note.) 39 OLR 531.

Lapsed and void legacies. (Case note.) 39 OLR 535.

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1. Where by her will, a testatrix left the residue of her estate to two of her sisters, their heirs and assigns forever, and one of such sisters predeceased the testatrix, leaving an adopted daughter who survived the testatrix, such adopted daughter by virtue of the provisions of this section and GC § 10512-19 (114 v 474) (Repealed and reenacted GC § 10512-23 (120 v 434 (440)) (RC § 3107.13), took the estate given her adopting mother: *Flynn v. Bredbeck*, 147 OS 49, 33 OO 243, 68 NE(2d) 75.

2. At most, former GC § 10504-73, and the former analogous GC § 10581 represent an effort of the general assembly to make certain that the English common-law rule (that a portion of a residuary legacy which is not to a class and which lapses passes as intestate property) shall not be applied in certain instances, even if that rule should be recognized as the law of Ohio: *Commerce Nat. Bank v. Browning*, 158 OS 54, 48 OO 28, 107 NE(2d) 120.

3. The law does not favor lapses of charitable bequests: *In re Barker*, 162 OS 531, 55 OO 421, 124 NE(2d) 421.

3.1 Whether a legacy lapses by the death of the legatee in the testator's lifetime is governed by the law of the testator's domicile: *Heater v. Mittendorf*, 72 App 4, 26 OO 508, 50 NE(2d) 559.

4. The daughter of a testator's wife cannot, under this section, take property which such wife would have taken under her husband's will had she survived him: *Kegler v. Kempter*, 74 App 279, 29 OO 418, 58 NE(2d) 701.

4.1 General Code § 10512-23, as now in force, does not apply only to the rights of an adopted child under the antilapse statute; it gives to an adopted child every right and privilege of inheritance which is given a natural child, excepting only the inheritance of property "expressly limited to heirs of the body of the adopting parent or parents": *In re Friedman*, 86 App 97, 40 OO 510, 88 NE(2d) 230 (reversed 154 OS 1, 42 OO 97, 93 NE(2d) 273).

5. For history of this section, see *Everhard v. Brown*, 75 App 451, 31 OO 268, 62 NE(2d) 901.

6. The phrase "if such devisee," appearing at the beginning of the second sentence of this section, relative to succession on the death of a devisee, refers back to the phrase "child or other relative" appearing in the first sentence of the section: *Hoetsch v. Lonsway*, 81 App 361, 37 OO 207, 79 NE(2d) 363.

6.1 When a remainder is given to persons named or otherwise definitely designated, and there is no clause of survivorship, the fact that a construction of the will which will render the remainder contingent may produce an intestacy as to the share of any of such persons who may die without leaving children surviving, during the continuance of the precedent estate, is a consideration which will influence the court to regard the remainder as a vested one: *Cleveland Trust Co. v.*

Andrus, 95 App 503, 54 OO 125, 121 NE(2d) 68.

6.2 Where a testator devises to his brother an interest in real estate, and devises the residue of his estate of every kind and description, which he has a right to dispose of, to another brother and sister, the devise of real estate does not lapse as a result of the death of the devisee prior to that of the testator, but passes as part of the residuary estate: *Zangerle v. Thomas*, 115 App 37, 17 OO(2d) 432, 176 NE(2d) 157.

6.3 A devise of real property to the widow of the testator, for life, "and upon her death said property and the title thereto shall vest in the name and title of my sons ... absolutely and in fee simple," which language anticipates absolute ownership of the property by the testator's sons, subject to the life estate of his widow, is a devise of vested remainders to the sons as of the death of the testator: *Lane v. Lane*, 116 App 100, 21 OO(2d) 375, 187 NE(2d) 71.

6.4 Where a husband named as a devisee in the will of his spouse dies prior to the time of the death of said spouse, or the time of his death comes within the "presumption of order of death" as stated in RC § 2105.21, the devisee, not being a relative of the testatrix within the meaning of RC § 2107.52, and the will not containing a residuary clause, nor any other provision showing any other intention of the testatrix, the devise to the deceased spouse lapses and the testatrix dies intestate as to such property designated in such devise: *Muckerheide v. Zink*, 1 OApp (2d) 76, 30 OO(2d) 103, 202 NE(2d) 725.

6.5 A testamentary provision for "lineal descendants of my blood" furnishes "other clear identification" as required by RC § 3107.13(B), of the children of testator's predeceased son, without naming them, so as to enable them to succeed to a designated portion of testator's estate, although such children were previously adopted by nonrelatives: *Saintignon v. Saintignon*, 5 OApp(2d) 133, 34 OO(2d) 243, 214 NE(2d) 124.

7. Where a surviving spouse dies within three days after the death of the husband, leaving a will in which all of her property is bequeathed and devised to her husband, her estate passes to the "issue" of her husband, including an adopted child, as provided for in this section: *Harrison v. Hillegas*, 13 OO 523 (PC).

8. This section has no application to a bequest to two relatives of the testator who die without issue before the testator if such bequest is no part of a residuary clause; and such bequest lapses and descends as intestate property: *Bryan v. Bryan*, 17 OO 48 (PC).

9. A specific bequest and devise to a half-brother who predeceases the testator, leaving no issue, does not pass under this section, but lapses: *Lane v. Berk*, 23 OO 41, 7 OSupp 186 (PC).

10. The division of an estate in remainder which vests at the death of the life tenant is governed by the statutes of descent and distribution in effect at the death of the life tenant (this section): *Holman v. Warrick*, 23 OO 397, 8 OSupp 132 (PC).

11. Where in a will testator devised one-half of his estate to his wife, one-fourth to his son, and one-fourth to his granddaughter, and the son predeceased the testator without issue, the latter part of this section does not apply and the one-fourth share descends as intestate property: *Kohn v. Kerr*, 39 OO 381, 87 NE(2d) 489 (PC), discussed 19 CinLRev 301.

12. The wife of the testator is not to be considered as a relative entitled to a proportionate share of the one-fourth interest of a son who predeceased the testator without issue: *Kohn v. Kerr*, 39 OO 381, 87 NE(2d) 489 (PC), discussed 19 CinLRev 301.

13. Where a will leaves the residue of an estate to two stepdaughters and a niece to be divided

equally among the three, and one of the stepdaughters has predeceased the testatrix, her one-third of the residue lapses and goes to the heirs of the testatrix as intestate property: *Sands v. Ross*, 41 OO 38, 89 NE(2d) 99 (PC).

14. Under this section when a devise of a residuary estate is made to a child or other relative of the testator and if such child or other relative was dead at the time the will was made, or dies thereafter, leaving no issue, the estate devised to such deceased devisee shall pass to and vest in such other devisee or devisees surviving the testator in such proportions as the testamentary share of each devisee in the devised property bears to the total of the shares of all the surviving devisees: *Kammer v. Raver*, 43 OO 302, 96 NE(2d) 439 (PC).

15. Where two of testator's eight children died, leaving children, prior to the execution of the will, one child after the execution of the will but before testator's death, leaving children, and the remaining five survived him, the residuary clause of his will leaving property "to be divided equally among my surviving children," refers to the five children which survived him. The right of issue of a deceased child to take its parent's share under this section is based upon the fact that the testator did, as a matter of fact, devise an estate to the deceased child: *Kelley v. Talifer*, 31 OLA 602.

16. This section, the purpose of which is to prevent the lapsing of bequests and devises clearly made to a child or other relative of a testator when such primary legatee or devisee dies before the testator, but leaving issue which survives him, is inapplicable where a primary legatee, not a blood relative, survived the testator but died before the distribution of his estate: *Wilcox v. Central Nat. Bank*, 46 OLA 65 (App).

17. Where the latter part of lapsing statute uses the words "one or more children or relatives," the word "relatives" should, in accordance with the maxim *noscitur a sociis*, be restricted to relationships which are consanguineous and not merely affinitive and therefore when a will devises the estate to son of testator, wife and granddaughter, the devise to the son who predeceases testator without issue does not pass under this section but passes as intestate property: *In re Needle's Estate*, 87 NE(2d) 489 (App).

19. Where a will contains a general residuary provision for disposition of all of the testator's property and a bequest of part of the residue lapses because of the death of the legatee one day after the death of the testator that part of the residue passes to the surviving residuary legatee instead of passing as intestate property: *Schuck v. Schuck*, 7 OO(2d) 198, 156 NE(2d) 351 (PC).

20. A bequest in a will "my brother, Howard Palmer, and I own a dwelling . . . and I give and devise my one-half interest therein to my brother, Howard Palmer, his heirs and assigns forever," does not lapse by reason of the fact that Howard Palmer predeceased the testatrix: *Graves v. Graves*, 79 OLA 262, 155 NE(2d) 540 (PC).

22. The word "issue" as used in this section, means "descendant," adopted as well as natural: *Third Nat. Bank v. Glendening*, 17 OO(2d) 337, 175 NE(2d) 239 (PC).

23. A grandchild of a relative of the testator comes within the term "issue" as used in the anti-lapse statute: *Third Nat. Bank v. Glendening*, 17 OO(2d) 337, 175 NE(2d) 239 (PC).

24. The phrase, "relative of a testator," contained in this section, does not include those "related" by affinity: *Kovar v. Kortan*, 32 OO(2d) 302, 3 OMisc 63, 209 NE(2d) 762 (PC).

25. As to bequests made to certain relatives of the testator in default of there being any grandchildren of the testator who survived his widow and children by ten years, the language of a codicil which provided that any property not finally disposed of under the will and codicil should pass to residuary legatees did not require a different disposition of the remainders than is contemplated by the anti-lapse statute, this section, especially since two of the named remaindermen had died since the execution of the will and the codicil made no change as to their bequests: *Schneider v. Dorr*, 32 OO(2d) 391, 3 OMisc 103, 210 NE(2d) 311 (PC).

26. A bequest of "all the rest and residue of property" which testatrix owns is sufficient to include a lapsed legacy: *Kellogg v. Campbell*, 3 OMisc 29, 32 OO(2d) 252, 209 NE(2d) 645.

27. A provision that a bequest is contingent upon the survival of the testator by the legatee, a relative of the testator, without an alternative provision that such bequest, upon the failure of the beneficiary to survive, shall go to another, does not prevent the application of this section, and such bequest will be taken by any issue of the named beneficiary who survive the testator: *Detzel v. Nieberding*, 36 OO(2d) 358, 7 OMisc 262, 219 NE(2d) 327 (PC).

28. A bequest conditioned by—who shall be living at the time of my decease—will prevent the operation of the antilapse statute, this section, and will cause the bequest to lapse: *Day v. Brooks*, 39 OO(2d) 441, 10 OMisc 273, 224 NE(2d) 557 (PC).

31. The anti-lapse statute, is inapplicable where a sister of the testatrix, the sole residuary devisee, dies without issue two months after the death of the testatrix: *McSteen v. Barclays Bank Limited*, 40 OO(2d) 489, 227 NE(2d) 280 (PC).

32. A bequest which contains a limitation to those of the group named who survive the testator is not subject to the anti-lapse statute: *Shalkhauser v. Beach*, 43 OO(2d) 20, 14 OMisc 1, 233 NE(2d) 527 (PC).

33. A bequest to a relative by affinity who predeceased testator, leaving no issue, lapses and fails under residuary clause of will. The anti-lapse statute does not apply to relative by affinity: *Evans v. Cass*, 51 OO(2d) 417, 256 NE(2d) 738 (CP).

34. When a relative devisee or legatee dies within thirty days after death of decedent, leaving a widow and one child, the child takes the share of decedent's estate that her father would have received by virtue of RC §§ 2105.21 and 2107.52. *Ruble v. Waites*, 72 OO(2d) 389 (PC 1975).

DECISIONS UNDER FORMER GC § 10581

CASE NOTES AND OAG

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Scope

1. This section does not apply if to give it effect would defeat the declared intention of the testator: *Larwill v. Ewing*, 73 OS 177, 76 NE 503.

Common law rule

6. Where a wife died before her husband, provision for her in the latter's will lapsed at common law, and this is not changed by the above section: *Trustees v. Wise*, 17 CC 659, 6 CD 703.

7. Former GC § 10581 (see now RC § 2107.52) changing common law rule relating to lapsing of devises and legacies should be liberally construed: *Gale v. Keyes*, 45 App 61, 186 NE 755, 38 OLR 227.

Statutory rule—child or relative

12. Where a devisee dies prior to the testator, such devisee not being a child or relative of testator within former GC § 10581 (see now RC § 2107.52), and such will contains no residuary clause nor any provision showing any other intention, such devise lapses, and such testator dies intestate as to such property: *Foreman v. Medina County Nat. Bank*, 119 OS 17, 162 NE 42.

13. Will, whereby testator divided residuary estate among his children with devises over on alternate contingencies of death of any children "leaving issue" or "leaving no issue," held referable to death of children at any time, notwithstanding statute preventing lapses: *Ohio Nat. Bank v. Harris*, 126 OS 360, 185 NE 532.

14. Where testatrix, in will dividing estate between her own and her husband's relatives, knew that certain named relatives of her husband were dead, devises to them were void: *Nelson v. Minton*, 46 App 39, 187 NE 576, 38 OLR 287.

15. The phrase "other relative" should be restricted to relationships of the character indicated by the associated word "child," and should include those which are consanguineous, but not those which are affinitive. A devise by a wife to her husband will lapse if his death precedes hers, although he leaves issue of a former marriage surviving her: *Schaefer v. Bernhardt*, 76 OS 443, 81 NE 640 [affirming *Bernhardt v. Bernhardt*, 7 CC(NS) 517, 18 CD 686]; *Hess v. American Bible Soc.*, 26 CC(NS) 439, 28 CD 172.

16. Under the provisions of this section, which are intended to prevent lapse of a legacy, the words "child or other relative of the testator," apply only to legitimate children; and a legacy to an illegitimate child of testator will lapse if such child dies before such testator, leaving children; even though it is evident from the relation of the parties that testator recognized his moral duty to provide for such child: *Owens v. Humbert*, 5 App 212, 25 CC(NS) 522, 27 CD 307, 61 Bull 259 (Ed); *LaRoche v. LaRoche*, 10 App 242, 29 OCA 113, 30 CD 519, 63 Bull 285 (Ed) [motion to certify record overruled, 16 OLR 320, 63 Bull 398].

17. Under a will which devises property to testator's children by name and provides that if one of them should die without issue, his share should pass to the survivors, and a codicil which makes provision for an afterborn child, such afterborn child takes as one of the survivors on the death of one of the other children without issue: *Reynolds v. Reynolds*, 9 App 337 [motion to certify record overruled, *Gott v. Reynolds*, 16 OLR 364, 63 Bull 473].

17.1 Where a will devises real estate to the brothers and sisters of the testatrix, individually, with no words of survivorship and no residuary clause, and one of such devisees predeceases the testatrix, leaving no issue, the devise as to the share of such devisee lapses: *Bishop v. Jones*, 29 OLR 48.

18. Where a will bequeathing property to testatrix's brothers and sisters provides that if any of such brothers or sisters predecease testatrix, the share of the estate bequeathed to such brother or sister shall pass to his or her child or children, and a brother of testatrix dies leaving two children, one of whom predeceases testatrix, leaving issue, such issue will, under authority of this section, share equally with the living child of the deceased brother: *Thatcher v. Trouslet*, 52 App 74, 6 OO 134, 3 NE(2d) 57.

19. This section is silent as to the disposition of a general legacy to a child or other relative who dies prior to the death of the testator without issue: *Stevens v. Hill*, 33 NP(NS) 39, 1 OO 247 (PC).

20. Where a son of the testator died prior to the death of the testator, owing testator an amount evidenced by promissory notes, but testator at no time presented the notes as a claim against the estate of the son, the amount of the notes will be set off against the share of testator's estate passing to a surviving child of the son under the provisions of this section, the child taking as the devisee would have done had he survived the testator: *Deibel v. McFadden*, 4 OO 420 (PC).

21. Under former GC § 10581 (see now RC § 2107.52), the term "other relative" refers to one related by consanguinity and not by affinity: *Rea v. Griffin*, 21 NP(NS) 129, 29 OD 174 [appealed to court of appeals, judgment of court of appeals reversed, *Rogers v. Rea*, 98 OS 315].

—Leaving issue

26. Adopted child cannot save a legacy from lapsing. "Issue" does not include such child: *Phillips v. McConica*, 59 OS 1, 51 NE 445, 69 AmSt. 753; *Theobald v. Fugman*, 64 OS 473, 60 NE 606.

27. The fact that an adopted child of a devisee survived such devisee does not prevent lapse: *Denley v. Wheeler*, 24 NP(NS) 357.

28. This section permits no distinction between the issue of one who dies before the will was made and of one who dies after it: *Shumaker v. Pearson*, 67 OS 330, 65 NE 1005.

29. Where a devisee, who dies before testator, is indebted to the latter's estate, his issue is entitled to take only so much of the amount bequeathed as is left after payment of the debt of his parent, the primary devisee: *Baker v. Carpenter*, 69 OS 15, 68 NE 577.

30. Where property was devised to the "legal heirs" of testator's deceased brother, all persons who, at the time of the death of the deceased brother, are his "legal heirs," shall share in the property, and if any such "legal heirs" had died when the will was made leaving issue surviving the testator, such issue shall take the share of such deceased "legal heir": *Youngblood v. Youngblood*, 11 CC(NS) 276, 20 CD 482 [affirmed, without report, 78 OS 405].

31. Under former GC § 10581 (see now RC § 2107.52), a widow of a legatee under a will is not entitled to the legacy, if the legatee dies before the testator, nor do the brothers of such legatee have any claim to the legacy: *Robbins v. Pigg*, 29 OCA 153, 35 CD 682 [motion to certify record overruled, *Pigg v. Robbins*, 16 OLR 80, 63 Bull 196].

32. If a deceased legatee left, as her next of kin, her husband, the legacy will lapse, for he is not her issue so as to come within the above provision: *Norwood v. Mills*, 1 NP 314, 3 OD 356; *Hess v. American Bible Soc.*, 26 CC(NS) 439, 28 CD 172.

33. Testator devised his property to his wife for life, and after that to his children who were then living, providing that, if any of said children had previously died leaving issue, said issue should receive the share of its parent. One child had so died, leaving

issue who had also died, leaving issue in turn. Held: The issue of such deceased issue takes the share of its grandparent: *Moon v. Hepford*, 2 NP 365, 3 OD 508.

34. A devise of real and personal property to be divided equally among the children of the devisors' brothers and sisters, some of the children being dead at the time of the making of the will, but leaving issue surviving the devisors, surviving issue of the deceased children take the share of their deceased parents: *Mather v. Copeland*, 5 NP 151, 7 OD 257.

—Gifts to a class

39. The provision of this section applies to a devise to "children" as a class: *Woodley v. Paxson*, 46 OS 307, 24 NE 599.

40. The provision of this section applies to a devise to nephews and nieces as a "class," as well as to "children" as a class: *Porterfield v. Porterfield*, 4 NP (NS) 654, 17 OD 448.

41. Under a gift to a class related to testator by affinity, the share of a member of the class who dies before the testator passes to the surviving members of the class, and not to the issue of such deceased member: *Rea v. Griffin*, 21 NP(NS) 129, 29 OD 174 [appealed to court of appeals, judgment of court of appeals reversed, *Rogers v. Rea*, 98 OS 315].

42. Where the devise was to "my nieces and nephews that are living," equally, one of whom, the father of the plaintiff, was the scrivener of the will and had transacted testator's business for many years but died prior to death of testator, plaintiff is entitled to that share of the devise which his father would have taken had he survived (former GC § 10581 [see now RC § 2107.52]): *Gale v. Keyes*, 45 App 61, 186 NE 755, 38 OLR 227.

43. Expression "and their legal representatives" construed: *Lansdowne v. Lansdowne*, 20 OLA 520.

44. The word "heirs" as used in the devise to E "my bookkeeper and his heirs forever," is a word of limitation and not of substitution, and caused the devise to lapse, where the death of the devisee occurred before that of the testator: *Evers v. Williams*, 29 NP(NS) 197 (affirmed 37 OLR 291).

Residuary gift

47. If there is no residuary clause, a lapsed legacy passes as intestate property; even though a bequest had been given to the next of kin as his full share of testator's estate: *Leopold v. Weaver*, 9 App 379, 29 OCA 567 [motion to certify record overruled, *Weaver v. Leopold*, 16 OLR 465, 64 Bull 40].

48. A lapsed legacy passes to the residuary legatee: *Robbins v. Pigg*, 29 OCA 153, 35 CD 682 [motion to certify record overruled, *Pigg v. Robbins*, 16 OLR 80, 63 Bull 196].

49. "Residuary estate" is here used in a technical sense, and should receive its technical construction: *Jewett v. Jewett*, 21 CC 278, 12 CD 131 [affirmed, 67 OS 541]; *Hess v. American Bible Soc.*, 26 CC(NS) 439, 28 CD 172.

Other questions

54. Will providing for disposition of remainder interest in real estate or proceeds thereof, and for distribution of household goods, after death of life tenant, held to dispose of testatrix' "entire estate" within statute providing for disposition of share of childless devisee predeceasing testator: *West v. Aigler*, 127 OS 370, 188 NE 563.

55. Petition by widow as sole devisee of residuary legatee (former GC §§ 10857, 10858 [see now RC § 2107.46]), for construction of will of original testator, alleging that trustee refused to distribute any part

of income to her after her husband's death, states cause of action under former GC § 10581 (see now RC § 2107.52): *Webb v. Biles*, 27 App 197, 161 NE 218.

56. A legacy given in payment of a debt, by the express terms of the will, does not lapse by the death of the legatee before the testator, but when by the will it appears that testator's intention was to confer a bounty it is not competent to show a different intent and to prevent a lapse by proof that the legacy was given in payment of a debt: *McNeal v. Pierce*, 73 OS 7, 75 NE 938, 112 AmSt 695, 1 LRA(NS) 1117.

57. Where the vesting of a legacy is not postponed by the will, the death of the legatee, before payment, does not cast the legacy back into the estate, but it becomes payable to the personal representative of the deceased legatee in the manner provided in the will: *Phillips v. Cole*, 11 App 431, 30 OCA 49.

58. There is no presumption that the devisee survives the testator where both die in a disaster, but evidence sufficient to establish a probability is enough where there is no conflicting testimony: *Ware v. Kinch*, 29 OCA 353, 35 CD 547.

59. Where testator by the second item of his will devised his property to his daughter and to all his grandchildren, "share and share alike," providing that, if any one of them die before the testator, the estate should go to the survivors, "share and share alike," and later, desiring to revoke this devise as to one granddaughter, did so by codicil, thus: "I hereby revoke so much of item second of my will as would include said Emma, and I hereby give and devise to my daughter, and all my other grandchildren, all my estate of every kind, share and share alike." Held: The codicil abrogated the provision of survivorship contained in the second item of the will: *Jackson v. Shinnick*, 3 NP 211, 6 OD 37.

Evidence

66. In case of death of a devisee before that of testator, it will be presumed that the testator had in mind the statute providing for descent of property in such a case (former GC § 10581 [see now RC § 2107.52]) and parol evidence is inadmissible to show a contrary intention: *Ballman v. Ballman*, 25 OLR 144.

[§ 2107.52.1] § 2107.521 [Power of appointment not exercised.]

A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power.

HISTORY: 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

§ 2107.53 Undevised real estate applied to debts. (GC § 10504-74)

When part of the real estate of a testator descends to his heirs because it was not disposed of by his will, and his personal estate is insufficient to pay his debts, the undevised real estate shall be chargeable first with the debts, as far as it will go, in exoneration of the real estate that is devised, unless it appears from the will

that a different arrangement of assets was made for the payment of such testator's debts, in which case such assets shall be applied for that purpose in conformity with the will.

HISTORY: GC § 10504-74; 114 v 320 (360). **Eff** 10-1-53. Analogous to former GC § 10582.

Cross-References to Related Sections

Sale of real estate to pay debts, RC § 2127.02 et seq.

See RC § 2107.58 which refers to RC § 2107.53 et seq.

Research Aids

O-Jur2d: Executors and Administrators § 339

Am-Jur2d: Executors and Administrators § 344 et seq.; 465.

Law Review

When is a trust not a trust? Article by Robert P. Goldman and Evans L. DeCamp of the Cincinnati bar. 16 CinLRev 191.

CASE NOTES AND OAG

1. "A" inherited real estate from wife under former GC § 8574 (see now RC § 2105.06), and mortgaged the same and died intestate, seized of the same, leaving personalty sufficient to pay all debts, including said mortgage; the mortgage must be paid from the personalty: *Medina County Nat. Bank v. Foreman*, 27 App 400, 161 NE 366.

2. Heirs hold land of their ancestor subject to his debts and a purchaser from them takes the incumbrance with the title: *Stiver v. Stiver*, 8 O 217.

3. Debts of deceased are a lien on his realty, in default of personal assets: *Ramsdall v. Craighill*, 9 O 197.

4. A provision in a will, whereby testator gives all of his personal property together with certain real property to his wife, shows that he does not intend that his debts shall be paid out of the personal property: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

6. A provision in a will to the effect that "out of my estate my children shall pay my funeral expenses and all my other debts," includes not only the debts which the testator owed at the time of his death, but all other obligations created by law which are to be paid out of his estate, such as the cost of administering such estate: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

7. Where a will provided that the real estate be sold and the proceeds divided into nine parts, eight of which were to be given to specified heirs, and one part was left undisposed of, the undivided one-ninth was first applicable to the payment of testator's debts in exoneration of the real estate that was devised: *Gilson v. Gilson*, 11 CC(NS) 49, 20 CD 322.

§ 2107.54 Contribution; exception. (GC §§ 10504-75, 10504-76, 10504-77)

When real or personal property, devised or bequeathed, is taken from the devisee or legatee for the payment of a debt of the testator, the other devisees and legatees must contribute their respective proportions of the loss to the person from whom such payment was taken so that the loss will fall equally on all the devisees and lega-

tees according to the value of the property received by each of them.

If, by making a specific devise or bequest, the testator has exempted a devisee or legatee from liability to contribute to the payment of debts, or if the will makes a different provision for the payment of debts than the one prescribed in this section, the estate must be applied in conformity with the will.

A devisee or legatee shall not be prejudiced by the fact that the holder of a claim secured by lien on the property devised or bequeathed failed to present such claim to the executor or administrator for allowance within the time allowed by sections 2117.06 and 2117.07 of the Revised Code, and the devisee or legatee shall be restored by right of contribution, exoneration, or subrogation, to the position he would have occupied if such claim had been presented and allowed for such sum as is justly owing thereon.

This section does not affect the liability of the whole estate of the testator for the payment of his debts. This section applies only to the marshaling of the assets as between those who hold or claim under the will.

HISTORY: GC §§ 10504-75, 10504-76, 10504-77; 114 v 320 (360, 361); 119 v 394 (398); 119 v 394 (397), § 1. **Eff** 10-1-53. Analogous to former GC §§ 10583 to 10585.

Comment

If the holder of a decedent's note, secured by mortgage upon the decedent's property, fails to present the claim upon the note to the executor or administrator within the period limited by statute, the claim in personam upon the note is barred. The lien of the mortgage upon the property continues unimpaired. The second paragraph of this section provides that under the foregoing circumstances, the rights of the devisee and legatee shall be the same as if a claim had been presented and allowed. This provision applies to any lien which will encumber the property in the hands of the devisee and legatee.

Cross-References to Related Sections

Heirs' contribution to estate after settlement to pay claims, RC § 2117.41.

See RC §§ 2107.50.1, 2107.55, 2107.56 which refer to this section.

Comparative Legislation

Contribution:

Cal.—Probate Code, § 753

Ind.—Burns' Stat., § 29-1-17-4

Ky.—KRS, § 394.420

Mich.—MCLA, § 702.14

N.Y.—EPTL, § 12-1.3

Pa.—Purdon's Stat., Tit. 20, § 3542

Research Aids

Contribution:

O-Jur2d: Wills § 886 et seq.; Executors and Administrators § 341; Contribution § 13

Am-Jur2d: Wills § 1753 et seq.; Descent and Distribution § 146

Effect of specific provisions in will for payment of debts:

O-Jur2d: Executors and Administrators § 340; Contribution § 13

Am-Jur2d: Wills § 1748 et seq.

Liability of whole estate for payment of debts:

O-Jur2d: Wills §§ 788, 789; Executors and Administrators § 336

Am-Jur2d: Wills § 1746 et seq.

ALR

Depreciation of assets of decedent's estate before final settlement, but after partial distribution or setting up of trust, as giving right to contribution. 114 ALR 458.

Rights as between specific devisee and residuary devisees in respect of blanket mortgage or other lien on the real estate covered by those devises. 168 ALR 701.

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Construction and application

1. This section construed and applied in *Campbell v. Lloyd*, 162 OS 203, 55 OO 102, 122 NE(2d) 695.

1.1 Provision in will for payment of interest on two thousand dollar fund from sale of land, to legatee, gives specific legacy, and legacy was required to contribute its share to deficit created by testator's debts (former GC §§ 10583, 10584 [see now RC § 2107.54]): *Shaw v. Shaw*, 32 App 168, 167 NE 611.

2. Whether a bequest is a personal charge depends on the construction; it cannot be inferred unless the will secures to the devisee the advantage which is the consideration of such charge; where, after a devise of land, there is a direction to pay debts, the payment of debts is a charge upon the devise: *Decker v. Decker*, 3 O 157; *Clyde v. Simpson*, 4 OS 445; *Nelons v. Truax*, 6 OS 97; *Moore v. Beckwith*, 14 OS 129; *Geiger v. Worth*, 17 OS 564; *Huey v. Thomas*, 23 OS 645; *Tope v. Tope*, 18 O 520; *Nelson v. Nelson*, 19 O 282.

3. A widow who takes a devise in lieu of dower must contribute to debts of testator under this section: *Allen v. Tressenrider*, 72 OS 77, 73 NE 1015.

4. Under the provisions of GC §§ 10504-75 and 10504-76 (RC § 2107.54), the residue of an estate must be exhausted first before specific devisees and legatees can be forced to contribute to the payment of debts of an estate: *Wilkinson v. Edwards*, 15 OO 328 (PC).

5. Except where the will provides otherwise, the amount necessary to compensate a surviving spouse, who elects not to take under a testator's will, must be taken from renounced devises and bequests, the residue, general legacies, and specific and demonstrative legacies and devises, in the order named, and a disappointed legatee cannot call upon other beneficiaries whose gifts have a priority over his for either compensation or contribution: *Citizens Nat. Bank v. Linn*, 22 OO 195 (PC).

6. Where a father has devised houses of equal value to each of his two daughters and later executed deeds of the properties to the daughters, it was held that the husband of one daughter, to whom the father had given a mortgage prior to the execution of the deeds, might enforce the mortgage, one-half as against each property, and the fact that the deed to his wife had been delivered subsequently to that to the sister did not compel him to subject the properties in the inverse order of their alienation: *Gates v. Stebbins*, 21 CC(NS) 236, 33 CD 334.

11. Where land was devised to J. D., in consideration of which he was directed to pay at different periods to different persons, J. D. was only personally liable for the sum appointed to be paid in his lifetime; the amount falling due after the death of J. D. is a charge upon the land devised: *Decker to Decker*, 3 O 157.

12. Express words are not necessary to charge pecuniary legacies upon the real estate; an intention to do so may be derived by implication: *Clyde v. Simpson*, 4 OS 445.

13. Where the trust or charge is defined and limited, the purchaser must see to the application of the purchase money; otherwise when it is general and unlimited: *Clyde v. Simpson*, 4 OS 445.

14. As between specific legatees and devisees where the property or money devised or bequeathed is taken to pay debts contribution may be enforced. But as between general and specific devisees and legatees, the law is otherwise. In such case, property specifically devised or bequeathed is exempted from liability to contribution: *Glass v. Dunn*, 17 OS 413.

16. In the absence of a contrary intention expressed in the will where there are specific legacies and devises and a residuary estate is created, expenses incurred by executor in the successful defense of a will contest suit, including compensation paid to counsel for executors in defending the will are chargeable against the estate and will not be equitably apportioned among the several beneficiaries: *In re Dickey*, 87 App 255, 42 OO 474, 57 OLA 346, 94 NE(2d) 223.

17. Under GC § 10504-76 (RC § 2107.54), a specific devisee or legatee is exempt from the liability to contribute to the payment of debts when there is a residuary estate out of which the debts may be paid: *In re Dickey*, 87 App 255, 42 OO 474, 94 NE(2d) 223.

22. The purchaser of lands of a decedent at a judicial sale of an administrator, holds it discharged of liens for debts: *Bank of Muskingum v. Carpenter*, 7 O (pt.1) 21.

23. But heirs, holding land of their ancestor, hold it subject to his debts; a purchaser from them takes the encumbrance with the title: *Stiver v. Stiver*, 8 O 217.

24. The debts of a deceased person are a lien on the land of which he died seized, in default of personal assets, whether devised or cast by descent, which can only be removed by the payment of the debts or the lapse of time: *Ramsdall v. Craighill*, 9 O 197.

25. The charges imposed by law upon an estate must first be paid out of the estate as a whole before payment of the charges imposed upon the estate by the will of the testator: *Young Mens Christian Assn. v. Davis*, 106 OS 366, 140 NE 114.

26. If testator leaves his personal property and certain real property to his wife, and thus shows an intention to exonerate the personal property from the payment of his debts, and his wife refuses to take under the will, the legatees and devisees who take

under the will must assume the burdens imposed by the will, and they must pay the debts of testator, including the cost of administration, if the will provides that they are to make such payments, even though the effect will be to give to the widow her distributive share of the personal property without payment of any part of testator's debts therefrom: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

27. Prior to this statute it was considered to be the law that personal property was to be exhausted before realty: *Ginder and Smith v. Ginder*, 72 OLA 277, 134 NE(2d) 603.

27.1 The words "testamentary expenses" embrace all those expenses that arise out of the protection and defense of the will: *In re Jacoby*, 79 OLA 239, 247.

27.2 Effect of surviving spouse's election to take against the will: *Winters Nat. Bank & Trust Co. v. Riffe*, 93 OLA 171, 194 NE(2d) 921.

28. Under this section general legatees and devisees must first contribute to the loss, as against specific legatees and devisees; but if the fund from the general devisees and bequests is insufficient to pay the debts, the specific devisees and legatees must contribute: *Gionfriddo v. Palatrone*, 26 OO(2d) 158, 196 NE(2d) 162 (PC).

29. In the absence of proof of the law of the place of the testator's domicile, the probate court may apply the provisions of this section for abatement pro rata among legatees, where there are not sufficient funds after payment of debts and expenses of administration to pay the pecuniary legacies in full: *Mastics v. Kiraly*, 26 OO(2d) 266, 196 NE(2d) 172 (PC).

30. A bequest of all personal property other than cash, stocks and bonds, is a general legacy which will abate in full where there is no residuary estate and the will makes no provision for the payment of debts different from that prescribed in this section: *McArther v. McArther*, 29 OO(2d) 137 (PC).

31. The underlying purpose of this section calls for ratable contribution between specific devisees and specific legatees, rather than the complete abatement of the specific legacies first: *McArther v. McArther*, 29 OO(2d) 137 (PC).

§ 2107.55 Portion of pretermitted heir, or of witness, subject to contribution. (GC § 10504-78)

When a part of the estate of a testator descends to a child born or adopted, or to an heir designated, after the execution of the will, or to a child absent and reported to be dead at the time of execution of the will but later found to be alive, or to a witness to a will who is a devisee or legatee, such estate and the advancement made to such child, heir, or witness for all the purposes mentioned in section 2107.54 of the Revised Code shall be considered as if it had been devised to such child, heir, or witness and he shall be bound to contribute with the devisees and legatees, as provided by such section, and may claim contribution from them accordingly.

HISTORY: GC § 10504-78; 114 v 320 (361). Eff 10-1-53. See former GC § 10586.

Cross-References to Related Sections

See RC § 2107.56 which refers to this section.

Research Aids

O-Jur2d: Wills § 892

Am-Jur2d: Wills § 662

ALR

Adopted child as within contemplation of statute regarding rights of children pretermitted by will. 105 ALR 1176.

§ 2107.56 Liability in case of insolvency. (GC § 10504-79)

When any of the persons liable to contribute toward the discharge of a testator's debt according to sections 2107.54 and 2107.55 of the Revised Code, is insolvent, the others shall be severally liable to each other for the loss occasioned by such insolvency, each being liable in proportion to the value of the property received by him from the estate of the deceased. If any one of the persons liable dies without paying his proportion of such debt, his executors and administrators shall be liable therefor to the extent to which he would have been liable if living.

HISTORY: GC § 10504-79; 114 v 320 (361). Eff 10-1-53. Analogous to former GC § 10587.

Research Aids

O-Jur2d: Wills § 893; Contribution § 15

§ 2107.57 Contribution enforced. (GC § 10504-80)

All cases arising under sections 2107.01 to 2107.62, inclusive, of the Revised Code, in which devisees or legatees are required to contribute or in which contribution is to be made among devisees, legatees, and heirs, may be heard and determined in a single action.

HISTORY: GC § 10504-80; 114 v 320 (361). Eff 10-1-53. See former GC § 10588.

Research Aids

O-Jur2d: Wills § 894

CASE NOTES AND OAG

1. Upon the sale by a testator of devised real estate, the proceeds thereof will not be substituted for such real estate, unless expressly directed by the terms of the will: *Kunkle v. Fisher*, 15 NP(NS) 351, 25 OD 383 [affirmed by court of appeals without opinion].

§ 2107.58 Order of sale to pay debts. (GC § 10504-81)

When a sale of lands alienated or unalienated by a devisee or heir is ordered for the payment of the debts of an estate, sections 2107.53 to 2107.57, inclusive, of the Revised Code do not prevent the probate court from making such order and decree for the sale of any portion of the alienated or unalienated land as is equitable between the several parties, and making an order of contribution and further order and decree to settle

and adjust the various rights and liabilities of the parties.

HISTORY: GC § 10504-81; 114 v 320 (361). **Eff** 10-1-53. Analogous to former GC § 10589.

Comparative Legislation

Sale to pay debts:

- Cal.—Probate Code, § 750
- Ill.—Rev Stat, ch 3, § 20-4
- Ind.—Burns' Stat, § 29-1-15-3
- Ky.—KRS, § 396.060
- Mich.—MCLA, § 709.2
- N.Y.—SCPA, § 1902
- Pa.—Purdon's Stat, Tit. 20, § 3351
- Fla.—FSA, § 733.613

Research Aids

O-Jur2d: Wills § 894; Executors and Administrators § 404

CASE NOTES AND OAG

1. Where, in the probate of an estate, the only claims against the estate consist of the widow's claims for year's allowance, property exempt from administration and for reimbursement for funeral expenses paid by her, acceptance by the widow, the sole heir and devisee under the will, of transfer of all the assets of the estates effects a merger of such claims of the widow in the property transferred, constitutes a waiver by her of all her claims against the estate and, no debts of the estate remaining unpaid, a petition by the executor to sell land to pay debts consisting of the widow's claims for year's allowance, property exempt from administration and for reimbursement for funeral expenses paid will be denied: *Kaczinski v. Kaczinski*, 118 App 225, 25 OO(2d) 68, 193 NE(2d) 731.

2. The probate court in fixing the value of the life estate of appellant first applied the proceeds of the personal estate to the indebtedness of the estate, deducted the remaining indebtedness from the proceeds of the sale of the real estate and from the sum thus remaining then computed the value of the life estate. This was affirmed, with reservations: *Brooks v. Prince*, 72 OLA 161, 134 NE(2d) 78.

§ 2107.59 Sale of land by executor's successor. (GC § 10504-82)

When a last will and testament is admitted to probate, or a will made out of this state is admitted to record as provided by sections 2129.05 to 2129.07, inclusive, of the Revised Code, and lands, tenements, or hereditaments are given or devised by such will to the executors therein named to be sold or conveyed, or such estate thereby is ordered to be sold by such executors and one or more of the executors named in the will dies, refuses to act, or neglects to take upon himself the execution of the will, then all sales and conveyances of such estate by the executors who took upon themselves in this state the execution of the will, or the survivor of them, shall be as valid as if the remaining executors had joined in the sale and conveyance. But if none of the executors named in such will take upon themselves its execution, or if all the executors who take out letters testamentary die, resign,

or are removed before the sale and conveyance of such estate, or die, resign, or are removed after the sale and before the conveyance is made, the sale or conveyance, or both shall be made by the administrator with the will annexed.

HISTORY: GC § 10504-82; 114 v 320 (362). **Eff** 10-1-53. Analogous to former GC § 10590.

Research Aids

O-Jur2d: Executors and Administrators §§ 510, 528

Am-Jur2d: Executors and Administrators § 455 et seq.

ALR

Right of an administrator with the will annexed, or trustee other than the person named in the will as such, to execute power of sale conferred by will. 9 ALR2d 1324.

Law Reviews

Uniform trusts act. Article by Prof. Harry W. Vanneman and Prof. Frank S. Rowley. 13 CinLRev 157, 5 OSLJ 145.

Does the executor in Ohio take an estate or a power? Does the power survive? Article by Charles C. White of the Cleveland bar. 15 CinLRev 1.

CASE NOTES AND OAG

1. In case of the death of one of two or more executors before the death of testator, the probate court should appoint the survivor or survivors as executors: *In re March*, 60 Bull 5.

2. If only one qualifies, he may execute a power to sell: *Taylor v. Galloway*, 1 O 232.

2.1 But no number less than all who are acting can execute the power: *Fleischmann v. Shoemaker*, 2 CC 152, 1 CD 415.

3. In the absence of such a statute as this, power to sell lands, given by will to an executor, could not be executed by the administrator with the will annexed: *Wills v. Cowper*, 2 O 124.

4. Although one executor cannot purchase lands of his co-executors, yet such a sale may be confirmed by the subsequent assent and ratification of the heirs: *Mitchell v. Dunlap*, 10 O 117.

5. Where a will confers power upon an executor to sell lands, it will be so construed as to carry out the intentions of the testator: *Williams v. Veach*, 17 O 171.

6. Where a will directs land to be sold by the executors, but they resign without so doing, the sale, or conveyance, or both may be made by an administrator with the will annexed: *Elstner v. Fife*, 32 OS 358.

7. Under the provisions of this section, the administrator with the will annexed has the same powers to sell property of the estate as is given to the executor named in the will: *Holly v. Phares*, 7 OO 236 (App).

[NUNCUPATIVE]

§ 2107.60 Oral will. (GC §§ 10504-83, 10504-84)

An oral will, made in the last sickness, shall be valid in respect to personal estate if reduced to writing and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words. Such witnesses must prove that the testator was of sound

mind and memory, not under restraint, and that he called upon some person present at the time the testamentary words were spoken to bear testimony to such disposition as his will.

No oral will shall be admitted to record unless it is offered for probate within six months after the death of the testator.

HISTORY: GC §§ 10504-83, 10504-84; 114 v 320 (362). Eff 10-1-53. Analogous to former GC §§ 10601, 10602.

Cross-References to Related Sections

Computation of time, RC § 1.14.

Comparative Legislation

Nuncupative wills:

- Cal.—Probate Code, § 54
- Ind.—Burns' Stat, § 29-1-5-4
- Mich.—MCLA, § 702.6
- N.Y.—EPTL, § 3-2.2

Forms

1 A&H Probate FORM 2107.60a et seq.

Research Aids

Oral wills—validity and requisites:

- O-Jur2d: Wills § 27 et seq; § 144
- Am-Jur2d: Wills § 724 et seq.

Time of probate:

- O-Jur2d: Wills § § 33, 277

ALR

Effectiveness of nuncupative will where essential witness thereto is beneficiary. 28 ALR2d 796

What amounts to "last sickness" or the like within requirement that nuncupative will be made during last sickness. 8 ALR3d 952.

What circumstances excuse failure to submit will for probate within time limit set by statute. 17 ALR3d 1361.

CASE NOTES AND OAG

1. Decedent's question to physician, "Will you be present?" is sufficient designation of witness to nuncupative will: Kellner v. Hagood, 39 App 351, 177 NE 637.

2. Nuncupative will is completed by testamentary statement and witnesses' signatures; attestation clause being surplusage: Kellner v. Hagood, 39 App 351, 177 NE 637.

3. The act of 1795 conferred power to devise real estate by verbal will. The act of 1805 provided for the disposal of personal property only by nuncupative will. The acts of 1808, 1810, 1816 and 1824 permitted the disposal of real estate by verbal will, but the act of 1831 restricted nuncupative will to personalty: Lessee of Gillis v. Weller, 10 O 462 [followed in Ashworth v. Carleton, 12 OS 381]; see also Williams v. Pope, W 406.

4. A written will can neither be wholly nor partially revoked by a subsequent nuncupative will: Devisees of McCune v. House, 8 O 144.

5. Directions by an owner in respect to a disposition of his property, to take effect after death, are of no effect unless made through the medium of a last will and testament: Phipps v. Hope, 16 OS 586.

6. If the words reduced to writing and probated are not substantially the same as those spoken, the will is invalid: Bolles v. Harris, 34 OS 38.

7. The witnesses must be disinterested. A devisee who is a witness cannot regularize by renouncing, but the will is void. The witness' status is that of the time of signing: Vrooman v. Powers, 47 OS 191, 24

NE 267, 8 LRA 39; Parsons v. Wass, 16 CC(NS) 404, 31 CD 577 [reversing Wass v. Guardian Trust Co., 15 OD(NP) 677].

8. Where the witnesses to a nuncupative will are also devisees of real estate under it, but there is no evidence tending to show that at the time the will was made they expected to benefit from it, it is error for the court to direct a verdict declaring the will invalid: Parsons v. Wass, 16 CC(NS) 404, 31 CD 577 [reversing Wass v. Guardian Trust Co., 15 OD(NP) 677].

9. The fact that a nuncupative will attempts to dispose of both real and personal property does not make it invalid as to the personal property: Parsons v. Wass, 16 CC(NS) 404, 31 CD 577 [reversing Wass v. Guardian Trust Co., 15 OD(NP) 677].

§ 2107.61 Will ineffectual. (GC § 10504-29)

Unless it has been admitted to probate or record, as provided in sections 2107.01 to 2107.62, inclusive, and 2129.05 to 2129.07, inclusive, of the Revised Code, no will is effectual to pass real or personal estate.

HISTORY: GC § 10504-29; 114 v 320 (351). Eff 10-1-53. Analogous to former GC § 10541.

Research Aids

Foreign wills:

Necessity for probate:

- O-Jur2d: Wills § 303; Conflict of Laws § 99
- Am-Jur2d: Wills § 831

Power of appointment of Ohio bond:

- O-Jur2d: Conflict of Laws § 106

Will ineffectual unless admitted to probate:

- O-Jur2d: Wills § 219

- Am-Jur2d: Wills § 826 et seq.

ALR

Probate in state where assets are found of a will of nonresident which has not been admitted to probate in state of domicile. 119 ALR 491.

Suppression of will as contrary to public policy or to statute in that regard. 117 ALR 1249.

Constitutionality and construction of statute requiring production of will for probate or declaring consequences of failure or delay in that regard. 119 ALR 1259.

Law Review

It can't be done. Article by William R. Kinney. 19 OBar (No. 13) 225.

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Actions prior to probate, 10

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1. Until a will is established by probate in the court prescribed by law, it cannot be received as evidence of any title set up under it: Swazey v. Blackman, 8 O 5.

2. Where partition of lands has been made between coheirs, and afterward one of the heirs brings suit against the assignee of the other heirs to recover possession of a part of the lands allotted to them by the decree of partition, he will not be estopped by

that decree from setting up a title as devisee under the will of a common ancestor admitted to probate subsequent to the decree in partition: *Woodbridge v. Banning*, 14 OS 328.

3. A duly certified copy of the probate and record of a will is conclusive evidence of its validity, on a collateral issue respecting the disposition of his estate by the testator: *Brown v. Burdick*, 25 OS 260.

4. A will has no force until it is probated, and has no standing as basis for a suit by devise for any claim to property or interest therein: *Pettitt v. Morton*, 28 App 227, 162 NE 627.

5. The devisee (a nephew of testator) under an unprobated will is not entitled to have a trust declared in property of testator, where the probated will is alleged to be a forgery, but forgery was discovered when it was too late to contest it: *Pettitt v. Morton*, 28 App 227, 162 NE 627.

6. A title as devisee is not acquired until probate. For a history of the above section, see this case: *Douglass v. Miller*, 3 NP 220, 4 OD 414.

7. The record of a foreign will is necessary to effectually pass title to property in this state. When this is done, the doctrine of relation applies, and validates acts previously done which after such record may be performed: *Union Sav. Bank & Co. v. Baltimore & O. R. Co.*, 7 NP(NS) 497.

8. When the will stands as probated, a compromise agreement made in connection with a will contest does not affect the terms of the will; its provisions stand unaltered: *In re McGreevey*, 32 NP(NS) 212.

9. A will is not effectual to pass real estate unless it be probated if domestic; or recorded, if foreign: *McClaskey v. Barr*, 47 Fed 153, 7 OFD 76.

10. In action by devisee, to set aside deed, brought prior to the probate of the will, such action was subject to demurrer since the will, until probated, has no force or effect to form the basis of an action involving the title to property: *Strawder v. Smith*, 75 OLA 186, 143 NE(2d) 327.

§ 2107.62 Expenses and fees. (GC § 10504-85)

The expense of proving and recording wills shall be paid by the party at whose instance this is done. The witnesses and officers shall have the same fees for attendance and services as in other cases. When the executor or administrator is appointed the expense shall be reimbursed out of the estate.

HISTORY: GC § 10504-85; 114 v 320 (362). Eff 10-1-53. Analogous to former GC § 10603.

Research Aids

Contest:

O-Jur2d: Wills § 491 et seq.

Expenses of probate:

O-Jur2d: Wills § 221

Am-Jur2d: Wills § 1092 et seq.

Witness fees:

O-Jur2d: Witnesses § 12

CASE NOTES AND OAG

1. An executor of a will duly admitted to probate may include in his account items for attorney fees incurred in establishing the probate of such will, which was subsequently set aside as invalid: *In re Hendrick*, 71 App 247, 26 OO 67, 49 NE(2d) 106.

2. Attorney fees for services rendered in the contest of one of two wills relating to a decedent's estate, which contest was ultimately successful and

such will set aside, and for services rendered relating to the refusal to admit to probate the other will and appeals therefrom, which will was ultimately admitted to probate, are necessary expenses of the estate in such an amount as the court may find fair and reasonable: *In re Woods*, 80 OLA 336, 159 NE(2d) 638 (PC).

§ 2107.63 Addition to trust estates.

A testator may by will devise, bequeath, or appoint real or personal property, or any interest in such property, to a trustee of a trust which is evidenced by a written instrument executed by the testator or any other person either before or on the same date of the execution of such will and which is identified in such will.

The property or interest so devised, bequeathed, or appointed to such trustee shall be added to and become a part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of such trust, and shall be administered in accordance with the terms and provisions of the instrument creating such trust, including, unless the will specifically provides otherwise, any amendments or modifications thereof made in writing before, concurrently with, or after the making of the will and prior to the death of the testator. The termination of such trust, or its entire revocation prior to the testator's death, shall invalidate such devise, bequest, or appointment to such trust.

This section shall not affect any of the rights accorded to a surviving spouse under section 2107.39 of the Revised Code.

This section applies to wills executed before October 5, 1961 as well as to wills executed thereafter.

HISTORY: 129 v 7 (9), § 1 (Eff 10-5-61); 130 v 612, § 1. Eff 1-23-63.

Forms

1 A&H Probate FORM 2107.63a et seq.

Research Aids

O-Jur2d: Wills §§ 110, 111, 187; Trusts § 34

Am-Jur2d: Wills § 209

Law Reviews

Trusts; surviving spouse electing against settlor's will may realize assets from corpus of revocable, amendable, pour-over trust. Case note. 34 CinLRev 117.

The pour-over trust. Elliott H. Kajan. 13 Clev MarLRev 544.

Decedent's estates—independent legal significance and pour-over wills. Note. 13 WestResLRev 795.

Drafting trust instruments revised. Robert P. Goldman, 36 CinLRev 650.

CASE NOTES AND OAG

1. In enacting the pour-over statute with all privileges and rights in the settlor during life, the legislature specifically reserved to the surviving spouse the right to elect against the will: *Purcell v. Cleveland Trust Co.*, 28 OO(2d) 262, 94 OLA 455, 200 NE(2d) 602 (PC) [reversed 6 OApp(2d) 235, 35 OO(2d) 426].

2. When a decedent has executed both a will and a trust and it is clear from the language of those

instruments that the trust was intended to be an inter vivos trust, a bequest to that trust made in the will fails for want of a taker if a valid inter vivos trust was not in existence at the time of the decedent's death: *Hageman v. Cleveland Trust Co.*, 41 OApp(2d) 160, 70 OO(2d) 322, 324 NE(2d) 594.

3. In order for assets in a testator's estate to be "poured over" into an inter vivos trust through language in the will authorized by this section there must be such a trust in existence at the time of testator's death: *Knowles v. Knowles*, 33 OO(2d) 218, 4 OMisc 153, 212 NE(2d) 88 (PC).

§ 2107.64 Trustee as beneficiary.

A policy of life insurance may designate as beneficiary a trustee named by will. Upon qualification and issuance of letters of trusteeship the proceeds of such insurance shall be payable to the trustee to be held and disposed of under the terms of the will as they exist as of the date of the death of the testator and in the same manner as other testamentary trusts are administered; but if no qualified trustee makes claim to the proceeds from the insurance company within twelve months after the death of the insured, or if satisfactory evidence is furnished to the insurance company within such twelve month period showing that there is or will be no trustee to receive the proceeds, payment shall be made by the insurance company to the executors, administrators, or assigns of the insured, unless otherwise provided by agreement with the insurance company during the lifetime of the insured.

The proceeds of the insurance as received by the trustee shall not be subject to debts of the insured nor to estate tax to any greater extent than if such proceeds were payable to the beneficiary or beneficiaries named in the trust and not to the estate of the insured.

Such insurance proceeds so held in trust may be commingled with any other assets which may properly come into such trust.

Nothing in this section shall affect the validity of any life insurance policy beneficiary designation made prior to August 10, 1965, naming trustees of a trust established by will.

HISTORY: 131 v 618 (EFF 8-10-65); 132 v S 326 (EFF 7-1-68); 134 v H 1. EFF 3-26-71.

The provisions of § 3 of SB 326 (132 v —) read as follows:

SECTION 3. Sections 1 and 2 shall take effect on July 1, 1968, except that existing section 5731.43 of the Revised Code shall be repealed effective November 30, 1967, and section 5731.41 of the Revised Code shall take effect on December 1, 1967. The repeal of existing Chapter 5731. of the Revised Code shall not affect any inheritance tax therein levied upon successions to property resulting from a death which occurs on or before June 30, 1968, nor any rights or procedures relating to the levy, collection, apportionment, disbursement, adjustment, or refund, other than compensation of agents employed by the tax commis-

sioner, of any such tax.

The provisions of § 4 of H 1 (134 v —) reads as follows:

SECTION 4. The repeal of section 5731.301 [5731-30.1] of the Revised Code shall not affect any inheritance tax levied by former Chapter 5731. of the Revised Code upon succession to property resulting from a death which occurred on or before June 30, 1968, nor any rights or procedures relating to the levy, collection, apportionment, disbursement, adjustment, or refund of any such tax.

Research Aids

O-Jur2d: Trusts § 29; Insurance § 829

[WILL CONTEST ACTION]

§ 2107.71 [Civil action to contest validity of will.]

A person interested in a will or codicil admitted to probate in the probate court may contest its validity by a civil action in the probate court in the county in which such will or codicil was admitted to probate.

HISTORY: 136 v S 145. EFF 1-1-76.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Analogous to former RC § 2741.01, repealed, 136 v S 145, § 2, effective 1-1-76.

See RC §§ 2107.72, 2107.77 which refer to § 2107.71 et seq.

Comparative Legislation

Will contest:

Cal.—Probate Code, § 370

Ill.—Rev Stat, ch 3, § 8-1

Ind.—Burns' Stat, § 29-1-7-17

Ky.—KRS, § 395.220

Mich.—MCLA, § 702.45

N.Y.—SCPA, § 1410

Pa.—Purdon's Stat, Tit. 20, § 777

Fla.—FSA, § 733.213

Outline of Procedure

Contest of a will. Leyshon No. 62; A&H No. 31

Research Aids

Contest—in general:

O-Jur2d: Wills § 325 et seq.

Am-Jur2d: Wills § 844 et seq.; § 861 et seq.

Estoppel:

O-Jur2d: Wills § 346 et seq.

Am-Jur2d: Wills § 896 et seq.

Judgment in action to contest:

O-Jur2d: Wills § 484

Jurisdiction:

O-Jur2d: Wills § 325

Am-Jur2d: Wills § 850 et seq.

Limitation of actions:

O-Jur2d: Wills § 335 et seq.

Am-Jur2d: Wills § 881 et seq.

Parties:

O-Jur2d: Wills § 353 et seq.

Am-Jur2d: Wills § 891 et seq.

ALR

Contest or attempt to defeat will within provision forfeiting share of contestant. 49 ALR2d 198.

Decedent's spouse as a proper party to contest will. 78 ALR2d 1060.

Judgment denying validity of will because of undue influence, lack of mental capacity, or like, as res judicata as to validity of another will, deed, or other instrument. 25 ALR2d 657.

Right of executor or administrator to contest will or codicil of his decedent. 31 ALR2d 756.

Right of heir's assignee to contest will. 39 ALR3d 696.

Validity and enforceability of agreement to drop or compromise will contest or withdraw objections to probate, or of agreement to induce others to do so. 42 ALR2d 1319.

Voluntary dismissal or withdrawal of proceedings to probate or contest will. 173 ALR 959.

Law Review

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

Rest in peace—or thy will be done. Ellis v. Rippner. 28 OSJ 647.

See explanatory article 4 OBar 245.

The constructive trust: a neglected remedy in Ohio. Article by Prof. Harry W. Vanneman, OSU, 10 CinLRev 366; 3 OSJ 1.

Wills can be made "unbreakable." Ellis v. Rippner. 6 ClevMLRev 336.

Wills—executors in prior will not interested parties to contest will revoking their appointment. Case note. CinLRev 397.

CASE NOTES AND OAC

[DECISIONS UNDER FORMER ANALOGOUS SECTIONS]

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not the duty of the court to give construction to the provisions of the will, nor to pass upon the validity or invalidity of the doubtful legacies or bequests therein contained: Mears v. Mears, 15 OS 90; Irwin v. Jacques, 71 OS 395.

3. The issue to be made up and tried in actions to contest a will cannot be varied or restricted by averments in the pleadings or by an order on the journal of the court, viz., "whether the writing produced is the last will or codicil of the testator, or not": Drew v. Reid, 52 OS 519, 40 NE 718.

4. On the trial of this issue the question of whether the will was properly or improperly admitted to probate by the probate court is not involved and cannot be inquired into: Stacey v. Cunningham, 69 OS 176, 68 NE 1001.

5. Contest of a will does not involve construction thereof: Irwin v. Jacques, 71 OS 395, 73 NE 683, 69 LRA 422.

6. Any person who has such a direct, immediate and legally ascertained pecuniary interest in the devolution of testator's estate as would be impaired or defeated by the probate of the will or be benefited by the setting aside of the will, is a "person interested": Bloor v. Platt, 78 OS 46, 84 NE 604; Chilcote v. Hoffman, 97 OS 98, 119 NE 364, LRA 1918D, 575.

7. A judgment creditor of an heir who has obtained a lien by levy on property, which in the absence of a will would be the property of the debtor heir by descent, is a person interested in a will or codicil within the meaning of this section, and can prosecute an action to contest the validity of an alleged will disposing of such property to a person other than such heir: Bloor v. Platt, 78 OS 46, 84 NE 604.

8. The right to contest a will is statutory and it can be exercised only in accordance with the provisions prescribed by statute: McVeigh v. Fetterman, 95 OS 292, 116 NE 518.

9. Where an action to contest a will is begun within the statutory period, the right to maintain such action is not forfeited by the fact that the party plaintiff consented in writing to the probating of the will and accepted a legacy thereunder where such consent and acceptance were induced by false and fraudulent representations as to the amount of the estate and the testamentary capacity of the testator, made by the executor under the will with the intent of inducing the legatee to abide by the will: Kelley v. Hazzard, 96 OS 19, 117 NE 182.

10. The expression "a person interested" in this section and the expression "other interested persons" in GC § 12080 (RC § 2741.02 [now RC § 2107.73]), are substantially the same and are identical in meaning: Chilcote v. Hoffman, 97 OS 98, 119 NE 364, LRA 1918D, 575.

11. An action may be brought by the heir of a disinherited heir of a testator, if such disinherited heir has died after testator's death, and before such contest proceedings are brought; although such plaintiff in the contest proceeding was not a party in interest at the time that such will was admitted to probate: Chilcote v. Hoffman, 97 OS 98, 119 NE 364, LRA 1918D, 575.

12. The right of a person to bring an action to contest a will passes with his pecuniary or property interest in the estate of the testator to his personal representative or heirs at law, under the statutes of descent and distribution: Chilcote v. Hoffman, 97 OS 98, 119 NE 364, LRA 1918D, 575.

13. A proceeding to contest a will is a civil action by the provisions of GC §§ 11238 and 12079 (RC §§ 2307.02 and 2741.01), and within the general issue which is made up on the journal as to whether the paper writing is the last will of the testator, a number of special issues are included, among which are: 1. That the testator was lacking in mental capacity. 2. That the testator was unduly influenced, as the term is defined by the law. 3. That there was a defective signing or attestation. 4. That the testator was not of legal age; and if one of such issues

is correctly submitted to the jury, a general verdict in favor of the defendant will not be reversed for error in submitting one of the other issues if it does not appeal from the record upon which issue such verdict was rendered: *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61].

14. General Code §§ 12079 to 12087 (RC §§ 2741.01 to 2741.09) provide the exclusive mode of setting aside a last will and testament: *Madden v. Shallenberger*, 121 OS 401, 169 NE 450.

15. Under GC §§ 10504-15 and 10504-16 (RC §§ 2107.11 and 2107.12), in a proceeding to admit a will to probate, "persons interested in its probate" include those whose interests are opposed to its probate. One who contends that there has been a former adjudication by a denial of probate may, under these sections, contest jurisdiction by asserting the defense of *res judicata*, and if aggrieved may prosecute error to the finding on such defense: *State ex rel Young v. Morrow*, 131 OS 266, 5 OO 584, 2 NE(2d) 595.

16. A beneficiary under a prior unprobated will may maintain an action to contest a later probated will: *Kennedy v. Walcutt*, 118 OS 442, 161 NE 336; a beneficiary is not a necessary party to an action to contest a later probated will: *Machovina v. Machovina*, 132 OS 171, 7 OO 253, 5 NE(2d) 496.

17. An illegitimate son, designated as heir at law by his natural father, pursuant to the provisions of GC § 10503-12 (RC § 2105.15), is not authorized under this section to bring an action to contest the will of the brother of the natural father, which brother died subsequent to the decease of the natural father: *Blackwell v. Bowman*, 150 OS 34, 37 OO 323, 80 NE(2d) 493.

18. Mandamus denied to compel hearing on motion to determine interest of contestant, before final hearing: *State ex rel Ticknor v. Randall*, 152 OS 129, 39 OO 440, 87 NE(2d) 340.

19. The children of a designated heir who dies prior to the execution of a will by the designator, may not contest such will: *Kirsheman v. Paulin*, 155 OS 137, 44 OO 134, 98 NE(2d) 26.

20. An interested person who, pursuant to RC § 2741.01 and in compliance with RC § 2741.02, initiates an action to contest a will within six months after its probate may not thereafter, in face of RC § 2741.04, dismiss the action over the protest of a defendant who wants the will set aside: *Andes v. Shippe*, 165 OS 275, 59 OO 363, 135 NE(2d) 396.

21. The probate court has no jurisdiction to consider an application to vacate the probate of a will filed while an action to contest the will is pending in the common pleas court: *State ex rel Cleveland Trust Co. v. Probate Court*, 172 OS 1, 15 OO(2d) 43, 173 NE(2d) 100 [affirming 113 App 1, 17 OO(2d) 1, 162 NE(2d) 574].

22. The right to maintain an action to contest a will, where placed in issue, should be determined by the court without a jury before the trial on the issue of the validity of the will: *Comer v. Comer*, 175 OS 313, 25 OO(2d) 182, 194 NE(2d) 572.

23. A person interested in a will, within the meaning of RC § 2741.01, is one, who, at the time of the commencement of an action to contest a will, has a direct, pecuniary interest in the estate of the putative testator, that would be impaired or defeated if the instrument admitted to probate is a valid will: *Steinberg v. Central Trust Co.*, 18 OS(2d) 33, 47 OO(2d) 154, 247 NE(2d) 303; *Wical v. Bernard*, 26 OS(2d) 55, 55 OO(2d) 66, 269 NE(2d) 45.

24. If property is devised to A, and the will provides that if A does not sell the property during his lifetime or dispose thereof by his last will, the property shall go to B, such devise to B is void, and B cannot bring an action to contest the validity of A's will: *Robarham v. Gregg*, 2 App 108, 18 CC(NS) 338, 26 CD 142.

25. The acceptance of a bequest of personal property does not bind the beneficiary not to contest the will, as in

the case of the acceptance of real property, but the money or property so received may be returned to the executor and the legatee left free to contest the will: *Spangler v. Beare*, 2 App 133, 19 CC(NS) 512, 26 CD 37.

26. For a discussion of the history of a proceeding to contest a will in Ohio, see *Slemmons v. Toland*, 5 App 201, 25 CC(NS) 485.

27. If one of the heirs of a deceased testator is given a legacy by testator's last will and testament, and is named as executor, and he applies for the probate of such will, acts as executor, distributes the estate, and applies to the probate court for a transfer of the realty devised to him, such heir is estopped from bringing a second action to contest such will: *Patterson v. Atkinson*, 7 App 495, 27 OCA 427, 29 CD 354.

28. Whether the plaintiff is a person interested within the meaning of GC § 12079 (RC § 2741.01), is a preliminary question for the court: *Wilson v. Wilson*, 8 App 258, 28 OCA 309, 29 CD 393; *Zinn v. Ferris*, 15 CC(NS) 148, 24 CD 113.

29. A child is rendered legitimate by the fact that his parents intermarried before the birth of such child, although the mother was pregnant when such marriage took place; if the husband knew of the fact of such pregnancy; and a subsequent decree of divorce rendered before the birth of such child, does not render such child illegitimate. Accordingly, such child may maintain an action to contest the will of his father: *Wilson v. Wilson*, 8 App 258, 28 OCA 309, 29 CD 393, 63 Bull 49 (Ed).

30. Upon motion by plaintiffs to direct a verdict in an action to contest a will, in the absence of ambiguity appearing on the face of the will, it becomes the duty of the court to determine as a matter of law from the will itself whether or not it has been executed and attested in compliance with the requirements of the statute: *Herbster v. Pincombe*, 10 App 322, 31 OCA 358 [motion to certify record overruled, *Pincombe v. Herbster*, 16 OLR 79, 63 Bull 195].

31. Proceeding to contest will does not lie, absent allegation that will has been admitted to probate: *Sours v. Shuler*, 42 App 393, 181 NE 908, 36 OLR 544.

32. Promise not to contest will held sufficient consideration for promise of a share in the estate; showing of belief of success in the litigation unnecessary, when: *Rutledge v. Hoffman*, 81 App 85, 36 OO 405, 75 NE(2d) 608.

33. A person named as a beneficiary under a will and omitted as such under a subsequently executed will which revoked the former will, has an interest in it in that, under this section, he is eligible to contest it: *Caswell v. Lermann*, 85 App 200, 40 OO 148, 88 NE(2d) 405.

34. Any person who has a direct, immediate and legally ascertainable pecuniary interest in the devolution of a testator's estate that would be impaired or defeated by the probate of the will or benefitted by setting aside the will, is a "person interested," within the meaning of GC § 12079 (RC § 2741.01): *Donovan v. Decker*, 98 App 183, 57 OO 230, 122 NE(2d) 501.

35. Where stock in a bank is bequeathed to certain named legatees with the express direction that "none of said stock shall be sold by any of said legatees unless with the consent and approval of" the named president of such bank, such bank president is not an interested person in such will, and it is not necessary to make him a party in an action to contest such will: *Durbin v. Durbin*, 106 App 155, 6 OO(2d) 414, 153 NE(2d) 706.

36. An interested party, within the meaning of this section, providing for the contest of a will, is a person who, at the time of the commencement of an action to contest a will, has a direct, pecuniary interest in the estate of the putative testator, which would be impaired or defeated if the instrument admitted to probate is a valid will: *Durbin v. Durbin*, 106 App 155, 6 OO(2d) 414, 153 NE(2d) 706.

37. The will-contest provisions of RC chapter 2741

afford the exclusive remedy of contesting the validity of a will which has been duly admitted to probate: *State ex rel Cleveland Trust Co. v. Probate Court*, 113 App 1, 17 OO(2d) 1, 162 NE(2d) 574.

38. A person who is a beneficiary under a will has such an "interest" in a later will of the testator, which permits him to contest such subsequent will: *Campbell v. Strasburger*, 17 OApp(2d) 56, 46 OO(2d) 71, 244 NE(2d) 530.

39. The contest of a will is regulated by statutes the provisions of which are special and mandatory and prevail over general statutory provisions contained elsewhere in the Revised Code: *Collins v. Nurre*, 20 OApp(2d) 53, 49 OO(2d) 70, 251 NE(2d) 621.

40. Fundamental issues related to matters extrinsic to the contents of the will and calling into question the competence of the entire document—the issue of undue influence—must be raised by contesting the will under RC Chapter 2741, whereas issues related to the legal propriety, meaning or effect of the particular contents of the will—whether a clause or paragraph is in violation of the rule against perpetuities—are proper objects of an action for a declaratory judgment: *Davidson v. Brate*, 44 OApp(2d) 248, 73 OO(2d) 253, 337 NE(2d) 642 (1975).

41. An illegitimate child does not per se have a direct pecuniary interest in the estate of his natural father that would be defeated or impaired if the father's will, admitted to probate, is a valid will; thus, he has no standing to contest the will of his natural father: *Moore v. Dague*, 46 OApp(2d) 75, 75 OO(2d) 68, 345 NE(2d) 449 (1975).

42. A bona fide agreement entered into between a legatee of a testator, and his children, under which the children agree not to contest the will of the testator in consideration of the payment to such children of one-third of the legacy, is valid: *West v. Leslie*, 21 OO 89, 6 OSupp 251 (PC).

43. A will contest is no longer purely a proceeding in rem: *Russell v. Cline*, 10 OO(2d) 481, 161 NE(2d) 655 (CP).

44. The will contest provisions of RC §§ 2741.01 to 2741.09, inclusive, afford the exclusive remedy for challenging the validity of a will that has been duly admitted to probate: *State ex rel Cleveland Trust Co. v. Probate Court*, 113 App 1, 12 OO(2d) 307, 165 NE(2d) 668.

45. A surviving spouse should not be permitted to resort to an action to contest a will when the same result can be accomplished by the simple method of electing not to take under the will of the decedent: *Klicke v. Uhlenbrock*, 27 OO(2d) 290, 200 NE(2d) 497 (CP).

47. An action to contest a will was unknown at common law and has been created by RC § 2741.01: *Alakiotis v. Lancione*, 41 OO(2d) 381, 12 OMisc 257, 232 NE(2d) 663 (CP).

48. In a will contest, the general provisions of the civil code can be invoked when not contrary to any of the specific statutes relating to the contest of wills: *Larimer v. Lowrey*, 46 OLA 147 (App).

49. The validity of a will can be contested only by a civil action brought pursuant to GC § 12079 (RC § 2741.01) et seq, after the admission of such will to probate: *In re Carson*, 83 App 510, 50 OLA 119, 75 NE(2d) 248.

50. A next of kin who would be the sole beneficiary if a probated will were set aside has such pecuniary interest in the estate as to entitle him to contest the will: *Adams v. Curklies*, 88 App 225, 56 OLA 167, 91 NE(2d) 706 (App).

51. An executor's right to a fee is a right to payment for services rendered in administering the affairs of the estate of the testator or testatrix by virtue of his appointment to the office of trust, and such interest in a fee for services is separate and distinct from a pecuniary interest in the devolution of the estate under this section: *Hermann v. Crossen*, 81 OLA 322, 160 NE(2d) 404 (App).

52. The filing of a petition to contest a decedent's will

does not suspend or extend the time in which a creditor shall present his claim to the executor of said decedent's estate under the provisions of RC §§ 2117.06, 2117.07: *In re Kehoe*, 94 OLA 469, 199 NE(2d) 29.

53. A daughter who went into possession of land devised to her by the will of her father, and leased the land and collected the rents under the lease from the date of the probate of the will, is estopped thereby from contesting the validity of the will; but the acceptance of the devise remains an absolute bar to a contest by her of the validity of the will, and where such an action has been brought by a devisee so situated, its dismissal by the trial court is not error: *Leedy v. Cockley*, 14 CC(NS) 72, 22 CD 299.

54. If the sole heir and next of kin is also the sole legatee and devisee, a more remote heir cannot maintain an action to contest such will: *Taylor v. Bushnell*, 29 OCA 497 [motion to certify record overruled, 17 OLR 4, 64 Bull 112].

55. A person cannot claim under a will and also against such will. This principle of equity, however, does not depend upon any doctrine of estoppel or election: *Walker v. Hollister*, 20 NP(NS) 225, 28 OD 299.

56. One who has entered into a contract with the beneficiaries under a will by which they agree not to oppose a contest thereof is not precluded from bringing an action to contest it: *Rohr v. Gatch*, 21 NP(NS) 65, 29 OD 158.

57. When the will stands as probated, a compromise agreement made in connection with a will contest does not affect the terms of the will; its provisions stand unaltered: *In re McGreevey*, 32 NP(NS) 212.

§ 2107.72 [Rules govern will contest action.]

The Rules of Civil Procedure govern all aspects of a will contest action, except as otherwise provided in sections 2107.71 to 2107.75 of the Revised Code.

HISTORY: 136 v § 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Research Aids

Pleading:

O-Jur2d: Wills § 373 et seq

Am-Jur2d: Wills § 938 et seq

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1. In a proceeding under the statute to contest the validity of a will, it is error for the court to render final judgment on demurrer to answer; an issue must be made up and tried by a jury: *Walker v. Walker*, 14 OS 157.

2. It is error for the court to proceed by mere decree, and without the intervention of a jury, to set aside the will in a will contest case: *Holt v. Lamb*, 17 OS 374.

3. In a proceeding to contest a will the judgment binds only the parties to the action, and such parties, as between themselves, are estopped from setting up a will when it has once been set aside in an action, but as to all other persons in interest it is to be regarded as a subsisting will, and their rights stand wholly unaffected by such proceedings: *Holt v. Lamb*, 17 OS 374; *McArthur v. Scott*, 113 US 340, 28 LEd 1015, 5 SCT 652, 5 OFD 357.

3.1 When evidence is offered tending to show that the will has been altered in a material provision since its execution, and evidence is also offered tending to show that the alteration was made before its execution, the jury, if they find for the will, must determine the question in dispute, and establish by special verdict the will as it read when executed: *Haynes v. Haynes*, 33 OS 598.

4. If the will shows upon its face that it was not signed at the end thereof, the court may direct a verdict that the writing is not a valid will: *Sears v. Sears*, 77 OS 104, 82 NE 1067; *Schubert v. Christman*, 16 App 432.

5. If substantial evidence has been offered by plaintiff in a will contest, it is reversible error for the trial court to instruct the jury to bring in a verdict sustaining such will: *Wilder v. Taylor*, 87 OS 520, 102 NE 1135 [reversing without opinion 14 CC(NS) 255, 23 CD 643, which affirmed 10 NP(NS) 209, 24 OD 621].

6. An action to contest a will is a civil action and a verdict by the jury must be rendered upon the concurrence of three-fourths or more of their number: *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61]; *Slemmons v. Toland*, 5 App 201, 25 CC(NS) 485, 28 CD 455; *Baird v. Detrick*, 20 NP(NS) 209, 28 OD 110 [affirmed, 8 App 198, 20 OCA 257].

7. If the jury makes a special finding that testator did not sign the will, error in the charge as to acknowledgment in the presence of an attesting witness is immaterial: *West v. Lucas*, 106 OS 255, 139 NE 859.

8. If a legacy has been paid under a will which is set aside thereafter, interest runs from the date at which the legacy is paid, and not from the date at which the will is set aside: *Bermont v. Gotshall*, 110 OS 425, 144 NE 137.

9. It is error to submit interrogatory to jury which requires finding as to whether attesting witnesses signed in presence of each other; also as to date of alleged subsequent will: *McFadden v. Thomas*, 154 OS 405, 43 OO 340, 96 NE(2d) 254.

10. Where in an action to contest a will, filed by creditors of a son of the deceased, the court finds that the will was not signed at the end, the court should grant the motion of the plaintiffs to direct a verdict invalidating the will, even though answers were filed denying generally the claims of plaintiffs that they are interested parties: *Herbster v. Pincombe*, 10 App 322, 31 OCA 358 [motion to certify record overruled, *Pincombe v. Herbster*, 16 OLR 79, 63 Bull 195].

11. If it is not admitted that a sheet of paper which is pinned to a will was added before execution, it is reversible error for the court to direct the jury to set the will aside: *Smith v. Ellis*, 15 App 38 [motion to certify record overruled, *Ellis v. Smith*, 19 OLR 512].

12. A probate court is without jurisdiction to hear and

determine an application for an allowance to applicants' counsel for services in a prior action to contest a will, to which prior action applicants were parties: *Union Sav. Bank &c. Co. v. Alter*, 17 App 29 [motion to certify record overruled, 21 OLR 3].

13. This section, fixing the procedure in a will contest and providing that the issue shall be tried by a jury, simply means that a will contest in such a civil action as is tried by a jury in the ordinary manner of a jury trial in civil actions, and since the abrogation of the "scintilla rule" of evidence in this state, the trial court may grant a motion for a directed verdict where there is only a scintilla of evidence; and where both parties so move, the favorable inference given the party's evidence against whom the motion is directed disappears, and the testimony of each party is considered for what it is worth: *Westfall v. Notman*, 53 App 314, 7 OO 128, 4 NE(2d) 932.

14. An action to contest the validity of a will is expressly made a civil action by the provisions of this section and is not a special proceeding within the meaning of GC § 12223-2 (RC § 2505.02), which provides that "an order affecting a substantial right made in a special proceeding . . . is a final order": *Hymel v. Bing*, 67 App 432, 21 OO 367, 31 NE(2d) 112.

15. In a will contest, it is the duty of the trial court, in the absence of an answer, to make up the issue prescribed by this section, by an order on the journal before the impaneling of a jury: *Meyer v. Welsbacher*, 80 App 200, 35 OO 518, 75 NE(2d) 89.

16. The requirement of RC § 2741.04 that a will contest shall be tried by a jury is mandatory. A jury cannot be waived by agreement of the parties: *Carr v. Howard*, 17 OApp(2d) 233, 46 OO(2d) 360, 246 NE(2d) 563.

17. Where one service of summons in an action contesting a will is made within the time prescribed by RC § 2741.09 upon a defendant occupying the positions of surviving spouse, devisee, and executrix and, although such summons does not designate the specific relationship between the estate and the defendant, the various capacities of the defendant are clearly designated in the body of the complaint attached to the summons, an amendment of the original complaint after the expiration of the six month statute of limitations prescribed by RC § 2741.09, in order to formally add the same defendant in a different capacity, relates back to the date of the original pleading. Rule 15C, Ohio Rules of Civil Procedure: *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

18. Revised Code § 2741.04, providing that a jury shall try the issues in a will contest, does not preclude a directed verdict or a summary judgment, when appropriate: *Kronauge v. Stoecklein*, 33 OApp(2d) 229, 62 OO(2d) 321, 292 NE(2d) 320 (1972).

19. The will contest action is a special statutory proceeding within Title XXVII of the Revised Code and, pursuant to Civil Rule 1(C)(7), any civil rule which would permit the liberal amendment or joinder adding a necessary party under RC § 2741.02, relating the cause of action back to within the time limitation of RC § 2741.09, would by its nature be clearly inapplicable as it would operate to extend the jurisdiction of the courts of this state in derogation of mandatory statutory language. Civil Rule 82: *Holland v. Carlson*, 40 OApp(2d) 325, 69 OO(2d) 299, 319 NE(2d) 362 (1974).

19.1 Under the provisions of this section, as amended in 1961, the common pleas court has the power to effect a settlement in a will contest and to dismiss the action without impaneling a jury: *Central Nat. Bank v. Eells*, 33 OO(2d) 418, 5 OMisc 187, 215 NE(2d) 77 (PC).

20. This section requires that issue be made up, if not by pleadings, by entry of court: *Harvie v. Goodale*, 6 OLA 198.

21. The power to review the testimony in a will case, and if the verdict is clearly and manifestly against the

weight of the evidence, to set aside the verdict and order a new trial, is not defeated by GC § 12082 (RC § 2741.04): *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

22. The procedure with reference to the contest of a will is regulated by the provisions of GC §§ 12079 to 12087 (RC §§ 2741.01 to 2741.09); and where such provisions are specific and are inconsistent with the provisions of the Code of Civil Procedure, they apply to the exclusion of analogous provisions of the Code of Civil Procedure: *Gomien v. Weidemer*, 27 OCA 177, 29 CD 1.

23. In a will contest the sole issue is whether the paper writing in question is the last will of the testator or not, and such issue cannot be varied by the pleadings: *Heimrich v. Dechant*, 11 NP(NS) 511, 21 OD 106 [citing *Dew v. Reid*, 52 OS 519, 40 NE 718, and *Windisch &c. Brew. Co. v. Opp*, 17 CC 465, 9 CD 516].

§ 2107.73 [Parties to will contest.]

Persons who are necessary parties to a will contest are as follows:

(A) Any person designated in a will to receive a testamentary disposition of real or personal property;

(B) Heirs who would take property pursuant to section 2105.06 of the Revised Code had the testator died intestate;

(C) The executor or the administrator with the will annexed;

(D) The attorney general as provided by section 109.25 of the Revised Code;

(E) Other interested parties.

HISTORY: 136 v S 145 (EF 1-1-76); 136 v S 466. EF 5-26-76.

Analogous to former RC § 2741.02, repealed 136 v S 145, § 2, effective 1-1-76.

For text of RC § 2107.73 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Research Aids

Necessary parties—defendants:

O-Jur2d: Wills § 366 et seq.

Am-Jur2d: Wills § 922 et seq.

Notice:

O-Jur2d: Wills §§ 371, 372

Am-Jur2d: Wills § 932 et seq.

ALR

Standing of legatee or devisee under alleged prior or subsequent will to oppose probate or contest will. 39 ALR3d 321.

Law Review

Will contest: necessary parties defendant. Case note. 19 OS LJ 772.

Wills—capacity to contest—service on executor—designation of capacity in precept for issuance of summons. Case note. 27 CinLRev 338.

Wills; probate, establishment and annulment; parties to proceedings. (Case note.) 20 CinLRev 305.

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1. In a suit to contest the validity of a will, the legatees and devisees are indispensable parties; and the omission to make a legatee a party to such suit is error, for which the decree setting aside the will, will be reversed: *Church v. Nelson*, 35 OS 638.

2. Where the devisee of real estate transfers it after the probate of the will by which it was devised, the grantee is an interested person within the meaning of this section, and is a necessary party to an action subsequently brought to contest the validity of the will: *Sears v. Stinehelfer*, 89 OS 163, 105 NE 1047.

3. Where a verdict and judgment sustaining a will were duly entered, a party defendant, though served only by publication, may not have such judgment opened up and the issue as to the validity of the will again tried, upon application filed after the running of the statute of limitation: *McVeigh v. Fetterman*, 95 OS 292, 116 NE 518 [followed, *Case v. Smith*, 142 OS 95, 26 OO 282, 50 NE(2d) 142].

4. An executor named in a will is not "united in interest" with the heirs and devisees, and an action to contest a will is not commenced as to the heirs of the testator and the devisees under the will by the issuance of a summons for the executor, though duly served upon him: *McCord v. McCord*, 104 OS 274, 136 NE 902. See also, 91 OS 441, 110 NE 1063; 7 App 129, 28 OCA 137, 29 CD 429.

5. Service of summons upon one of the legatee-devisee defendants is to be deemed commencement of the action as to each of the defendants of that class, and also the executor. Actual service of summons can thereafter be made upon the remainder of the defendants of that class: *Draher v. Walters*, 130 OS 92, 3 OO 121, 196 NE 884; *Morisse v. Billau*, 70 App 215, 24 OO 558, 45 NE(2d) 798.

6. A beneficiary under an unprobated will is not a necessary party to an action to contest a later will duly admitted to probate: *Machovina v. Machovina*, 132 OS 171, 7 OO 253, 5 NE(2d) 496.

7. In an action to contest validity of will where none of heirs-at-law or next of kin is served with summons and no

person "united in interest" with them is served within six months from date of probate, there is failure of compliance with this section, specifying who must be made parties, and common pleas court is without jurisdiction to entertain such action: *Case v. Smith*, 142 OS 95, 26 OO 282, 50 NE(2d) 142.

8. The sole beneficiary under a will, who is neither an heir-at-law nor next of kin of the decedent, is not "united in interest" with decedent's heirs-at-law or next of kin and an action to contest such will is not commenced as to testator's heirs-at-law by service of summons upon such sole beneficiary within six months from date of probate: *Case v. Smith*, 142 OS 95, 26 OO 282, 50 NE(2d) 142; nor is the action commenced as to the heirs and devisees by timely service upon the executor: *McCord v. McCord*, 104 OS 274, 135 NE 548.

9. Under the provisions of this section, all the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to an action to contest a will: *Peters v. Moore*, 154 OS 177, 42 OO 254, 93 NE(2d) 683.

10. It is not a compliance with this requirement when a person's occupying the positions of heir, legatee and sole executor is made a party in his individual capacity as heir and legatee but not in his distinctive, official, fiduciary capacity as executor, and another person is sued as executor: *Peters v. Moore*, 154 OS 177, 42 OO 254, 93 NE(2d) 683.

11. This section clearly provides that the executor must be made a party to the action; and where this is not done within the statutory period the action must fail: *Bynner v. Jones*, 154 OS 184, 42 OO 257, 93 NE(2d) 687.

12. The provisions of the statutes relative to the right to contest the validity of a will are mandatory, and the enjoyment of the right is dependent upon compliance with the conditions and limitations there contained: *Gravier v. Gluth*, 163 OS 232, 56 OO 228, 126 NE(2d) 332.

13. Under RC §§ 2741.02 and 2741.09 it is mandatory and jurisdictional that the executor or administrator be made a party in an action to contest a will, and in such an action the court is without jurisdiction unless the executor or administrator is made a party, and a summons, duly followed by service, is issued within six months after the will has been admitted to probate: *Mangan v. Hopkins*, 166 OS 41, 1 OO(2d) 186, 138 NE(2d) 872.

14. For the purposes of a will contest, the theory that one person is only one legal entity even though acting in more than one capacity, tends to eliminate technical barriers in the path of justice. Cf. *Mangan v. Hopkins*, 166 OS 41, 1 OO(2d) 186 (concurring opinion of Taft, J.); *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

15. Under the mandatory provisions of RC §§ 2741.02 and 2741.09, the interested persons must be so named and made parties within the period of six months: *Fletcher v. First Nat. Bank*, 167 OS 211, 4 OO(2d) 268, 147 NE(2d) 621.

16. In a will contest, where the executor or administrator is made a party, is named in the caption of the petition as executor or administrator and in no other capacity, is described in the body of the petition as executor or administrator and in no other capacity, and in fact has no relation to such case in any other capacity, and where, attached to the petition, there is a precipe for the issuance of summons, naming such executor or administrator but not with his title attached, and where service of summons is made upon such executor or administrator, with the caption of the petition upon the summons, in which caption the party is named as executor or administrator and in no other capacity, such executor or administrator is summoned as a party to the will contest in his fiduciary capacity: *Abbott v. Dawson*, 167 OS 238, 4 OO(2d) 288, 147 NE(2d) 609.

17. One who takes under the half-and-half statute (RC

§ 2105.10) takes as an heir of the relict or surviving spouse and as such, under the provisions of this section is a necessary party in an action to contest the will of such relict: *Kluever v. Cleveland Trust Co.*, 173 OS 177, 18 OO(2d) 461, 180 NE(2d) 579.

18. Where in a timely brought action to contest a will, a defendant is designated in the body of the petition as the executor of the deceased testator's estate, but in the caption of the petition, in the precipe for summons and in the summons which is served on him he is named in an individual capacity, and it is apparent that his sole relation to the estate is that of executor, there is sufficient compliance with the provisions of this section, to bring him into the action as executor, and a motion filed more than six months after the admission of the will to probate to dismiss the petition for failure to summon him as executor should be overruled: *Porter v. Fenner*, 5 OS(2d) 233, 34 OO(2d) 465, 215 NE(2d) 389.

19. Revised Code § 2741.02 is a remedial statute and the proceedings thereunder are to be liberally construed, and no person should be denied the assertion of a cause of action on captious or purely technical grounds. *Porter v. Fenner*, 5 OS(2d) 233, 34 OO(2d) 465, paragraph 1 of the syllabus, overruling *Mangan v. Hopkins*, 166 OS 41, 1 OO(2d) 186; *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

20. The complaint or record of the court's proceedings, rather than the caption of the pleadings, determines who the parties rightfully and legally are, *Porter v. Fenner*, 5 OS(2d) 233, 34 OO(2d) 465, paragraph 1 of the syllabus; *Vance v. Davis*, 107 OS 577, paragraph 1 of the syllabus; *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

21. The purport of RC § 2741.02, is that "interested persons" be made parties to a will contest: *Hecker v. Schuler*, 12 OS(2d) 58, 41 OO(2d) 277, 231 NE(2d) 877.

22. A will contest action otherwise rightly "brought" within the meaning of RC § 2741.09, will not fail under RC § 2741.02 for the sole reason that a person who is nonexistent within the period of six months following probate is not joined as a party thereto: *Hecker v. Schuler*, 12 OS(2d) 58, 41 OO(2d) 277, 231 NE(2d) 877.

23. An adopted child who was subsequently returned and permanently surrendered to a social agency, pursuant to RC § 5103.15, was nevertheless an heir of the adoptive parents and thus a necessary party to a will contest action: *Maurer v. Becker*, 26 OS(2d) 254, 55 OO(2d) 486, 271 NE(2d) 255 (1971).

24. That executrix who was also sole beneficiary remained silent until after year for will contest expired was held not waiver of her right to assert that she was not individually bound by judgment setting will aside in contest wherein she was not individually made party: *Myers v. Hogue*, 45 App 330, 187 NE 127, 39 OLR 122.

25. An action to contest a will must, under this section, be commenced within six months after probate of the will, and it is not sufficient that a petition to contest and praecipe for summons be filed within the time prescribed, but summons must also be issued within that time: *Coughlin v. Passionist Monastery*, 59 App 433, 13 OO 199, 18 NE(2d) 496.

26. Executrix who, in her official capacity, defended an action to contest will did not thereby enter her appearance as sole legatee, since executrix who is also sole legatee is not one and same person: *Myers v. Hogue*, 45 App 330, 187 NE 127; but the fact that an executrix-devisee is named in the caption of a petition to contest a will merely as devisee is not fatal, where the petition shows that such devisee was appointed as executrix: *Morisse v. Billau*, 70 App 215, 24 OO 558, 45 NE(2d) 798.

27. Whether an executor of a will, made a party defendant in compliance with this section, in a suit to set the will aside, is an adverse party within the meaning of GC § 11497 (RC § 2317.07), subject to cross-examination on call of a plaintiff seeking to set the will aside, is to be

determined from the entire record in the case: *Board of Education v. Pendleton*, 80 App 249, 35 OO 554, 75 NE(2d) 182.

28. Although service of summons is made within the six-month period prescribed by this section, for bringing an action to contest a will, only on the defendant so individually named, service may be lawfully made on the executor after the expiration of such period: *Bockert v. Bockert*, 82 App 274, 37 OO 571, 87 NE(2d) 549.

29. In an action to contest a will, where the executor has been discharged, an administrator *de bonis non* is a necessary party, but he is not a party united in interest with a testamentary trustee and where such administrator is not served with summons within the statutory time, the court obtains no jurisdiction of such administrator although the trustee was served within time: *Campbell v. Johnson*, 83 App 225, 38 OO 301, 81 NE(2d) 238.

30. An executor not made a party to such an action within the statutory time cannot thereafter, by his general appearance in the action, confer jurisdiction of the subject matter upon the court: *McKelvey v. McKelvey*, 90 App 563, 48 OO 207, 107 NE(2d) 555.

31. In an action to contest a will there is no unity of interest between an executor and the heirs at law, and service of summons upon the latter, within the statutory time, and not upon the executor will not save the action. The provisions of GC §§ 12080 and 11410 (RC §§ 2741.02 and 2311.33) are mandatory: *McKelvey v. McKelvey*, 90 App 563, 48 OO 207, 107 NE(2d) 555.

32. The executor or administrator is a necessary party to an action to contest a will: *Woodruff v. Norvill*, 91 App 251, 48 OO 361, 107 NE(2d) 911.

33. Under GC § 12080 (RC § 2741.02) that all devisees, legatees and heirs of testator and other interested persons, including the executor or administrator, be made parties to an action to contest a will, the court is without jurisdiction unless an executor is made a party, and summons duly followed by service is issued within six months after a will has been admitted to probate: *Martin v. Mansfield Sav. &c. Bank*, 92 App 465, 50 OO 44, 110 NE(2d) 814.

34. Insufficient compliance with GC § 12080 (RC § 2741.02) is shown where the plaintiff in an action to contest a will fails to name a necessary executor as a party defendant, in the caption of the petition and fails to serve such party as executor, merely listing the party in the caption in an individual or corporate capacity, although referring to such defendant as executor in the body of the petition: *Martin v. Mansfield Sav. &c. Bank*, 92 App 465, 50 OO 44, 110 NE(2d) 814.

35. A reviewing court is bound by the record before it, and, where such record is silent as to the exact relationship of one sought to be made a party to the other parties to a cause or to a will in controversy, or as to whether such party is united in interest, the reviewing court is unable to determine whether such individual is a necessary party to the cause by reason of the requirements of GC § 12080 (RC § 2741.02): *Roscoe v. Kolb*, 93 App 352, 51 OO 96, 113 NE(2d) 746.

36. An action to contest a will must be brought within six months after the will is admitted to probate, and in such an action the executor of the estate is a necessary party (this section and GC § 12087 [RC § 2741.09]): *Bessire v. Fisher*, 96 App 465, 55 OO 46, 122 NE(2d) 491.

37. Where a necessary party to whom summons has not been issued until after the statutory period has elapsed, is not an heir or next of kin of the testatrix, is related only by marriage to the testatrix, and is a legatee under the will of such testatrix, together with other legatees under such will, who are also heirs and next of kin of such testatrix, the issuance of summons to such latter legatees so related to the testatrix does not cause the commencement of an action to contest a will within the statutory period, there being a defect of parties, required by RC § 2741.02: *Staley v. Scheck*, 99 App 242, 58 OO 405, 133 NE(2d) 189.

38. A person named as executor in a will, which appointment was revoked by a codicil duly probated as a part of such will, does not come within the category of "interested persons" and is not a necessary defendant in an action to contest such will and codicil: *Bruckmann v. Shaffer*, 108 App 531, 10 OO(2d) 20, 155 NE(2d) 491.

39. The doctrine of virtual representation does not apply to a will contest action where it is apparent from the allegations in the petition that the persons interested in the action are not so numerous that it would be impracticable or inconvenient to make them all parties to the action, and such action is not brought as a class suit: *McKinney v. McKinney*, 115 App 379, 20 OO(2d) 453, 185 NE(2d) 319.

40. On motion of another defendant, such misnomer may not be grounds for dismissal of a will contest action as constituting a failure of the plaintiff to make all necessary parties defendant within the six-month period of time as prescribed by RC §§ 2741.02 and 2741.09: *Cook v. Sears*, 9 OApp(2d) 197, 38 OO(2d) 209, 223 NE(2d) 613.

41. This section providing who must be made parties to a will contest, is a personal statute, and all of each class named therein must be made parties to such action. An actual party to such action can be made only by one of the methods of lawful service of summons upon those parties: *Collins v. Nurre*, 20 OApp(2d) 53, 49 OO(2d) 70, 251 NE(2d) 621.

42. A will contest action, otherwise rightly brought within the meaning of RC § 2741.09, will not fail under RC § 2741.02 just because persons named testamentary trustees in the will, but not appointed to such capacity within six months following probate of the will, are not joined as parties in that capacity, where such persons have been timely made parties in the capacity of co-executors (having been so named in the will and appointed by the probate court), and all the beneficiaries of the testamentary trust have been timely made parties to the action: *Hirsch v. Hirsch*, 32 OApp(2d) 200, 61 OO(2d) 212, 289 NE(2d) 386 (1972).

43. Where a court in a will contest proceeding directs a verdict *sua sponte* on the basis of a compromise agreement made in a private conference, which distributes the devised property among the claimants in attendance, and all of the parties in the case are not parties to the agreement, such verdict is void: *Taylor v. Connell*, 26 OApp(2d) 253, 55 OO(2d) 412, 271 NE(2d) 305 (1971).

44. All the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to an action in testing the validity of a will (RC § 2741.02) and the court is without jurisdiction in such an action unless the executor is made a party and a summons, duly followed by service, is issued within six months after the will has been admitted to probate: *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

45. Where one service of summons in an action contesting a will is made within the time prescribed by RC § 2741.09 upon a defendant occupying the positions of surviving spouse, devisee, and executrix and, although such summons does not designate the specific relationship between the estate and the defendant, the various capacities of the defendant are clearly designated in the body of the complaint attached to the summons, an amendment of the original complaint after the expiration of the six month statute of limitations prescribed by RC § 2741.09, in order to formally add the same defendant in different capacities, relate back to the date of the original pleading. Rule 15(C), Ohio Rules of Civil Procedure: *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

46. In a will contest action all necessary parties under RC § 2741.02 must be named and made parties within the six-month limitation period of RC § 2741.09. This requirement is mandatory and jurisdictional: *Holland v.*

Carlson, 40 OApp(2d) 325, 69 OO(2d) 299, 319 NE(2d) 362 (1974).

47. The attorney general is not a necessary party in a will contest case, the purpose of which is to determine whether a given paper writing is the last will of a certain decedent and not to terminate a charitable trust under RC § 109.25: Spang v. Cleveland Trust Co., 1 OO(2d) 288, 134 NE(2d) 586 (CP).

48. Where the pleader in a will contest lists all of the devisees, legatees and heirs of the testator in the body of the petition, it is not necessary to identify them therein as to the capacity in which they are served and made parties: Hinde v. Hinde, 5 OO(2d) 465, 146 NE(2d) 646 (CP).

49. Any person who might inherit under the "half-and-half" statute, if the relic died intestate, should be made a party defendant (or plaintiff) along with all other parties necessary, in a suit to contest the will of such relic: Bussell v. Cline, 10 OO(2d) 481, 161 NE(2d) 655 (CP).

50. In a will contest action, all the devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties to the action by virtue of this section: Campbell v. Duncan, 51 OLA 257, 81 NE(2d) 238 (App).

51. Although plaintiffs, in an action to contest a will, fail to bring in all necessary parties designated in this section, and thus are not entitled to maintain the action, they will be bound by the determination of the court should the case proceed to trial and result in a judgment sustaining the will: Fleming v. Jackson, 55 OLA 271 (App).

52. Where a will contestant fails to make personal service or service by publication on the sole heir under the will within six months from the date of the probate of the will, service made on such heir after the expiration of such time will, on motion, be quashed: Faust v. Cailor, 76 OLA 504, 146 NE(2d) 875 (App).

53. A party cannot represent another whose interests are adverse: Harris v. Maholm, 20 NP(NS) 439, 28 OD 228.

54. General Code §§ 11925 to 11934 (RC §§ 5303.21 to 5303.30) tend to show that, in a proceeding involving an estate tail, the heirs of the body of the donee in tail must be made parties: Harris v. Maholm, 20 NP(NS) 439, 28 OD 228.

55. A remainderman who is born after contest is bound thereby if his interest was represented by others of the same class: Stewart v. O'Neal, 237 Fed 897, 150 CCA 547.

§ 2107.74 [Order of probate prima-facie evidence of validity.]

On the trial of any will contest under section 2107.71 of the Revised Code, the order of probate is prima-facie evidence of the attestation, execution, and validity of the will or codicil. The contesting party may call any witness to the will as upon cross examination.

HISTORY: 136 v § 145. EF 1-1-76.

Analogous to former RC § 2741.05, repealed, 136 v § 145, effective 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Research Aids

Evidence:

O-Jur2d: Wills § 382 et seq.

Am-Jur2d: Wills § 948 et seq.

Order of probate:

O-Jur2d: Wills § 383

Am-Jur2d: Wills § 957

Review:

O-Jur2d: Wills § 495 et seq.

Am-Jur2d: Appeal and Error §§ 140, 192, 193

Trial:

O-Jur2d: Wills § 446 et seq.

Am-Jur2d: Wills § 1024 et seq.

ALR

Admissibility in will contest of financial condition or needs of those constituting natural objects of testator's bounty. 26 ALR2d 374.

Presumption and burden of proof as regards continuance or revocation of will produced for probate. 165 ALR 1188.

Presumption and burden of proof as undue influence on testator. 154 ALR 583.

Law Review

Presumption of validity of the order of probate (Case note). 9 OBar (No. 14) 175.

Wills—attorney who participated in drawing of will named as beneficiary. (Case note.) 19 CinLRev 297.

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Testamentary capacity, see case notes under RC § 2107.02

For the competency of a party in actions involving the validity of a will, see case notes under RC § 2317.03.

Revocation of will, see case notes under RC § 2107.33 et seq.

After-born heirs, effect on will, see case notes under RC § 2107.34.

1. In a suit to contest the validity of a will, declarations of a legatee, who is a defendant, in reference to the mental capacity of the testator, are not admissible to impeach the will, where there are other defendants whose interest may be injuriously affected by the admission of such evidence: *Thompson v. Thompson*, 13 OS 356.

2. A witness cannot state his opinion as to testator's capacity to make a will: *Runyan v. Price*, 15 OS 1; *Bahl v. Byal*, 90 OS 129, 106 NE 766; *Burns v. Crowe*, 31 OCA 566, 35 CD 468 [motion to certify record overruled, *Burns v. Crowe*, 17 OLR 112, 65 Bull 278]. See discussion in *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing, 26 CC(NS) 513, 28 CD 61].

3. To maintain the issue on their part, the plaintiffs must prove the invalidity of the will by a preponderance of the evidence: *Mears v. Mears*, 15 OS 90; *Bloor v. Platt*, 78 OS 46, 84 NE 604.

4. For other questions of execution, see *Glancy v. Glancy*, 17 OS 134; *Baker v. Baker*, 51 OS 217, 37 NE 125; *Sears v. Sears*, 77 OS 104, 82 NE 1067, 17 LRA(NS) 353; *Mader v. Apple*, 80 OS 691, 89 NE 37, 131 AmSt 719, 23 LRA(NS) 515; *Raudebaugh v. Shelley*, 6 OS 307; *Morris v. Osborne*, 27 OCA 161, 29 CD 280.

5. To invalidate a will for fraud or undue influence, it must appear that the fraud or influence complained of had some effect upon the testator in producing the very act of making his will: *Monroe v. Barclay*, 17 OS 302; *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

6. On a trial to contest the validity of a will, errors or irregularities of the probate court in admitting the will to probate cannot be inquired into on the trial; the order of probate can only be overcome by showing that the will is in fact invalid: *Converse v. Starr*, 23 OS 491.

7. The order of probate is conclusive evidence of validity on the trial of a collateral issue, between a stranger and the devisee respecting the property devised, even though a proceeding to contest the will may be pending: *Brown v. Burdick*, 25 OS 260.

8. The original will, when not lost or destroyed, should be produced to the jury. It is the basis of the inquiry and trial, and the verdict and judgment should be responsive to the question whether that paper is the last will of the testator or not: *Haynes v. Haynes*, 33 OS 598.

9. Where the probate court has found and established the contents of a lost, spoliated or destroyed will, this will be prima facie evidence of the due attestation, execution, validity and contents of the will, and the burden of proof will be on the contestants to invalidate such will: *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820.

10. If a will which was in testator's custody cannot be found at the time of his death, a presumption that he revoked it arises; and his declarations to the effect that he intended to revoke it are admissible to strengthen such presumption: *Behrens v. Behrens*, 47 OS 323, 25 NE 209, 21 AmSt 820.

11. Evidence that testator signed out of the presence of the subscribing witnesses and that he did not acknowledge his signature in their presence renders the will invalid: *Keyl v. Feuchter*, 56 OS 424, 47 NE 140.

12. By the bringing of an action to contest the validity of a will, under the statute, plaintiffs admit the probate of the will so put in contest, and will not, therefore, on the trial of said cause, be permitted to question or deny either the regularity of the order of probate, or the authority and jurisdiction of the court that made it: *Stacey v. Cunningham*, 69 OS 176, 68 NE 1001.

13. Evidence that testator signed his will a little above a marginal provision which was a part of such will renders it invalid: *Irwin v. Jacques*, 71 OS 395, 73 NE 683, 69 LRA 422.

14. In a contest to set aside a will admitted to probate as a lost or spoliated will after the probate record had been introduced by the defendant, the burden remained upon the plaintiff to establish that such will is not the last will of the deceased. Such burden does not shift to the defendant upon proof tending to show that the will was, shortly before his death, in the custody of testator and could not be found among his effects shortly after his decease: *Hutson v. Hartley*, 72 OS 262, 74 NE 197.

15. The presumption that testator revoked a will, which is shown to have been in his custody shortly before his death, and which is not found thereafter, is a presumption of fact, not of law: *Hutson v. Hartley*, 72 OS 262, 74 NE 197.

16. In proceedings to set aside the probate of a will in existence after the death of the testatrix and lost, a paper alleged to contain the substance of such will having been admitted to probate, it is not error to charge the jury that "if no other or further proof were given in respect to the will or its contents, it being shown that the original will was lost after the death of the testatrix without fault of the defendants as beneficiaries, and at the time of the death of the testatrix it has not been revoked, the defendants would be entitled to your verdict," especially when such instruction is considered with the context: *Bloor v. Platt*, 78 OS 46, 84 NE 604.

17. In a will contest, it is error to omit to instruct the jury that the order of probate raises a presumption that the will is valid, or that the jury must not set the will aside unless they find that the evidence offered by the contestant outweighs the evidence offered by the defendant and the presumption arising from the order of probate: *Hall v. Hall*, 78 OS 415, 85 NE 1125.

18. In an action contesting a will, it is error to charge that the law scrutinizes with a greater care the acts of a son or daughter who is remembered in a will to a larger extent than any others bearing the same kinship, if such son or daughter is in close relationship of trust or confidence, or upon whom a testatrix would implicitly rely, than it would on others bearing no such relationship: *Hall v. Hall*, 78 OS 415, 85 NE 1125.

19. It is error to instruct the jury that preponderance of the evidence means the greater weight of the testimony: *Hall v. Hall*, 78 OS 415, 85 NE 1125.

20. The declaration of testator and his conduct are admissible to show that he did not intend to revoke as an entirety a will out of which he tore a single sheet: *Coghlin v. Coghlin*, 79 OS 71, 85 NE 1058.

21. For a proper question as to the opinion of the witness as to the capacity of the testator, see *Dunlap v. Dunlap*, 89 OS 28, 104 NE 1006.

22. If a physician has had an opportunity of observing the mental condition of testator, by having rendered medical services to him for a sufficient period of time, he

may be asked his opinion as to the actual condition of testator's mind if such condition is in issue: *Bahl v. Byal*, 90 OS 129, 106 NE 766.

23. The fact that testator makes an unequal and unfair distribution of his property does not raise the presumption of undue influence: *Bahl v. Byal*, 90 OS 129, 106 NE 766.

24. The supreme court does not weigh the evidence, but it will examine the record to ascertain whether there is any evidence in support of the contention of the prevailing party in the trial court, and to ascertain whether the trial court should have rendered a verdict on the undisputed evidence: *Bahl v. Byal*, 90 OS 129, 106 NE 766.

25. As long as the rule prevails permitting lay witnesses to give opinion as to testator's sanity or insanity, wide latitude may safely be permitted as to both the form and substance of questions which have for their object the presentation to the jury of a replica of the testator's mind, with all its strength or weakness, and its powers or limitations: *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61].

26. The rule that capacity to make a will requires ability to recollect testator's family and to appreciate their claims upon his bounty is not limited to members of testator's household, but, in the absence of closer connections, includes such relatives as under the laws of descent and distribution of Ohio would be entitled to the next estate of inheritance should he have died intestate: *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61].

27. For an erroneous charge as to undue influence when there was no evidence from which undue influence might be inferred, see *Niemes v. Niemes*, 97 OS 145, 119 NE 503 [reversing 26 CC(NS) 513, 28 CD 61].

28. For a charge as to execution of will, see *Underwood v. Rutan*, 101 OS 306, 128 NE 78.

29. In a proceeding to contest a will the executor has no power to waive the privilege from testifying as to confidential communications as given by GC § 11494 (RC § 2317.02): *Swetland v. Miles*, 101 OS 501, 130 NE 22 [affirming 31 OCA 529]; *Haley v. Dempsey*, 14 App 326 [motion to certify record overruled, *Dempsey v. Haley*, 19 OLR 155; judgment on retrial sustaining will affirmed by court of appeals; motion to certify record overruled, *Haley v. Dempsey*, 21 OLR 300].

30. An attorney for testator may not generally testify as to communications between himself and testator, not in the presence of a third person: *Swetland v. Miles*, 101 OS 501, 130 NE 132; but if he is a subscribing witness to the will he may testify, as the testator has waived the privilege: *Collins v. Collins*, 110 OS 105, 143 NE 561, 38 ALR 230.

31. The fact the attorney who drew a will by which testator left his property to a board of education, attempted, though without success, to be named therein as executor is evidence tending to show undue influence; and it is error to withdraw such question from the jury: *Board of Education v. Phillips*, 103 OS 622, 134 NE 646.

32. Evidence that testator was of advanced age and weak mentally, and that the beneficiary lived with testator on intimate terms and was also on intimate terms with the attorney who drew the will, is sufficient evidence of undue influence to require submission of the issue to the jury: *Board of Education v. Phillips*, 103 OS 622, 134 NE 646.

33. Evidence of inferior capacity, not amounting to incapacity is admissible on the issue of undue influence: *Board of Education v. Phillips*, 103 OS 622, 134 NE 646.

34. Failure in a general charge in the contest of a will to restate, in connection with the instructions relating to testamentary capacity and undue influence, that the presumption arising from the probate of the will must be taken into account and weighed according to its proper proportionate value as part of the whole evidence in arriving at a preponderance, is not prejudicial error,

where the special finding of the jury is in all respects consistent with the general finding and clearly shows justification for the verdict returned on the issue of "want of execution," where proper instructions in that respect were given in the part of the charge dealing with that subject: *West v. Lucas*, 106 OS 255, 139 NE 859.

35. If ambiguous language in a will might refer to the reason for making such will, or might amount to a condition precedent to the will's taking effect, the fact that the testator keeps such will in his possession without revocation for a long period of time after the possibility of such event has ceased, tends to indicate that it is not a condition precedent, but merely a statement of the reasons which lead to making the will: *McMerriman v. Schiel*, 108 OS 334, 140 NE 600.

36. In determining the mental capacity of testator and undue influence, the jury may consider his age, his mental and physical condition when he executed the will, his relations toward the various parties, his feeling toward them, the nature and extent of his property, and the reasonable or unreasonable character of the will: *Collins v. Collins*, 110 OS 105, 143 NE 561, 38 ALR 230.

37. Where a will is signed by the testator and certain words appear below the signature, as to which there is a question whether they have any relation to the dispositive provisions before the signature, upon a contest of such will, the proponents are entitled to offer competent "other evidence"; and it is for the jury to say whether the signature is at the end of such will: *Hane v. Kintner*, 111 OS 297, 145 NE 326.

38. To set aside will, evidence invalidating will must outweigh evidence sustaining will and presumption from order admitting will to probate; determination of validity of will should not be limited to evidence of either party, but issue should be determined by a preponderance of all evidence adduced (this section): *Van Demark v. Tompkins*, 121 OS 129, 167 NE 370.

39. Where witnesses subscribe a will on one occasion in the presence of the testator, and the testator subscribes or acknowledges in their presence on a subsequent occasion, resubscription by attesting witnesses is not necessary where they identify the instrument and recognize but do not disaffirm their signatures: *Bloechle v. Davis*, 132 OS 415, 8 OO 249, 8 NE(2d) 247 [reversing 23 OLA 85]; see also *School v. Sterkel*, 46 App 389, 189 NE 15, 40 OLR 9 [motion to certify overruled].

40. A lay witness who testifies to facts which show opportunity to observe mental state of testator may give opinion as to his soundness of mind and capacity to form the purpose and intent to dispose of his property by will: *Weis v. Weis*, 147 OS 416, 34 OO 350, 72 NE(2d) 245; but may not give opinion as to whether testator was able to dispose of his property by will: *Gottfried v. Yochum*, 155 OS 283, 44 OO 292, 98 NE(2d) 821.

41. By the plain terms of this section the only issue which is to be tried by a jury is whether the writing produced is the last will or codicil of the testator: *Comer v. Comer*, 175 OS 313, 315, 25 OO(2d) 182, 194 NE(2d) 572.

42. In a will contest, by virtue of the statute, the burden of proof is cast upon the contestant of the will and such burden never shifts from him: *Kata v. Second Nat. Bank*, 26 OS(2d) 210, 55 OO(2d) 458, 271 NE(2d) 292.

43. To charge the jury with reference to the admission of a will to probate, that "by prima facie evidence we mean that these matters certified by the probate court probably occurred," is to give less than full value to the certificate of the probate court and is erroneous, and the error involved therein cannot be cured by a correct statement in another part of the charge: *Stark v. Cress*, 4 App 92, 22 CC(NS) 88 [reversing *Cress v. Stark*, 14 NP(NS) 545].

44. The charge that "it is not essential to the validity of a will that all or any of the subscribing witnesses should testify that the testatrix was of sound mind and memory,

provided you find from all the evidence before you that she was of sound mind and memory," is proper: *Stark v. Cress*, 4 App 92, 22 CC(NS) 88 [reversing *Cress v. Stark*, 14 NP(NS) 545].

45. It is error to refuse to charge in a will case that a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind and competent to make a will; and, while the law will permit him to subsequently testify to the contrary, because the truth, if such it be, should be learned, yet the jury, in weighing his testimony, may consider the fact of such implied contradiction: *Stark v. Cress*, 4 App 92, 22 CC(NS) 88 [reversing *Cress v. Stark*, 14 NP(NS) 545].

46. In a proceeding to contest a will a nonexpert witness can be asked to give his opinion of the mental capacity of the testator only at the time when the testator was under the observation of such witness: *Strick v. Kiss*, 5 App 292, 26 CC(NS) 456, 27 CD 554.

47. For an improper question, see *Shuly v. Fink*, 5 App 359, 26 CC(NS) 106.

48. Since undue influence is generally established by circumstantial evidence and by inferences drawn from a full presentation of facts which are inconclusive when taken separately, a wide range of inquiry is to be permitted to bring before the jury the facts and influences which bore upon the preparation of the will: *Koch v. Meyers*, 7 App 306, 29 OCA 142, 30 CD 439.

49. Declarations of a subscribing witness made after leaving the room in which the will was executed, cannot be admitted on the theory that they are part of the *res gestae*: *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

50. The testimony of a witness cannot be impeached by showing that he has made contradictory statements unless his attention is called to such statements and he is given an opportunity to admit, deny, or explain such statements; and this rule is not changed by the subsequent death of the witness. Accordingly, evidence of such declaration made by a subscribing witness to a will cannot be offered at contest if such witness died before the trial of such case: *Baird v. Detrick*, 8 App 198, 28 OCA 257 [affirming 20 NP(NS) 209, 28 OD 110; motion to certify record overruled, 15 OLR 439, 62 Bull 476].

51. Though the order of probate is made *prima facie* evidence of the due execution, attestation and validity of the will, where in an action to contest a will, the court finds that the will was not signed at the end, the court should grant the motion of plaintiffs to direct a verdict invalidating the will: *Herbster v. Pincombe*, 10 App 322, 31 OCA 358 [motion to certify record overruled, *Pincombe v. Herbster*, 16 OLR 79, 63 Bull 195].

52. When no evidence is offered on the trial to show when a will was lost or destroyed, whether before or after the death of the testator, the order of probate admitting the will to record is sufficient evidence of the existence of the will after such death to justify a verdict sustaining the will: *Egbert v. Egbert*, 10 App 432, 29 OCA 584 [motion to certify record overruled, 16 OLR 507, 64 Bull 61].

53. The so-called presumption of undue influence arising from confidential relations between testator and beneficiary is a mere inference of fact and not a presumption of law regarding which the court should charge the jury: *Haley v. Dempsey*, 14 App 326 [motion to certify record overruled, *Dempsey v. Haley*, 19 OLR 155].

54. The testimony of an expert witness, like the evidence of every other witness, is to be considered by the jurors, who are to accord to it influence, much or little, and in such degree as it appeals to their intelligent and impartial minds, in view of all the facts and circumstances developed in the trial: *Ross v. Stewart*, 15 App 339, 32 OCA 217.

55. It is not error for the trial judge to say to the jury in a will case that "there is no evidence of duress, coercion, or undue influence" where no evidence has been offered in support of that question: *Ross v. Stewart*, 15 App 339, 32 OCA 217.

56. For a correct charge on testamentary capacity, see *Ross v. Stewart*, 15 App 339; 32 OCA 217.

57. The trial court is without power to dismiss an action to contest a will, after the issues have been made up: *Perrine v. Perrine*, 18 App 467.

58. Action to contest a will admits the regularity of order of probate, and jurisdiction of court: *Aston v. Hauck*, 22 App 430, 153 NE 277.

59. In will contest, subscribing witness' affidavit, made and offered in probate court as proof of execution of will, held incompetent, where witness was in court: *Fox v. Lynch*, 43 App 305, 183 NE 177.

60. In will contest, subscribing witness to will cannot be called for cross-examination by contestants after contestants have, without objection, permitted introduction of witness' affidavit as part of order of probate: *Fox v. Lynch*, 43 App 305, 183 NE 177.

61. Word "probate," within statute requiring sustaining party in will contest to offer will and "probate," held to mean order of probate, not including affidavit of subscribing witnesses to will: *Fox v. Lynch*, 43 App 305, 183 NE 177.

62. In will contest, though petition did not allege specific grounds of contest, excluding evidence respecting relations between testator and favored son, unjustness of will, and incoherent talk by testator, was held prejudicial error: *Fox v. Lynch*, 43 App 305, 183 NE 177.

63. In will contest, excluding testimony as to what witness observed about testator at time will was made, as bearing on testator's mental condition, held error: *Fox v. Lynch*, 43 App 305, 183 NE 177.

64. In will contest, that defendants' written preargument request to charge contained same error as plaintiffs' request was held not to preclude defendants from availing themselves of error in plaintiffs' request where court, of own volition, changed defendants' request in certain respects and also included error in general charge: *Warn v. Whipple*, 45 App 285, 187 NE 88, 39 OLR 49.

65. Order of probate is *prima facie* evidence of attestation as well as execution and validity of will: *Steinle v. Kester*, 46 App 245, 188 NE 395, 39 OLR 415.

66. In will contest, instruction to find against will if one or both of signatures of subscribing witnesses was not genuine was properly refused because instruction did not also incorporate presumption arising from probate of will: *Steinle v. Kester*, 46 App 245, 188 NE 395, 39 OLR 415.

67. The admission in a will contest of an order of probate containing unusual matter was not erroneous, in view of instruction correctly limiting evidential purpose and value: *Scholl v. Sterkel*, 46 App 389, 189 NE 15, 40 OLR 9.

68. An affidavit of the attesting witness subsequently disavowing signature to will was competent in will contest for impeaching purposes and to prove signature to will: *Scholl v. Sterkel*, 46 App 389, 189 NE 15, 40 OLR 9.

69. A request, in a will contest, to charge that jury found instrument was signed and executed on dates as shown therein, was properly refused as presupposing will was invalid because of discrepancies in dates: *Scholl v. Sterkel*, 46 App 389, 189 NE 15, 40 OLR 9.

70. An objection that a requested instruction that justness, reasonableness, and naturalness of will, and value and nature of testatrix' estate have weight on the question of testamentary capacity only according to the circumstances and in connection with other evidence required the jury to give some weight to testimony as to such matters, was held insufficient to require a refusal of

the charge: *Helmig v. Kramer*, 48 App 71, 1 OO 93, 192 NE 388, 40 OLR 413.

71. Requested instructions, incorporating only one of testatrix' mental characteristics, on which will contestants relied to establish her testamentary incapacity, was properly refused as incomplete: *Helmig v. Kramer*, 48 App 71, 1 OO 93, 192 NE 388, 40 OLR 413.

72. A charge to the jury concerning a finding that would not be "sufficient to justify you in sustaining the will herein" is misleading as impelling the jury to the conclusion that the proponents have the duty of sustaining the will whereas the jury is always justified in sustaining the will by the presumption attending probate: *Brown v. Jacoby*, 55 App 250, 7 OO 343, 9 NE(2d) 693.

73. The fact that the chief beneficiary of a will was not a relative of the testator should not be considered as evidence of undue influence, in an action to contest the will, in the absence of definite evidence to that effect: *Brown v. Jacoby*, 55 App 250, 7 OO 343, 9 NE(2d) 693.

74. A physician who has examined, diagnosed and treated a patient for bodily ailments, may, in a proceeding to contest his will following death, give his opinion as to the soundness of his patient's mind; GC § 11494 (RC § 2317.02) to be strictly construed: *Meier v. Peirano*, 76 App 9, 31 OO 342, 62 NE(2d) 920.

75. The evidence justifying, it is error to refuse to charge, on request before argument, "... it is not the actual remembering of the names of those who have natural claims upon one's bounty, but the capacity and ability to remember such persons...": *Meier v. Peirano*, 76 App 9, 31 OO 342, 62 NE(2d) 920.

76. It is error to reject evidence, offered by contestants, in respect to appointment of guardian and adjudication of incompetency made about a month before execution of will, where it, with other evidence, would constitute some evidence of undue influence: *Heath v. Kosier*, 76 App 89, 31 OO 403, 61 NE(2d) 728.

77. Rejection of evidence, offered by contestants, of a statement of testatrix tending to indicate that the disposition of her property under her former will, executed about two weeks before the contested will, was consistent with the desires she had expressed previously, is not error, where the time when the statement was made is not shown: *Heath v. Kosier*, 76 App 89, 31 OO 403, 61 NE(2d) 728.

78. Refusal to give contestant's requested charge, as to where testatrix's property would go pursuant to a former will, is not error when the requested charge constituted an inexact statement of law: *Heath v. Kosier*, 76 App 89, 31 OO 403, 61 NE(2d) 728.

79. The so-called presumption of undue influence arising out of confidential relations (guardian and ward) between a beneficiary and the testator is neither a conclusive presumption nor one of law, but is a mere inference of fact which the jury may draw, but which the court may not charge the jury as a matter of law to find: *Board of Education v. Pendleton*, 80 App 249, 35 OO 554, 75 NE(2d) 182.

80. That testator's lawyer, who participated in drawing will, was named as a beneficiary does not alone give rise to a presumption that he used or abused his trust: *Caswell v. Lermann*, 85 App 200, 40 OO 148, 88 NE(2d) 405.

81. A family physician who had treated testatrix for physical ailments only, may testify as to her mental condition and capacity to make will: *Carson v. Beatley*, 86 App 173, 41 OO 25, 82 NE(2d) 745.

82. In a proceeding to contest a will, the court is required to overrule defendant's motion for a directed verdict, made at the close of plaintiff's evidence, where the plaintiff has produced credible evidence of a substantial character sufficient to overcome the presumption of due attestation, execution and validity of the will which arises from the order of probate: *Truchess v. Brand*, 98 App 118, 57 OO 195, 128 NE(2d) 157.

83. The jurisdiction of the trial court in a will contest is limited to one simple question: whether or not the writing produced is the last will or codicil of the testator: *Skorapa v. Skorapa*, 17 OO(2d) 97, 177 NE(2d) 310 (PC).

84. If a trust agreement is competent evidence in an action to contest a will, it is immaterial which party is required to or did introduce it in evidence: *Toledo Trust Co. v. Koeninger*, 14 OLA 633.

85. The court's statement in a charge to the jury in a will contest that "you as jurors are not at liberty to make a will for her," was held not error: *Bergoon v. Berk*, 17 OLA 507.

86. After the proponent has offered evidence in a will contest, the contestant, under GC § 11420-1 (RC § 2315.01) and this section, may by way of impeachment show that witnesses for the proponent made certain statements outside of court which contradicted their testimony in court: *Underwood v. Hickin*, 18 OLA 345.

87. A testament is placed in contest in a proceeding to test its validity with a presumption of validity in every respect consequent upon its probate: *Meyer v. Geiger*, 34 OLA 1.

88. Where, in a will contest case in which no answer was filed, the entry setting forth the issue of whether or not the writing produced was the last will and testament of the decedent, was dictated by the trial judge before the conclusion of the testimony, and then filed, and, at the time of impanelling the jury, such issue was given orally to the jury, there was a sufficient compliance with this section requiring that such issue be made up either by the pleadings or an order on the journal, so as to prevent prejudicial error: *Fazekas v. Gobozy*, 78 OLA 258, 150 NE(2d) 319 (App).

89. A person under guardianship for mental incompetency, by order of the probate court, is presumed to be insane; however, a last will and testament executed by such person while under legal guardianship and admitted to probate by a court of competent jurisdiction, is not presumed to be invalid. To the contrary, "the order of probate is prima facie evidence of the attestation, execution, and validity of the will ***," *Hermann v. Crossen*, 81 OLA 322, 160 NE(2d) 404 (App).

90. Oral declarations of a testatrix as to her testamentary intentions, made during her last sickness and shortly after the execution of her will, are not admissible to show an intention contrary to that expressed in the will or contradict its terms, but are competent as tending to show the condition of her mind at the time the will was executed: *Kuhl v. Reichert*, 2 CC(NS) 42, 15 CD 693.

91. Questions of mental capacity and undue influence are for the jury. But the preponderance of evidence should be considered and given great weight by a reviewing court, even against the verdict of the jury: *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

92. The fact that a daughter, after leaving her father's house, brought suit against him for and made a settlement with him as to her share of her mother's estate, is evidence in a will contest tending to show that the daughter at that time regarded her father as of sound mind: *Kettemann v. Metzger*, 3 CC(NS) 224, 13 CD 61.

93. The statement in the charge to the jury in a suit to contest a will that "the important item of evidence bearing upon the condition of mind of the testator is the will itself," is erroneous in that the court invaded the province of the jury by inviting a substitution of its opinion for that of the jury as to what item of evidence should be regarded as of special importance: *Rapp v. Becker*, 4 CC(NS) 139, 16 CD 321.

94. An erroneous instruction to a jury regarding testamentary capacity, is not cured by giving elsewhere in the charge, proper rules and criteria for determining testamentary capacity, but which do not qualify such improper charge: *West v. Knoppenberger*, 4 CC(NS) 305, 16 CD 168.

95. Declarations made by a witness which tend to show her state of mind, and which afford circumstantial evidence of her purpose and design in treating the testatrix with apparent kindness and affection, as she did in her last illness, are admissible: *Schoch v. Schoch*, 6 CC(NS) 110, 17 CD 828.

96. In a suit to contest a will, it is not error to refuse to give a special charge to the effect that the fact of the testator's belief in spiritualism does not afford ground for setting the will aside, where the charge as requested does not embrace all the facts brought out at the trial concerning the belief and practice of spiritualism by the testatrix: *Schoch v. Schoch*, 6 CC(NS) 110, 17 CD 828.

97. Where the controlling issue is as to whether the alleged will is a forgery or genuine, any competent evidence tending to prove either fact is admissible, and to this end it is competent to introduce the disputed will in evidence for comparison with other written documents in evidence which have been proved to be genuine, or to introduce forged papers, where such papers will tend to show the evil purpose of the parties who may have forged the will in suit: *Gurley v. Armentraut*, 6 CC(NS) 156, 17 CD 199.

98. The legal presumption that a will once known to exist and to have been in the possession of the testator, but which cannot be found after his death, was destroyed by the testator, with the intention of revoking it, may be either fortified or weakened by evidence as to declarations by the testator subsequent to the making of the will: *Gurley v. Armentraut*, 6 CC(NS) 156, 17 CD 199.

99. Wills cannot be set aside by the admissions of different beneficiaries under the will made out of court: *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449.

100. Evidence of the faithfulness of the beneficiary to the testator is competent in a will contest because of the bearing which it has upon the question of the reasonableness of the will as executed: *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449.

101. Where a witness is called by the defendant in a will contest to give his opinion in chief as to the mental capacity of the testator, no right exists in favor of the plaintiff to cross-examine him upon the facts and ground upon which his opinion is based, until after the conclusion of the examination in chief: *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449.

102. Previous declarations of a witness, who is also a beneficiary under a will, are not a proper subject of cross-examination except for the purpose of impeachment: *Moore v. Caldwell*, 6 CC(NS) 484, 17 CD 449.

103. It is not error to charge that, in order to make a valid will, "it is necessary a person shall have sufficient mental capacity for the transaction of the ordinary affairs of life," when this was followed in a later paragraph by the express statement that "he need not have sufficient capacity to make a contract, but must understand substantially what he is doing and the nature of the act in which he or she is engaged": *Welsh Hills Baptist Church v. Wilson*, 9 CC(NS) 611, 19 CD 391 [affirmed without report, 75 OS 636].

104. In an action to contest a will, declarations by a party to the record, who is a legatee with others under the will, are inadmissible to prove that the will was contrary to the intentions of the testator, or was procured by undue influence: *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110.

105. Whether or not testator's eccentricities, peculiarities or delusions affect his testamentary capacity is a question for the jury under proper instructions, and to charge that they are of no consequence, if testator has sufficient mental capacity to transact ordinary business and of understanding the nature of the business in hand, is prejudicial: *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110.

106. An order admitting a will to probate is, by force of former GC § 10516 (see now RC § 2107.14), prima

facie evidence only of its validity, from which it follows that in a proceeding to contest a will under this and the following sections, a statement by counsel in argument to the jury to the effect that the probate judge, experienced in such matters, had admitted the will to probate on the same evidence heard in the proceeding to contest, and that it would be presumptions in the jury to hold differently, constitutes misconduct of counsel prejudicial to the rights of contestants, for which a judgment based on a verdict sustaining the will is reversible: *Wadsworth v. Purdy*, 12 CC(NS) 8, 21 CD 110.

107. The presence of a beneficiary at the place at which a will was executed, and the fact that he gave advice to the testator with reference to such will, is not sufficient to justify a verdict setting aside the will on the ground of undue influence: *Wilson v. Wilson*, 14 CC(NS) 241, 22 CD 498, 56 Bull 377 (Ed) [reversing 7 NP(NS) 435, 19 OD 188].

108. Where a woman of fine character and delicate sensibilities executes a will, after long deliberation and with the full knowledge of her children, in which, contrary to her own strong desire to give the property received by her from her husband to her children, she disposes of the property in accordance with a written request received from her husband, the influence so operating upon her will not be treated, in an action brought by a grandchild to set the will aside, as an undue or improper influence: *Wilder v. Taylor*, 14 CC(NS) 255, 23 CD 643 [affirming 10 NP(NS) 209, 24 OD 621, and reversed without opinion, 87 OS 520].

109. Testimony showing that the son of the testator was heavily in debt is competent for the purpose of indicating the purpose of the testator in making no provision for the son and giving his entire estate to his son's wife and their children, thereby protecting the estate against the creditors of the said son: *Kuester v. Yeoman*, 14 CC(NS) 264; sub nomine, *Kuster v. Yeoman*, 22 CD 476, [affirmed, without opinion, *Yeoman v. Kuester*, 88 OS 592].

110. Where testimony is offered on the trial by the contestants of an alleged will, tending to show that one of the witnesses thereto made contradictory statements at different times touching his knowledge that the paper writing signed by him as such witness was subscribed and acknowledged as testator's will, it is error upon the part of the trial court to exclude such testimony: *Tims v. Tims*, 14 CC(NS) 273, 22 CD 506.

111. A jury cannot set aside a will on the ground that they do not regard it as a fair and reasonable will: *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

112. The fact that the testator was afflicted with progressive locomotor ataxia and was for a number of years before his death physically unable to perform any task or to help himself in any way, is not sufficient ground for setting the will aside, where it appears that during all that time he directed in detail the operations on farms aggregating over three hundred acres, and with reference to the management of his said lands did all that could have been done by a person of a sound and active mind; and the only testimony tending to show mental incapacity was slight forgetfulness on certain occasions and failure to include in his will certain legacies which he had declared he intended to make: *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

113. It is erroneous to charge a jury that undue influence "is coercion produced by importunity, or by a silent, resistless power, which the strong will often exercises over the weak and infirm, so that the motive was tantamount to force or fear": *Gregg v. Moore*, 14 CC(NS) 570, 23 CD 534.

114. In the trial of a contest of a nuncupative will, the introduction of evidence of the two witnesses thereto, taken at the time of its probate and the journal entry therefor, may not be proper; but if proponents offer it, they cannot complain if it is given due effect to destroy the prima facie case made out by probate: *Parsons v.*

Wass, 16 CC(NS) 404, 31 CD 577 [reversing *Wass v. Guardian Trust Co.*, 15 OD(NP) 677].

115. For a charge properly refused as to effect of order of probate, see *Eggleston v. Gardner*, 16 CC(NS) 455, 31 CD 627.

116. Where a will is signed by the testator in the absence of the witnesses, and he later acknowledges his will to the witnesses, this implies that he also acknowledges his signature to the will: *Eggleston v. Gardner*, 16 CC(NS) 455, 31 CD 627.

117. An expert may not be called upon to say whether one was competent to make a particular will, but only whether, in his opinion, his mental capacity was such as the law requires for the making of a valid will: *Walsh v. Walsh*, 18 CC(NS) 91, 32 CD 617.

118. In a will contest case it is misleading to charge the jury that it is of no importance what the probate judge did in probating the will, and that they are not to be influenced by what he did: *Walsh v. Walsh*, 18 CC(NS) 91, 32 CD 617.

119. Guardianship on the ground of interdependence does not raise the same presumption of testamentary incapacity as would be the case if the guardianship rested upon the ground of insanity or imbecility: *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

120. It is not error, after properly defining the capacity which a testator must have, the understanding which he must have of the extent of his property, his relation to the objects of his bounty, the effect of his will and the strength of mind necessary to perceive their obvious relations to each other, to add, "Though he may not be able to understand these matters in all their bearings as a person in sound and vigorous health of mind and body would do": *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

121. It is not error to charge that the law gives to testatrix "The right to dispose of her property by last will and testament lawfully executed in any way she saw fit. . . . You are not at liberty to make a will for her. That was her right. You are simply to decide whether the one she had made was sanctioned by and fulfilled the requirements of the law": *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

122. It is not error to refer to the alleged will as "The will" or "The will she has made": *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

123. For a charge as to burden of proof, see *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

124. The fact that a wife guides or even dominates her husband in the ordinary affairs of life, or has acquired an ascendancy over him, does not render his will made in her favor invalid: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

125. A declaration made by a testator to the effect that he has made a will, or that he has revoked a will, is not independent evidence of such fact; and it is not admissible without some foundation of direct evidence or presumption as to the existence of such fact: *Kornfield v. Kornfield*, 22 CC(NS) 363, 33 CD 617.

126. Hypothetical questions as to testator's mental condition cannot be asked a witness who is not an expert, even upon cross-examination: *Hathaway v. Farley*, 22 CC(NS) 462, 33 CD 668 [affirmed without opinion, 76 OS 562].

127. Declarations of testator if made near the time of the execution of the will, whether made before or after such execution, are admissible to prove the state of mind of testator, but are not admissible to prove the specific facts which are relied upon as constituting undue influence: *Boepple v. Mellert*, 24 CC(NS) 409, 34 CD 651.

128. If the plaintiffs, in a proceeding to contest a will, contend that the beneficiary under the will excluded the other members of the family from the testatrix, who was their mother, by violence, and that he brought her completely under his control by such violence and other similar means, and that he thus induced her to make a

will which expressed his desires and not hers, evidence tending to show that such beneficiary was harsh and vile in his treatment of his father is admissible: *Boepple v. Mellert*, 24 CC(NS) 409, 34 CD 651.

129. In a proceeding to contest a will, in which the question of undue influence is raised, the actual relations existing between testator and other members of his family may be shown: *Boepple v. Mellert*, 24 CC(NS) 409, 34 CD 651.

130. If the trial court, in an action to contest a will, does not instruct the jury that the order of probate raises a presumption that the will is valid or that such order of probate was prima facie evidence of the due execution, attestation and validity of the will, such omission is erroneous; but if the verdict and judgment are in favor of the validity of the will, such omission is not prejudicial to the contestant; and such judgment will not be reversed for such error: *Rogers v. Monroe*, 26 CC(NS) 193, 29 CD 558.

131. In a proceeding to contest a will in which evidence has been offered to the effect that testator was slovenly in appearance, and in which evidence has been introduced as to his appearance in general, a photograph of the testator is admissible in connection with evidence tending to show that such photograph was a good likeness of the testator, and resembled him about the time of the execution of the will: *Ware v. Slocum*, 26 CC(NS) 317, 27 CD 348 [motion to certify record overruled, October 10, 1916; distinguishing *Varner v. Varner*, 16 CC 386, 9 CD 273, on the ground that in such case there was no evidence as to the accuracy of such photograph].

132. It will be presumed that a will was drawn in accordance with the wishes of testator: *Morris v. Osborne*, 27 OCA 161, 29 CD 280 [motion to certify record overruled, *Morris v. Osborne*, 61 Bull 152]; *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

133. Opinion evidence of lack of capacity of a testator which is based on the witness' observation of such testator is of no value if the evidence of such witness shows that the facts upon which such opinion is based do not warrant such opinion: *Gomien v. Weidemer*, 27 OCA 177, 29 CD 1.

134. Declarations of a testator made either before, after, or at the time of the execution of the will, are competent as evidence where the mental capacity of the testator is in issue: *Chaney v. Coulter*, 29 OCA 177, 35 CD 418 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

135. It is prejudicial error for a court to refuse to charge the jury that an order of probate under this section carried with it sufficient prima facie evidence to establish the validity of a will unless overcome by competent evidence: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

136. The fact that a will is written on pieces of paper of different sizes and kinds is not sufficient to show undue influence or forgery; especially if such fact is explained by competent evidence: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

137. Error cannot be predicated on the refusal of a court to receive the testimony of witnesses expressive of an opinion as to the mental testamentary capacity of the decedent, regardless of the competency of such witnesses to form a trustworthy opinion in that behalf: *Burns v. Crowe*, 31 OCA 566, 35 CD 468 [motion to certify record overruled, 17 OLR 112, 65 Bull 278].

138. Evidence to the effect that a beneficiary under a will obtained the consent of the decedent to the calling of a lawyer to draw the will, and that one was procured and the will executed, and that two weeks later the same beneficiary applied to the probate court for the

appointment of a guardian for the decedent on the ground of imbecility and was subsequently named as one of the guardians appointed by said court, is sufficient to support the issue of undue influence: *Burns v. Crowe*, 31 OCA 566, 35 CD 468 [motion to certify record overruled, 17 OLR 112, 65 Bull 278].

139. A will made by one with no relatives who had any right to expect help from him, which gave all property to the Salvation Army and to some of its members, was sustained: *Baillie v. Heimsath*, 23 OLR 386 (App).

140. A scrivener of a will, who is also executor, and who appears to be an adverse party, may be cross-examined under GC § 11497 (RC § 2317.07) in an action to contest the validity of the will: *Chaney v. Coulter*, 29 OCA 177, 35 CD 481 [motion to certify record overruled, *Coulter v. Chaney*, 16 OLR 349, 63 Bull 446].

141. Deeds executed by a testator may be admitted in evidence in an action to set aside his will, where the purpose is to throw light on the mental capacity of the testator by showing his method of transacting business and the nature of the business transacted by him at about the time of making the will: *Wilson v. Wilson*, 7 NP(NS) 435, 19 OD 188.

142. A plaintiff in a will contest, although a son of the testator and a devisee under the will, is a competent witness to testify to acts of the testator, and the manner in which those acts were performed: *Wilson v. Wilson*, 7 NP(NS) 435, 19 OD 188.

143. Undue influence over a testator on the part of his second wife is not shown by the fact that the children of the second wife fared better than the contestant, a child of the first wife, where the second wife was not herself given an undue proportion of the estate: *O'Rourke v. Kenny*, 11 NP(NS) 602, 22 OD 56.

144. Under this section, when contestants of a will have produced evidence from which legitimate inferences could be drawn that a daughter had acquired a dominating influence over the testator five years preceding the will, declarations of the testator just preceding this period are not too remote to be admissible as material evidence of the last free exercise of his faculties and as showing his testamentary intentions: *Otte v. Bullock*, 22 NP(NS) 305, 31 OD 177.

145. Under this section, declarations of a legatee are admissible to show a general intent or disposition to exercise undue influence over the testator: *Otte v. Bullock*, 22 NP(NS) 305, 31 OD 177.

146. The reasonableness of the will may be considered by the jury on the issue of capacity to make it, and for this purpose the financial condition of the principal legatee may be inquired into: *Snyder v. Ream*, 1 Dayton TermRep (Iddings) 167.

§ 2107.75 [Administration costs of purported will.]

When the jury or the court finds that the writing produced is not the last will and testament or codicil of the testator, the trial court shall allow as part of the costs of administration such amounts to the fiduciary and to the attorneys defending such purported last will or purported codicil as the trial court finds to be reasonable compensation for the services rendered in such contest. The court shall order such amounts to be paid out of the estate of the decedent.

HISTORY: 136 v S 145. Eff 1-1-76.

Analogous to former RC § 2741.04, repealed, 136 v S 145, effective 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Research Aids

O-Jur2d: Executors and Administrators §§ 269; 271; Wills §§ 491, 492

Am-Jur2d: Wills § 1092 et seq.

ALR

Attorneys' fees and expenses incurred by personal representative in successful defense of will contest as chargeable to the residuary estate or as apportionable among beneficiaries. 20 ALR2d 1226.

CASE NOTES AND OAC

[DECISIONS CONSTRUING FORMER ANALOGOUS SECTIONS]

1. This section, as amended effective July 4, 1945, and authorizing the allowance as a part of the costs of administration of a decedent's estate, attorney fees for an unsuccessful defense of a purported will, is not unconstitutional, does not deprive the contestees of property without due process of law, and is not unreasonable: *Lindsey v. Markley*, 87 App 529, 43 OO 317, 96 NE(2d) 311.

2. The provisions of this section do not prohibit a contract between an attorney and a beneficiary under a will, providing for the amount which is to be paid for services rendered in defending such will. A probate court is not precluded from allowing, as a part of the expense in the administration of a decedent's estate, compensation to an executor and attorney for services rendered in the defense of such will, notwithstanding there is no provision for such allowance in this section: *In re Teopas*, 116 App 506, 22 OO(2d) 322, 188 NE(2d) 616.

§ 2107.76 [Probate forever binding; except.]

If within four months after a will is admitted to probate, no person files an action to contest the validity of the will, the probate shall be forever binding, except as to persons under any legal disability, or to such persons for four months after such disability is removed. The rights saved shall not affect the rights of a purchaser, lessee, or encumbrancer for value in good faith, nor impose any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not the purchaser, lessee, encumbrancer, fiduciary, or other person had notice, actual or constructive, of the legal disability.

HISTORY: 136 v S 466. Eff 5-26-76.

Analogous to former RC § 2107.23.

Forms

1 A&H Probate FORM 2107.76a et seq.

Research Aids

Conclusiveness of order:

O-Jur2d: Wills § 267 et seq.

Am-Jur2d: Wills § 1035 et seq.

Limitations of actions to contest:

O-Jur2d: Wills § 335 et seq.

Am-Jur2d: Wills §§ 881-886

"Person" does not include state:

O-Jur2d: § 364

Persons under legal disability:

O-Jur2d: Wills § 336; Limitations of actions §§ 103, 106

Am-Jur2d: Wills § 882; Limitations of actions § 182 et seq.

ALR

Estoppel to contest will or attack its validity. 28 ALR2d 116.

CASE NOTES AND OAG

[DECISIONS UNDER FORMER ANALOGOUS SECTIONS]

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with him. The disability of nonresidence under an earlier form of this section was removed by temporary presence even in infancy: *Powell v. Koehler*, 52 OS 103, 39 NE 195, 26 LRA 480, 49 AmSt 705; see *Meese v. Keefe*, 10 O 362; *Bradford v. Andrews*, 20 OS 208.

7. Probate of a will is not reviewable on error, though a refusal to admit the will to probate is reviewable: *Hollrah v. Lasance*, 63 OS 58, 57 NE 964.

8. Since a proceeding to contest a will is conferred by a statute which prescribes the time within which such right may be exercised, the period of time thus fixed is a part of the right and not merely a period of limitations within which a right may be enforced by the courts: *McVeigh v. Fetterman*, 95 OS 292, 116 NE 518; *McCord v. McCord*, 104 OS 274, 135 NE 548 [see also 91 OS 441; 7 App 129, 28 OCA 137, 29 CD 429].

9. Where the next of kin have no knowledge of fraud, and fail to bring the action to contest within the period of one year (now six months) after they respectively arrive at majority, they may maintain a suit in equity within the period of four years after discovery of the fraud: *Seeds v. Seeds*, 116 OS 144, 156 NE 193, 52 ALR 761.

10. An action for damages will lie after expiration of time for contest of a forged will probated by perjured testimony: *Morton v. Pettit*, 124 OS 241, 177 NE 591, 34 OLR 479 [affirming 38 App 348, 176 NE 494]; also, a suit in equity commenced within four years after discovery of the fraud: *Seeds v. Seeds*, 116 OS 144, 156 NE 193, 52 ALR 761.

11. Service of summons upon one of the legatee-devisee defendants, in an action to contest the validity of a will, is to be deemed commencement of the action as to each of the defendants of that class and also the executor; actual service of summons can thereafter be made upon the remainder of the defendants of that class: *Draher v. Walters*, 130 OS 92, 3 OO 121, 196 NE 884.

12. Where a will contest is brought within the statutory time provided therefor but the petition fails to disclose that the plaintiff is a party interested in the will involved, an amendment of the petition to allege facts showing that the plaintiff is an interested party will be in furtherance of justice; and such an amendment may be made after the statutory period for the bringing of such will contest: *Morton v. Fast*, 159 OS 380, 50 OO 335, 112 NE(2d) 385.

13. Where, in an action to contest a will brought by three heirs at law of the decedent, the petition names as defendants the sole legatee and devisee, the executrix and three other heirs at law but fails to name numerous other heirs at law necessary to the determination of the validity of the will, and no service of process is sought or secured on any of the defendant heirs within six months after the will has been admitted to probate, the addition as plaintiffs of the heirs at law, who are not included in the petition, and the defendant heirs at law, who are not served with summons to the action, after the expiration of the statutory period of limitation, does not confer jurisdiction on the court to hear such contest: *Gravier v. Gluth*, 163 OS 232, 56 OO 228, 126 NE(2d) 332 [affirming 99 App 374, 59 OO 146, 119 NE(2d) 663, affirming 70 OLA 5116, 119 NE(2d) 663].

14. Devisee under unprobated will, not discovering fraud within statutory period for will contest, may maintain tort action for forgery and fraudulent probate of other will within four years after discovery of fraud: *Pettit v. Morton*, 38 App 348, 176 NE 494 [affirmed, 127 OS 241].

15. In suit to contest will, omission to allege will had been admitted to probate could be supplied by amendment filed year after probate: *Sours v. Shuler*, 42 App 393, 181 NE 908, 36 OLR 544.

16. An action to contest a will must, under GC § 12087 (RC § 2741.09), be commenced within six months after probate of the will, and it is not sufficient that a petition to contest and praecipe for summons be filed within the time prescribed, but summons must also be issued within

1. Where a will is set aside at the instance of one heir who is within the saving clause of the statute of limitations, it is wholly annulled and the entire estate is distributed: *Meese v. Keefe*, 10 O 362.

2. Where a proceeding to contest a will is commenced within the statutory period, although only part of the persons interested are made parties thereto, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired: *Bradford v. Andrews*, 20 OS 222.

3. A will, once probated and recorded, is binding in every respect, except as evidence against interested persons, who may contest it within the time limited. But if interested persons do not so contest it, then it becomes forever binding upon them as it had been on all others from the date of probate and record. If interested persons contest the will, it nevertheless remains in full force during such proceeding for all purposes except as evidence in that contest: *Brown v. Burdick*, 25 OS 260.

4. This provision was first introduced into the wills act on February 18, 1808 (1 Chase, 571), and has continued to be the law down to the present time: *Mosier v. Harmon*, 29 OS 220.

5. The mode of contesting a will admitted to probate, provided by GC § 12079 (RC § 2741.01) and the above section, is exclusive: *Mosier v. Harmon*, 29 OS 220.

6. Disability of the contestant inures to all interested

that time: *Coughlin v. Passionist Monastery*, 59 App 433, 13 OO 199, 18 NE(2d) 496.

17. The provision of GC § 12087 (RC § 2741.09), that “an action to contest a will or codicil shall be brought within six months after it has been admitted to probate,” is not a mere time limitation on the commencement of such an action but imposes a condition to the existence of the right: *Woodruff v. Norvill*, 91 App 251, 48 OO 361, 107 NE(2d) 911.

18. In an action to contest a will, service of summons on the devisees, one of whom was also the executor, does not constitute the commencement of an action against the executor as such: *Woodruff v. Norvill*, 91 App 251, 48 OO 361, 107 NE(2d) 911.

19. Where, in an action to contest a will the executors of the decedent's estate are named as such in the caption of the petition and so designated in the body of the petition, and in the precipe for summons such executors are named in their individual capacities only and as individuals are served with summons within the six-month period within which an action to contest a will must be brought, this section is not complied with: *Bessire v. Fisher*, 96 App 465, 55 OO 46, 122 NE(2d) 491.

20. The provisions of RC §§ 2107.23, 2741.02 and 2741.09, relative to actions to contest the validity of a will are mandatory and the enjoyment of the right to maintain such an action is dependent upon compliance with such statutory conditions and limitations: *Gravier v. Gluth*, 99 App 374, 59 OO 146, 119 NE(2d) 663.

20. The provisions of RC §§ 2107.23, 2741.02 and 2741.09, relative to actions to contest the validity of a will are mandatory and the enjoyment of the right to maintain such an action is dependent upon compliance with such statutory conditions and limitations: *Gravier v. Gluth*, 99 App 374, 59 OO 146, 119 NE(2d) 663 [affirmed, 163 OS 232, 56 OO 228, 126 NE(2d) 332.]

21. Where a party to such action has been dismissed as a plaintiff, he may be made a party defendant; and where others in the class have been properly served with summons, such party may be served after the six-month period of limitation: *Frederick v. Brown*, 102 App 117, 2 OO(2d) 115, 141 NE(2d) 683.

22. Where a petition is filed to set aside a will, service is obtained on all defendants, the case is never called for trial, is placed on the drop list and the plaintiff ordered to show cause why it should not be dropped, the attorney who filed the petition is deceased and his successor is not carried on the drop list and, therefore, fails to appear when the case is called, and the case is dismissed for want of prosecution, it is error to overrule a motion to reinstate the case, and there is a mandatory duty imposed upon the trial court by this section to make up the issue by an order on the journal, where the issue is not made up by the pleadings, and submit the issue to the jury: *Sharp v. Johnson*, 103 App 194, 3 OO(2d) 264, 144 NE(2d) 896.

23. An action to contest a will admitted to probate on January 25 is brought within the statutory period prescribed by this section where such action is instituted on July 25, on the same day there is filed a praecipe and summons issued for 13 defendants, designated as heirs at law and devisees and who are served on July 26, and an affidavit and order for service by publication on two nonresident defendants, who with a cemetery are designated as the only other legatees and devisees, the first publication is made on July 26 and publication completed but no notice mailed to such two defendants as required by RC § 2703.16 and the cemetery is served on July 26: *Cover v. Hildebran*, 103 App 413, 3 OO(2d) 435, 145 NE(2d) 850.

24. In the fixing of attorney fees, it is error to consider the grounds of the will contest: *Logeman v. Wagner*, 7 OApp(2d) 48, 36 OO(2d) 124, 218 NE(2d) 761.

25. The fiduciary and attorneys defending a purported will in a will contest action are entitled to “reasonable compensation for the services rendered in such contest,” and no fees for services in appeals attacking a judgment

finding such paper writing not to be the last will alleged are allowable: *Logeman v. Wagner*, 7 OApp(2d) 48, 36 OO(2d) 124, 218 NE(2d) 761.

26. Where the captions of the complaint and the summons in an action contesting a will do not designate the specific legal relationship between the estate and a defendant occupying the positions of surviving spouse, devisee, and executrix, the requirements of RC § 2741.02 are satisfied where service of summons within the time prescribed by RC § 2741.09 is made upon such defendant, with a copy of the complaint concisely designating the capacities in which such person is named as defendant: *Beverly v. Beverly*, 33 OApp(2d) 199, 62 OO(2d) 303, 293 NE(2d) 562 (1973).

27. The will contest action is a special statutory proceeding within Title XXVII of the Revised Code and, pursuant to Civil Rule 1(C)(7), any civil rule which would permit the liberal amendment or joinder adding a necessary party under RC § 2741.02, relating the cause of action back to within the time limitation of RC § 2741.09, would by its nature be clearly inapplicable as it would operate to extend the jurisdiction of the courts of this state in derogation of mandatory statutory language. Civil Rule 82: *Holland v. Carlson*, 40 OApp(2d) 325, 69 OO(2d) 299, 319 NE(2d) 362 (1974).

28. The word “person” as used in this section, which grants authority to bring an action to set aside a will, is defined in GC § 10213, and does not include the state of Ohio: *State ex rel Rich v. Page*, 20 OO 155, 6 OSupp 104 (CP).

29. A motion to dismiss the petition for want of jurisdiction on the ground that the action was not commenced within the time specified by this section, will be overruled where trustees who were legatees and devisees under the will were served within six months of the probate: *Lehman v. Bachelor*, 28 OO 310, 14 OSupp 20 (CP).

30. In an action to contest the validity of a will, the legatee-devisee defendants are so “united in interest,” within the meaning of that phrase in GC § 11230 (RC § 2305.17) as to render service of summons upon any one of them within the time set by this section, sufficient to constitute commencement of the action against all of them: *Wallenstein v. Wallenstein*, 30 OO 96, 114 OSupp 61 (CP).

31. The fact that this section, prior to the amendment of this statute in 1898, included within its saving clause “persons absent from the state,” does not enable nonresident next of kin to bring an action to contest a will more than six months after probate: *Feeley v. First Nat. Bank*, 55 OO 324, 124 NE(2d) 800 (CP).

32. Persons who are legatees and devisees only are not such interested parties who have a right to contest a will, since as beneficiaries their interest is in sustaining, not contesting a will: *Feeley v. First Nat. Bank*, 55 OO 324, 124 NE(2d) 800 (CP).

33. A bona fide agreement entered into between a legatee of a testator, and his children, under which the children agree not to contest the will of the testator in consideration of the payment to such children of one-third of the legacy, is valid: *West v. Leslie*, 21 OO 89, 6 OSupp 251 (PC).

34. The six-month period established in RC § 2741.09, for the commencement of a will contest action, is a part of the right of action: *Alakiotis v. Lancione*, 41 OO(2d) 381, 12 OMisc 257, 232 NE(2d) 663 (CP).

35. The savings clause of RC § 2305.19, for commencing a new action when a suit has failed otherwise than on the merits, is not available in regard to a will contest action: *Alakiotis v. Lancione*, 41 OO(2d) 381, 12 OMisc 257, 232 NE(2d) 663.

36. Where an action to contest a will is not commenced within the time prescribed by the qualifying limitation attached to the grant of the right in this section, taking into consideration GC §§ 10216 and 11230 (RC §§ 1.14 and 2305.17), the right itself is extinguished by the lapse

of time, and there remains no authority in the plaintiff to maintain the action and no jurisdiction in the court over the person or subject matter to hear and determine it: *Christensen v. Maxen*, 29 OLA 219.

37. Revised Code § 2741.09 providing that an action to contest a will shall be brought within six months after it has been admitted to probate is mandatory: *Faust v. Cailor*, 76 OLA 504, 146 NE(2d) 875 (App).

38. Where a beneficiary under a will consented in writing to the probate of the will and within six months the beneficiary brought an action contesting the will in the court of common pleas, the probate court did not have jurisdiction to vacate the probate of the will upon an application made, after term, by the beneficiary, after expiration of the statutory period for the contest of a will: *State ex rel Cleveland Trust Co. v. Probate Court*, 113 App 1, 12 OO(2d) 307, 165 NE(2d) 668.

39. In a will contest action all necessary parties must be before the court either as plaintiffs or defendants within the statutory six months period or the contest is not properly filed and the case should be dismissed: *Kluever v. Cleveland Trust Co.*, 86 OLA 79, 173 NE(2d) 183 (App).

40. A granddaughter, upon attaining her majority, is not estopped from contesting the will of her grandmother by the fact that while she was a child of tender years the executors, one of whom was her guardian, distributed the available assets of the estate without filing an inventory or obtaining an order of distribution or filing any report thereof: *Swetland v. Miles*, 31 OCA 529 [not considered on affirmance in 101 OS 501].

41. An action contesting a will, if dismissed for want of prosecution, may be recommenced within one year after such dismissal, although the filing of the petition may in such event be after the two years prescribed by the statute of limitations: *Hunt v. Hunt*, 2 NP(NS) 577, 15 OD 571. (The correctness of this decision may be doubted in view of GC § 10504-32 [RC § 2107.23] and *McVeigh v. Fetterman*, 95 OS 292, 116 NE 518. Com-

pare *George L. Rackle &c. Co. v. Western &c. Indem. Co.*, 54 App 274, 7 OO 118, 6 NE(2d) 1007).

42. In proceedings to contest a will, only such parties as were interested in the will at the time of the probate thereof are proper parties plaintiff: *Rockwell v. Blaney*, 5 NP(NS) 580, 18 OD 436.

43. If an action to contest a will is brought within the time limited, the death of the plaintiff does not cause such action to abate: *Heimrich v. Dechant*, 11 NP(NS) 511, 21 OD 106.

44. Under this section, a motion made more than a year after probate to amend a petition which alleges that a will and two codicils are not the valid last will and codicils of the testator, so as to attack a third codicil, should be overruled: *Trull v. Patrick*, 22 NP(NS) 385, 31 OD 319 [on second trial in common pleas court will sustained, which judgment was reversed by court of appeals and cause remanded; motion to certify record overruled, *Patrick v. Trull*, 20 OLR 152].

45. The requirement of this section as to contest within two years is imperative and unqualified, except as to infants and other persons under disabilities, which clearly implies that those not in esse are barred and concluded as effectually as those living at the time of contest: *McArthur v. Allen*, 3 Fed 313, 13 OFD 523.

§ 2107.77 [Later wills.]

Sections 2107.71 to 2107.76 of the Revised Code apply to later wills admitted to probate.

HISTORY: 136 v S 466. EF 5-26-76.

Analogous to former RC § 2107.25.

Research Aids

O-Jur2d: Wills § 332

CHAPTER 2108: HUMAN BODIES OR PARTS THEREOF

Section

- 2108.01 [Definitions.]
- 2108.02 [Rights of donor; donee.]
- 2108.03 [Who may become donees.]
- [WILLS; DOCUMENTS]
- 2108.04 [Gift made effective upon death.]
- 2108.05 [Safekeeping of document.]
- 2108.06 [Gift revocation.]
- 2108.07 [Removal of part; transplant restrictions.]
- [2108.07.1] 2108.071 Eye enucleation by embalmer.
- 2108.08 [Liability for damages.]
- 2108.09 [Uniform act.]
- 2108.10 [Forms.]
- 2108.11 Transaction involving human tissue not a sale.
- 2108.21 [Blood donor.]

[POST-MORTEM EXAMINATION]

- 2108.50 Post-mortem examination; persons who may give consent.
- 2108.51 Exemption from liability.
- 2108.52 Exceptions to requirement of consent for post-mortem examination.

Forms

- 1 A&H Probate FORM 2108a et seq: Gift of body under Uniform Anatomical Gifts act.

§ 2108.01 [Definitions.]

As used in sections 2108.01 to 2108.10, inclusive, of the Revised Code:

(A) "Bank or storage facility" means a facility licensed, accredited, or approved under the laws of any state for storage of human bodies or parts thereof.

(B) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(C) "Donor" means an individual who makes a gift of all or part of his body.

(D) "Hospital" means any hospital operated in this state which is accredited by the joint commission on accreditation of hospitals of the American hospital association, the American medical association, the American college of physicians, and the American college of surgeons. "Hospital" also means a hospital licensed, accredited, registered, or approved under the laws of any state, and includes a hospital operated by the United States government, a state, or a subdivision thereof, although not required to be licensed under state laws.

(E) "Part" means organs, tissues, eyes, bones, arteries, blood or other fluids, and any other portions of a human body.

(F) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(G) "Physician" or "surgeon" means a physician or surgeon licensed or authorized to practice under the laws of any state.

(H) "State" means any state, district, commonwealth, territory, insular possession, and any other area subject to the legislative authority of the United States of America.

HISTORY: 133 v H 51 (Eff 11-6-69); 133 v H 852. Eff 8-27-70.

Not analogous to former RC § 2108.01, repealed in 133 v H 51, § 2. For a section analogous to former RC § 2108.01, see now RC § 2108.02.

Cross-References to Related Sections

See RC §§ 2108.07.1, 2108.08, 2108.09 which refer to 2108.01 et seq.

Comparative Legislation

Disposition of body:

- Cal.—Health and Safety Code, § 7150
- Ill.—Rev Stat, ch 3, § 551
- Ind.—Burns' Stat, § 29-2-16-1
- Ky.—KRS, § 311.352
- Mich.—MCLA, § 328.261
- N.Y.—Public Health, § 4300
- Pa.—Purdon's Stat, Tit. 20, § 8601
- Fla.—FSA, § 732.910

Research Aids

O-Jur2d: Dead Bodies § 13

Law Review

Gift of body for research. Ted Boehm. 41 OBar (No. 41) 1241.

Heart transplants; legal problems and the need for new legislation. Editorial. 19 WestResLRev 1073.

§ 2108.02 [Rights of donor; donee.]

(A) Any individual of sound mind and eighteen years of age or more may give all or any part of his body for any purpose specified in section 2108.03 of the Revised Code, the gift to take effect upon his death.

(B) Any of the following persons, in the order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give any part of the decedent's body for any purpose specified in section 2108.03 of the Revised Code:

- (1) The spouse;
- (2) An adult son or daughter;
- (3) Either parent;
- (4) An adult brother or sister;
- (5) A guardian of the person of the decedent at the time of his death;
- (6) Any other person authorized or under obligation to dispose of the body.

(C) The donee shall not accept the gift if he has actual notice of contrary indications by the decedent or that a gift by a member of a class is opposed by a member of the same or a prior class.

The persons authorized in division (B) of this section may make the gift after or immediately before death.

(D) A gift of all or part of a body authorizes any examination necessary to assure medical acceptability of the gift for the purpose intended.

(E) The rights of the donee created by the gift are paramount to the rights of others except that a coroner, or in his absence, a deputy coroner, who has, under section 313.13 of the Revised Code, taken charge of the decedent's dead body and decided that an autopsy is necessary, has a right to the dead body and any part that is paramount to the rights of the donee. The coroner, or in his absence, the deputy coroner, may waive this paramount right and permit the donee to take a donated part if the donated part is or will be unnecessary for successful completion of the autopsy or for evidence. If the coroner or deputy coroner does not waive his paramount right and later determines, while performing the autopsy, that the donated part is or will be unnecessary for successful completion of the autopsy or for evidence, he may thereupon waive his paramount right and permit the donee to take the donated part, either during the autopsy or after it is completed.

HISTORY: 133 v H 51 (EF 11-6-69); 136 v H 1182. EF 5-4-76.

Not analogous to former RC § 2108.02, repealed in 133 v H 51, § 2, but see former RC § 2108.01 (132 v H 215).

Cross-References to Related Sections

See RC § 2108.04 which refers to this section.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 6, 13; Wills § 63; Gifts § 23

§ 2108.03 [Who may become donees.]

Any of the following persons may become donees of gifts of bodies or parts thereof for the purposes stated:

(A) A hospital, surgeon, or physician, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation;

(B) An accredited medical or dental school, college, or university, for education, research, advancement of medical or dental science, or therapy;

(C) A bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation;

(D) A specified individual for therapy or transplantation, needed by him.

HISTORY: 133 v H 51. EF 11-6-69.

Not analogous to former RC § 2108.03, but see former RC § 2108.02 (132 v H 215, § 1) repealed in 133 v H 51, § 2.

Cross-References to Related Sections

See RC § 2108.02 which refers to this section.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13; Wills § 63; Gifts § 23

[WILLS; DOCUMENTS]

§ 2108.04 [Gift made effective upon death.]

(A) A gift of all or part of the body under division (A) of section 2108.02 of the Revised Code may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(B) A gift of all or part of the body under division (A) of section 2108.02 of the Revised Code may also be made by any document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, shall be signed by the donor in the presence of two witnesses who shall sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in the presence of two witnesses, having no affiliation with the donee, who shall sign the document in his presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

(C) A gift of parts of the body under division (A) of section 2108.02 of the Revised Code, may also be made by a statement to be provided for on all Ohio operator's or chauffeur's licenses or motorcycle operator's licenses, or endorsements. The gift becomes effective upon the death of the owner. The statement must be signed by the holder of the operator's or chauffeur's license or endorsement in the presence of two witnesses, who must sign the statement in the presence of the donor. Delivery of the license during the donor's lifetime is not necessary to make the gift valid. The gift shall become invalidated upon expiration of the license or endorsement. Cancellation, revocation, or suspension of the license or endorsement will not invalidate the gift. The gift must be renewed upon renewal of each license or endorsement.

(D) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician may accept the gift as donee upon or following death, in the absence of any expressed

indication that the donor desired otherwise. The physician who accepts the gift as donee under this division shall not participate in the procedures for removing or transplanting a part.

(E) Notwithstanding division (B) of section 2108.07 of the Revised Code, the donor may designate in his will, card, or other document of gift the surgeon or physician to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any surgeon or physician to carry out the appropriate procedures.

(F) Any gift by a person specified in division (B) of section 2108.02 of the Revised Code shall be made by a document signed by him or made by his telegraphic, recorded telephonic, or other recorded message.

HISTORY: 133 v H 51 (E# 11-6-69); 136 v H 650. E# 1-5-76.

Cross-References to Related Sections

See RC § 2108.10 which refers to this section.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 6, 7, 13; Wills § 63; Gifts § 23

ALR

Validity and effect of testamentary direction as to disposition of testator's body. 7 ALR(3d) 747.

§ 2108.05 [Safekeeping of document.]

If the gift is made by the donor to a specified donee, the will, card, or other document, or an executed copy thereof, may be delivered to the donee to expedite the appropriate procedures immediately after death. Delivery is not necessary to the validity of the gift. The will, card, or other document, or an executed copy thereof, may be deposited in any hospital, bank or storage facility, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of any interested party upon or after the donor's death, the person in possession shall produce the document for examination.

HISTORY: 133 v H 51. E# 11-6-69.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13; Wills § 63; Gifts § 23

§ 2108.06 [Gift revocation.]

(A) If the will, card, or other document, or an executed copy thereof, has been delivered to a specified donee, the donor may amend or revoke the gift by any of the following means:

(1) The execution and delivery to the donee of a signed statement;

(2) An oral statement made in the presence of two persons and communicated to the donee;

(3) A statement during a terminal illness or injury addressed to an attending physician and communicated to the donee;

(4) A signed card or document found on his person or in his effects.

(B) The donor may revoke any document of gift which has not been delivered to the donee, in any manner specified in division (A) of this section or by destruction, cancellation, or mutilation of the document and all executed copies thereof.

(C) Any gift made by a will may also be amended or revoked in the manner provided for amendment or revocation of wills or as provided in division (A) of this section.

HISTORY: 133 v H 51. E# 11-6-69.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13; Wills § 63; Gifts § 23

§ 2108.07 [Removal of part; transplant restrictions.]

(A) The donee may accept or reject the gift. If the donee accepts a gift of the entire body, the surviving spouse or next of kin may, subject to the terms of the gift, authorize embalming and the use of the body in funeral services. If the gift is of a part of the body, the donee, upon the death of the donor and prior to embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the surviving spouse, next of kin, or other persons under obligation to dispose of the body.

(B) The attending physician or a physician selected by the donor shall determine the time of death. If it is not possible for such physician to attend the donor at his death or to certify the death within a period of time which would make it possible to carry out the terms of the gift, the time of death shall be determined by two physicians having no affiliation with the donee. The physician or physicians determining the time of death or certifying the death shall not participate in the procedures for removing or transplanting a part.

HISTORY: 133 v H 51. E# 11-6-69.

Cross-References to Related Sections

See RC § 2108.04 which refers to this section.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13; Wills § 63; Gifts § 23

[§ 2108.07.1] § 2108.071 Eye enucleation by embalmer.

(A) With respect to the gift of an eye, an embalmer licensed pursuant to Chapter 4717. of the Revised Code who has completed a course in eye enucleation and has received a certificate of competency to that effect from a school of medicine recognized by the state medical board may enucleate eyes for the gift after proper certifica-

tion of death by a physician and compliance with the intent of the gift as defined by sections 2108.01 to 2108.10 of the Revised Code.

(B) As used in this section, "eye enucleation" means the removal of the eyeball in such a way that it comes out clean and whole.

HISTORY: 133 v H 1242. EF 3-4-75.

§ 2108.08 [Liability for damages.]

A person who acts in good faith in accordance with sections 2108.01 to 2108.10, inclusive, of the Revised Code, or the anatomical gift laws of another state, is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act.

HISTORY: 133 v H 51 (EF 11-6-69); 133 v H 852. EF 8-27-70.

Analogous to former RC § 2108.03 (132 v H 215) repealed in 133 v H 51, § 2.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13, 14, 17; Gifts § 23

§ 2108.09 [Uniform act.]

Sections 2108.01 to 2108.09, inclusive, of the Revised Code, are enacted to adopt the Uniform Anatomical Gift Act (1968), national conference of commissioners on uniform state laws, and shall be construed so as to effectuate its general purpose to make uniform the law of those states which enact it.

HISTORY: 133 v H 51. EF 11-6-69.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13

§ 2108.10 [Forms.]

The document of gift provided for in section 2108.04 of the Revised Code shall conform substantially to the following forms:

UNIFORM DONOR CARD
of

Print or type name of donor

In the hope that I may help others, I hereby make this anatomical gift, if medically acceptable, to take effect upon my death. The words and marks below indicate my desire.

I give: (A) _____ any needed organs or parts

(B) _____ only the following organs or parts

Specify the organ(s) or part(s) for the purpose of transplantation, therapy, or medical research or education.

(C) _____ my body for anatomical study, if needed. Limitations or special wishes, if any: _____ signed by the donor and the following

two witnesses in the presence of each other:

Signature of Donor

Date of Birth of Donor

Date Signed

Witness

Witness

This is a legal document under the Uniform Anatomical Gift Act or similar laws.

ANATOMICAL GIFT BY NEXT OF KIN
OR OTHER AUTHORIZED PERSON

I hereby make this anatomical gift from the body of _____ who died on _____ in _____,
(name) (date) (city and state)

The marks in the appropriate squares and the words filled into the blanks below indicate my relationship to the deceased according to the following order of priority as presented by Ohio law, and indicate my desires respecting the gift.

1. I am the surviving:

- 1. ☐ spouse;
- 2. ☐ adult son or daughter;
- 3. ☐ parent;
- 4. ☐ adult brother or sister;
- 5. ☐ guardian;
- 6. ☐ _____

_____ authorized to dispose of the body;

2. I give: ☐ any needed organs or parts; ☐ the following organs or parts _____;

3. To the following person (or institution): _____ (insert the name of a physician, hospital, research or educational institution, storage banks, or individual);

4. For the following purposes: ☐ any purpose authorized by law; ☐ transplantation; ☐ therapy; ☐ medical research and education.

Dated _____ city and state _____

Signature of Survivor

Address of Survivor

HISTORY: 133 v H 852. EF 8-27-70.

Forms

1 Anderson Fam.L. No. 130.

Research Aids

O-Jur2d: Dead Bodies §§ 5, 13; Gifts § 23; Wills § 63

§ 2108.11 Transaction involving human tissue not a sale.

The procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, blood derivatives, and products, corneas, bones, organs, or other human

tissue except hair, for the purpose of injecting, transfusing, or transplanting any of them in the human body, is declared for all purposes to be the rendition of a service by every person, firm, or corporation participating therein, whether or not any remuneration is paid therefor, is declared not to be a sale of any such items, and no warranties of any kind or description are applicable thereto.

HISTORY: 133 v H 439, EF 11-14-69.

Research Aids

O-Jur2d: Sales § 6; Gifts § 23; Health § 24
Am-Jur2d: Sales §§ 33, 460

CASE NOTES AND OAG

1. The procuring, furnishing or distribution of human whole blood or blood products is declared for all purposes to be a rendition of a service by every person and is declared not to be a sale as a matter of law. Hence, while the general law of negligence applies in a case involving a transfusion of impure blood, warranty and *res ipsa loquitur* rules are inapplicable: *Morse v. Riverside Hospital*, 44 OApp(2d) 422, 73 OO(2d) 537, 339 NE(2d) 846 (1975).

§ 2108.21 [Blood donor.]

Any person eighteen years of age or older may donate blood in a voluntary blood program, which is not operated for profit, without consent of his parent or guardian.

HISTORY: 133 v S 455, EF 7-17-70.

Research Aids

O-Jur2d: Gifts § 23; Infants § 4

[POST-MORTEM EXAMINATION]

§ 2108.50 Post-mortem examination; persons who may give consent.

An autopsy or post-mortem examination may be performed upon the body of a deceased person by a licensed physician or surgeon if consent has been given in the order named by one of the following persons of sound mind and eighteen years of age or older in a written instrument executed by him or on his behalf at his express direction:

- (A) The deceased person during his lifetime;
- (B) The decedent's spouse;
- (C) If there is no surviving spouse, if the address of the surviving spouse is unknown or outside the United States, if the surviving spouse is physically or mentally unable or incapable of giving consent, or if the deceased person was separated and living apart from such surviving spouse, then a person having the first named degree of relationship in the following list in which a relative of the deceased survives and is physically and mentally able and capable of giving consent may execute consent:

(1) Children;

(2) Parents;

(3) Brothers or sisters.

(D) If there are no surviving persons of any degree of relationship listed in division (C) of this section, any other relative or person who assumes custody of the body for burial;

(E) A person authorized by written instrument executed by the deceased person to make arrangements for burial.

Consent may be revoked only by the person executing the consent and in the same manner as required for execution of consent under this section.

As used in this section, "written instrument" includes a telegram or cablegram.

HISTORY: 133 v S 234 (EF 11-27-69); 134 v S 243, EF 12-3-71.

Cross-References to Related Sections

See RC §§ 2108.51, 2108.52 which refer to this section.

Comparative Legislation

Post-mortem examination:

Cal.—Health and Safety Code, § 7156

Ill.—Rev Stat, ch 91, § 18.12

Ind.—Burns' Stat, § 16-8-1-6

Ky.—KRS, § 72.070

Mich.—MCLA, § 328.151

N.Y.—Public Health, § 4209

Pa.—Purdon's Stat, Tit. 35, § 1111

Research Aids

O-Jur2d: Dead Bodies § 11

Am-Jur2d: Dead Bodies § 32 et seq

§ 2108.51 Exemption from liability.

Any licensed physician or surgeon who, in good faith and acting in reliance upon an instrument of consent for an autopsy or post-mortem examination executed under section 2108.50 of the Revised Code and without actual knowledge of revocation of such consent, performs an autopsy or post-mortem examination is not liable in a civil or criminal action brought against him for such act.

HISTORY: 133 v S 234, EF 11-27-69.

Research Aids

Civil liability:

O-Jur2d: Dead Bodies § 14

Am-Jur2d: Dead Bodies § 33 et seq

Criminal liability:

O-Jur2d: Dead Bodies § 17

Am-Jur2d: Dead Bodies § 33 et seq

§ 2108.52 Exceptions to requirement of consent for post-mortem examination.

The requirements of section 2108.50 of the Revised Code do not apply to a post-mortem or other examination performed under sections 313.01 to 313.22 of the Revised Code, or to

medical, surgical, and anatomical study performed under sections 1713.34 to 1713.42 of the Revised Code.

HISTORY: 133 v S 234 (Eff 11-27-69); 136 v H 1. Eff 6-13-75.

Research Aids

O-Jur2d: Dead Bodies § 11

Am-Jur2d: Dead Bodies § 32

CHAPTER 2109: FIDUCIARIES

Section

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- [FUNDS BELONGING TO UNKNOWN OR NONRESIDENT]
- 2109.57 [Appointment of trustee of funds of unknown or nonresident.]
- [INVENTORY]
- 2109.58 Inventory by fiduciary.
- [PAYMENT OR DISTRIBUTION]
- 2109.59 [Failure of fiduciary to make payment or distribution.]
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- 2109.61 Bond; parties to suit.

§ 2109.01 Definition.

"Fiduciary" as used in Chapters 2101. to 2131., inclusive, of the Revised Code, means any person, association, or corporation, other than an assignee or trustee for an insolvent debtor or a guardian under sections 5905.01 to 5905.19, inclusive, of the Revised Code, appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, association, or corporation, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another; and includes the division of mental retardation or an agency under contract with the division for the provision of protective service under sections 5119.85 to 5119.89, inclusive, of the Revised Code, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded and developmentally disabled persons.

HISTORY: GC § 10506-1; 114 v 320 (364); 134 v H 290. EF 3-23-72.

Cross-References to Related Sections

- See RC §§ 2109.05, 2109.28 which refer to RC § 2109.01 et seq.
- See RC § 2131.02 which refers to this chapter.

Research Aids

- Fiduciary defined:
O-Jur2d: Fiduciaries §§ 3, 4
- Fiduciary distinguished from trustee:
O-Jur2d: Fiduciaries § 5

Law Reviews

- See explanatory article in 4 OBar 305.
- Uniform trusts act. Article by Prof. Harry W. Vanneman (OSU) and Prof. Frank S. Rowley (UC). 13 CinLRev, 5 OSLJ 145.

CASE NOTES AND OAG

1. It was held under former GC § 11029 (see now RC § 2109.30) that the probate court had power to remove a trustee appointed by deed and appoint his successor: *Pherson v. Mitchell*, 12 App 336. That section, however, was repealed, effective January 1, 1932, and it would seem under this section that a trustee appointed by deed is not subject to the jurisdiction of the probate court because such fiduciary was not appointed by the probate court.

2. This section includes corporations under a definition of the term fiduciary: *Judd v. City Trust & Co. Bank*, 133 OS 81, 10 OO 95, 12 NE(2d) 288.

3. The superintendent of banks is not a "fiduciary" within the meaning of the term as defined by this section, and is not controlled by GC § 10501-59 (repealed, 118 v 78 [80]), relative to the bond of a party appealing in a fiduciary capacity: *Fulton v. Tischer*, 17 OLA 449.

4. The federal government is not included in the terms of this section, as a "person, association, or corporation, . . . accountable to the probate court": *Edgeter v. Kemper*, 73 OLA 297, 136 NE(2d) 630 (PC).

§ 2109.02 Appointment and duties.

Every fiduciary, before entering upon the execution of a trust, shall receive letters of appointment from a probate court having jurisdiction of the subject matter of the trust.

The duties of a fiduciary shall be those required by law, and such additional duties as the court orders. Letters of appointment shall not issue until a fiduciary has executed a written acceptance of his duties, acknowledging that he is subject to removal for failure to perform his duties, and that he is subject to possible penalties for conversion of property he holds as a fiduciary. The written acceptance may be filed with the application for appointment.

No act or transaction by a fiduciary is valid prior to the issuance of letters of appointment to him. This section does not prevent an executor named in a will from paying funeral expenses, or prevent necessary acts for the preservation of the trust estate prior to the issuance of such letters.

HISTORY: GC §§ 10506-2, 10506-22; 114 v 320 (368); 136 v S 145. Eff 1-1-76.

See former GC § 10616.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2109.02 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2109.04 which refers to this section.

Comparative Legislation

Fiduciaries:

- Cal.—Probate Code § 420
- Ill.—Rev Stat, ch. 3 § 9-1
- Ind.—Burns' Stat, § 29-1-10-1
- Ky.—KRS, § 395.005
- Mich.—MCLA, § 704.1
- N.Y.—SCPA, § 701
- Pa.—Purdon's Stat, Tit. 20, § 3155
- Fla.—FSA, § 733.601

Forms

- 1 A&H Probate FORM 2109.02a et seq.
- 1 A&H Probate Form 2109.04a et seq: Bond of fiduciary.
- 1 A&H Probate FORM 2109.57a et seq: Trustee for unknown or nonresidents.
- 1 A&H Probate FORM 2111.02a et seq, 2111.03a et seq: Application, appointment of guardian.

1 A&H Probate FORM 2111.37a et seq: Resident guardian for nonresident.

1 A&H Probate FORM 2113.05a et seq: Letters testamentary.

1 A&H Probate FORM 2119.01a et seq: Trustee for absentees.

Outline of Procedure

Appointment of administrator, in general. *Leyshon No. 35*, A&H No. 6; *Executor. Leyshon No. 41*, A&H No. 12; *Trustee. Leyshon No. 46*, A&H No. 17.

Research Aids

Appointment:

O-Jur2d: Fiduciaries § 6 et seq

Duties:

O-Jur2d: Fiduciaries § 19 et seq

ALR

Appointment and qualification of one of several trustees named in will as affecting power or duty of court to appoint a co-trustee. 151 ALR 1308.

Changes in corporate organization as affecting status of corporation as trustee. 131 ALR 753.

Law Review

See explanatory article in 4 OBar 305.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Ordinarily, no act or transaction by a fiduciary shall be valid prior to the issuance of letters of appointment to him: *Wrinkle v. Trabert*, 174 OS 233, 22 OO(2d) 248, 188 NE(2d) 587.

2. The principal function of the fiduciary of an estate under a will is to protect, preserve and pay out the assets according to law and the will. Here there was no property, and consequently, no purpose to be served by the appointment of a fiduciary: *Hecker v. Schuler*, 12 OS(2d) 58, 41 OO(2d) 277, 231 NE(2d) 877 (1967).

3. Where an Ohio testatrix named the Indianapolis Humane Society as trustee of a residuary trust and the trust property was transferred to the society by express order of the probate court and removed to Indianapolis without the society seeking or receiving letters of appointment as trustee as required by Ohio law, an action brought seventeen years later by a trustee appointed by the Ohio probate court to obtain possession of the trust property and an accounting was barred by the Indiana statute of limitations: *Hamrick v. Indianapolis Humane Society, Inc.*, 273 F(2d) 7, 11 OO(2d) 400, 174 FSupp 403, 11 OO(2d) 150.

4. Under this section every testamentary trustee, before entering upon the execution of a trust, must receive letters of appointment from a probate court having jurisdiction of the subject matter of the trust: *Hamrick v. Indianapolis Humane Society, Inc.*, 11 OO(2d) 400, 273 F(2d) 7.

5. Federal courts have no supervisory powers over executors or administrators: *Starr v. Rupp*, 421 F(2d) 999, 53 OO(2d) 169, 25 OMisc 224.

6. Where a testamentary trust named cotrustees, and real estate comprising part of the trust res was located in the District of Columbia, an Ohio probate court appointing a sole trustee was without jurisdiction over the subject matter, as it had no power to change title to real estate in the District of Columbia, and full faith and credit is not required to be given its judgment: *Hughes v. Hughes*, 52 OO 137, 112 FSupp 899.

7. Since the United States Government is not a fiduciary over which the probate court has jurisdiction under this section there is no statutory authority that such Government, as trustee, must receive letters of appointment from the probate court prior to embarking upon the administration of a trust, and the executor, after the estate is completely administered, may deliver the trust fund to the United States Government as trustee and be discharged as provided by law of any further responsibility over said fund: *Edgeter v. Kemper*, 73 OLA 297, 136 NE(2d) 630 (PC).

[§ 2109.02.1] § 2109.021 [Filings by mail or in person.]

After letters of appointment are issued to a fiduciary, the court shall accept filings by mail in matters of estates, guardianships, or trusts, unless the court in writing notifies the fiduciary or attorney of record that a personal appearance is necessary, or a personal appearance is otherwise required by law. An improper or incomplete filing shall be rejected, and that court shall return it to the sender, and impose a cost of two dollars and fifty cents per improper or incomplete filing, chargeable against the estate.

HISTORY: 136 v S 145 (EF 1-1-76); 136 v S 466. EF 5-26-76.

For text of RC § 2109.02.1 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

§ 2109.03 Fiduciary's attorney. (GC § 10506-3)

At the time of the appointment of a fiduciary, such fiduciary shall file in the probate court the name of the attorney, if any, who will represent him in matters relating to the trust. After the name of an attorney has been filed, notices sent to such fiduciary in his official capacity shall also be sent by the court to such attorney who may sign waiver of service of any or all of such notices upon him. If the fiduciary is absent from the state, such attorney shall be the agent of the fiduciary upon whom summonses, citations, and notices may be served. Any summons, citation, or notice may be served upon the fiduciary by delivering duplicate copies thereof to the attorney designated by him. No probate judge shall permit any person to practice law in the probate court for compensation, unless he has been admitted to the practice of law within the state. This section does not prevent any person from representing his own interest in any estate, matter, action, or proceeding.

HISTORY: GC § 10506-3; 114 v 320 (364); 119 v 394 (398), § 1. EF 10-1-53.

Comparative Legislation

Attorney for fiduciary:

Cal.—Probate Code, § 910

Ill.—Rev Stat, ch. 3, § 27-2

Ind.—Burns' Stat, § 29-1-10-13

Ky.—KRS, § 395.145

Mich.—MCLA, § 704.34

N.Y.—SCPA, § 2110

Fla.—FSA, § 733.617

Forms

1 A&H Probate FORM 2109.03a et seq.

Research Aids

Fiduciary's attorney:

O-Jur2d: Fiduciaries § 109

Service on attorney:

O-Jur2d: Fiduciaries § 114

Law Reviews

See explanatory article in 4 OBar 305.

Power of testator to designate an attorney. (Case note.) 8 OBar (No. 46) 647, 2 OSLJ 77.

Testamentary direction to employ attorney. (Case note.) 10 CinLRev 104.

CASE NOTES AND OAG

1. The presentation of a claim against an estate to the agent of an insurance company appointed by the administrator as his agent, does not satisfy the statute, and the claim becomes barred at the end of the time fixed by statute, unless otherwise properly presented: *Beacon Mutual Indemnity Co. v. Stalder*, 95 App 441, 54 OO 69, 120 NE(2d) 743.

2. In this section providing that a fiduciary shall file in the probate court the name of the attorney who will represent him as to the trust, that if the fiduciary is absent from the state such attorney shall be the agent of the fiduciary upon whom summonses may be served, and that any summonses may be served upon the fiduciary by delivering copies thereof to such attorney, the last provision is all-inclusive and is not limited or restricted to summonses in actions originating in the probate court: *Meisner v. Fleming*, 109 App 117, 10 OO(2d) 302, 164 NE(2d) 183.

3. This section provides, among other things, that if the fiduciary is absent from the state, fiduciary's attorney shall be the agent of the fiduciary upon whom service of summons may be made; but if the fiduciary is not absent from the state then the attorney named by the fiduciary is in no wise his agent upon whom summons may be served, but is merely an attorney representing the fiduciary in matters that may arise relating to the trust: *Kaczinski v. Kaczinski*, 83 OLA 469, 169 NE(2d) 36 (App).

4. This section, providing for service upon the agent of the fiduciary requires the one seeking the service of summons to affirmatively allege in the body of the petition that the fiduciary is absent from the state: *Kaczinski v. Kaczinski*, 83 OLA 469, 169 NE(2d) 36 (App).

5. This section setting out specific authorization for the attorney to do certain things in respect to the settlement of an estate is not all inclusive and the attorney has many more general powers in connection with the settlement of estate, and the doctrine of "inclusio unius est exclusio alterius" is not applicable: *In re Clark*, 40 OO(2d) 347, 11 OMisc 103, 229 NE(2d) 122 (CP).

6. The executor of a will cannot be required to name as his attorney in the administration of the estate, counsel specified by the testator in the will to be such attorney: *In re Shinnick*, 3 OO 458 (PC).

§ 2109.04 Bond.

Unless otherwise provided by law, every fiduciary shall, prior to the issuance of his letters as provided by section 2109.02 of the Revised Code, file in the probate court in which the letters are to be issued a bond with a penal sum in such amount as may be fixed by the court, but in no event less than double the probable value of the personal estate and of the annual real estate rentals which will come into such person's hands as a fiduciary. The penal sum of the bond of a guardian of the person only shall be double the probable expenditures to be made by such guardian for the ward during one year. Such bond shall be in a form approved by the court and signed by two or more personal sureties or by one or more corporate sureties approved by the court and shall be conditioned that the fiduciary will faithfully and honestly discharge the duties devolving upon him as such fiduciary, and shall be conditioned further as may be provided by law; provided that if the instrument creating the trust dispenses with the giving of a bond the court shall appoint a fiduciary without bond, unless the court is of the opinion that the interest of the trust demands it, in which event the court may require bond to be given in such amount as may be fixed by the court.

When an executive secretary who is responsible for the administration of children services in the county is appointed as trustee of the estate of a ward pursuant to section 5153.18 of the Revised Code, and has furnished bond under section 5153.13 of the Revised Code, or when the division of mental retardation or an agency under contract with the division for the provision of protective service under sections 5119.85 to 5119.89, inclusive, of the Revised Code is appointed as trustee of the estate of a ward under such sections and any employees of the division or agency having custody or control of funds or property of such a ward have furnished bond under section 5119.89 of the Revised Code, the court may dispense with the giving of a bond.

When letters are granted without bond, at any later period on its own motion or upon the application of any party interested, the court may require bond to be given in such amount as may be fixed by the court. On failure to give such bond the defaulting fiduciary shall be removed.

No instrument authorizing a fiduciary therein named to serve without bond shall relieve a successor fiduciary from the necessity of giving bond, unless the instrument clearly evidences such intention.

The court by which a fiduciary is appointed may reduce the amount of the bond of such

fiduciary at any time for good cause shown.

When two or more persons are appointed as joint fiduciaries, the court may take a separate bond from each or a joint bond from all.

HISTORY: GC §§ 10506-4, 10506-8, 10506-13, 10506-21; 114 v 320 (365-368); 116 v 385; 123 v 534; 125 v 903 (964); 129 v 1623 (EF 10-5-61); 132 v H 1 (EF 2-21-67); 134 v H 290. EF 3-23-72.

GC § 10506-21 analogous to former GC §§ 10594, 10611.

Comment

This section is also derived from GC § 10506-5.

General Code § 10506-4 and those following were intended to replace all former sections relating to bonds of fiduciaries, which were former GC §§ 10591, 10606, 10614, 10920 and 10991. The requirement of GC § 10922 that a guardian take an oath was omitted, since it did not then obtain as to other fiduciaries. General Code § 10506-21 retained the substance of the first sentence in former GC § 10611, but omitted the second sentence which required that all sureties reside in the state, and the third sentence which required that all surety bonds be filed in the court taking them. It also replaced former GC § 10594.

Cross-References to Related Sections

Conditions of administrator's bond, RC § 2109.07.

Conditions of executor's bond, RC § 2109.09.

Conditions of special administrator's bond, RC § 2109.08.

Guardian for veteran, RC § 5905.10.

No bond required when trust company is fiduciary, RC § 1109.14.

Release of sureties, RC § 2109.18.

Securities in lieu of bond, RC § 2109.13.

Special guardian for insane patient, RC § 5123.42.

See RC §§ 2109.07 et seq, 2109.20, 2113.13 which refer to this section.

Comparative Legislation

Fiduciary bond:

Cal.—Probate Code, § 541

Ill.—Rev Stat, ch. 3, § 12-5

Ind.—Burns' Stat, § 29-1-11-1

Ky.—KRS, § 395.130

Mich.—MCLA, § 704.3

N.Y.—SCPA, § 801

Pa.—Purdon's Stat, Tit. 20, § 3171

Fla.—FSA, § 733.402

Guardian's bond:

Cal.—Probate Code, § 1483

Ill.—Rev Stat, § 29-1-18-22

Ky.—KRS, § 387.070

Mich.—MCLA, § 703.11

N.Y.—SCPA, § 1708

Pa.—Purdon's Stat, Tit. 20, § 5121

Fla.—FSA, § 744.351

Forms

1 A&H Probate FORM 2109.04a et seq.

1 A&H Probate FORM 2109.02a et seq: Fiduciary; appointment, duties.

1 A&H Probate FORM 2109.06a et seq: New or additional bond.

1 A&H Probate FORM 2109.07a et seq: Bond excused when surviving spouse is sole beneficiary.

1 A&H Probate FORM 2109.17a et seq: Sureties.

1 A&H Probate FORM 2111.02a et seq, 2111.03a et seq, 2111.06a et seq: Applications, appointment of guardian.

1 A&H Probate FORM 2111.38a et seq: Bond of resident guardian.

1 A&H Probate FORM 2113.15a et seq: Special administration.

1 A&H Probate FORM 2113.19a et seq: Administration de bonis non.

Outline of Procedure

Appointment of administrator, in general. Leyshon No. 35, A&H No. 6; Executor. Leyshon No. 41, A&H No. 12; Guardian. Leyshon No. 42, A&H Nos. 13, 14; Trustee. Leyshon No. 46, A&H No. 17.

Research Aids

Amount of bond:

O-Jur2d: Fiduciaries § 179

Bond may be dispensed with:

O-Jur2d: Fiduciaries § 186 et seq

Effect of immunity upon successor:

O-Jur2d: Fiduciaries § 187

Generally:

O-Jur2d: Fiduciaries § 173 et seq

Am-Jur2d: Executors and Administrators § 126 et seq

Joint bond:

O-Jur2d: Fiduciaries §§ 183, 215

Necessity for bond:

O-Jur2d: Fiduciaries §§ 177, 178

Am-Jur2d: Executors and Administrators §§ 107, 126

ALR

Invalidity of appointment of administrator as affecting liability of surety on his bond. 113 ALR 411.

Notice to one or more co-administrators or co-executors as notice to all. 115 ALR 390.

Law review

Status and liability of an executor who is also a trustee. (Case note.) 8 OSLJ 347.

CASE NOTES AND OAG

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Trust company as administrator, 1, 9, 10, 12

1. Except at the time of issuance of letters of appointment, full power is vested in the probate court, under the provisions of both RC §§ 1107.14 and 2109.04, to require bond from a trust company as a testamentary trustee, solely within the discretion of the court: *Winters Nat. Bank &c. Co. v. Ross*, 169 OS 335, 8 OO(2d) 347, 159 NE(2d) 603.

4. For history of this section, see *Winters Nat. Bank &c. Co. v. Ross*, 169 OS 335, 8 OO(2d) 347, 159 NE(2d) 603.

5. Executors, also named as trustees under will, should give bond as trustees on completion of duties as executors (former GC § 10591 [see now RC § 2109.04]): In re *Kachelmacher*, 40 App 282, 178 NE 314.

6. Where a loss accrues to a trust fund through the default of one of five trustees appointed by will, his co-trustees will not be held responsible for such loss if they have acted in good faith and exercised that vigilance over the fund which a man of ordinary prudence would exercise over his own property: *State v. Guilford*, 18 O 500 [for opinion on former hearing, see 15 O 594].

7. But when trustees authorize one of their number to receive and control the trust fund, and are negligent in taking security and looking after the

fund, and it is lost by the defalcation of the trustee having such control, all the trustees are liable: *State v. Guilford*, 15 O 594 [for opinion reaching opposite conclusion, on rehearing, see 18 O 500].

8. Where two administrators give a joint bond, with surety, if waste is committed by one of the administrators, after the death of the other, it will be the right of the surety that the estates of both administrators shall be exhausted before the surety shall be subjected for the surviving administrator's default: *Eckert v. Myers*, 45 OS 525, 15 NE 862; see also *Horner v. Koons*, 63 OS 559, 60 NE 1131.

8.1. In a suit on a guardian's bond, containing a recital of the appointment by the proper authority, the obligors are estopped to deny the fact thus recited, or to question the validity of the appointment: *Shroyer v. Richmond*, 16 OS 455.

9. No bond is required in connection with the appointment of a bank and trust company as administrator with will annexed: *Clippinger v. Wood*, 44 OO 83, 98 NE(2d) 645 (CP).

10. General Code § 710-161 (RC § 1107.14), which provides that no bond shall be required from any trust company when appointed executor or administrator, has not been repealed by the subsequent enactment of GC § 10506-4 (RC § 2109.04) requiring every fiduciary to file a bond: *Clippinger v. Wood*, 44 OO 83, 98 NE(2d) 645 (CP).

11. Where a testator requests that bond be given by his executor in a stated amount, it is the duty of the probate court to fix the amount of such bond in accordance with GC § 10506-4 (RC § 2109.04), and the probate court in such case has no discretion to follow the testator's request or suggestion as to amount of bond of executor, if same is less than double the estimated value of the personal estate: *Tieman v. Smith*, 30 NP (NS) 544.

12. An incorporated trust company which has deposited funds with the treasurer of state as provided by law is required, notwithstanding the provisions of GC § 710-161 (RC § 1107.14), to give a bond by reason of the provisions of GC § 10506-4 (RC § 2109.04), before being qualified to act as a fiduciary, where its appointment is made and letters are issued by the probate court: 1945 OAG No.631.

DECISIONS UNDER FORMER GC § 10591

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Appointment of trustee

1. The administration of a trust fund, by testamentary trustees created by will, is clearly within the jurisdiction of the probate court: *Fidelity &c. Co. v. Wolfe*, 100 OS 332, 126 NE 414 [affirming *Wolfe v. Fidelity &c. Co.*, 11 App 58, 30 OCA 593].

2. Former GC §§ 10591 to 10600 (see now RC §§ 2109.04, 2109.05, 2109.26, 2109.27, 2129.27 to 2129.30) make no provision for the appointment of a trustee by the probate court, or for issuing letters to him as testamentary trustee: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

3. Rules governing testamentary trustees are same as those governing guardians and administrators. This section and former GC § 10596 (see now RC § 2109.26) are directory as to what court shall appoint such trustee. Jurisdiction to appoint testamentary trustee conferred by residence of beneficiary: *Boals v. Clinigan*, 6 NP(NS) 609, 16 OD 267.

Bond

4. In an action against sureties on the bond of a testamentary trustee, such sureties are bound by the judgment in a former proceeding determining the amount due from the trustee: *Braiden v. Mercer*, 44 OS 339, 7 NE 155; *Slagle v. Entrekin*, 44 OS 637, 10 NE 675; *Smith v. Rhodes*, 68 OS 500, 68 NE 7; *Smith v. Worley*, 12 App 367.

6. An order of the probate court releasing and discharging the sureties on a former bond after a new bond has been given and approved, is a valid order that cannot be challenged by any subsequent proceeding upon the former bond made in the court of common pleas: *Fidelity &c. Co. v. Wolfe*, 100 OS 332, 126 NE 414 [affirming *Wolfe v. Fidelity &c. Co.*, 11 App 58, 30 OCA 593].

7. Testamentary trustees are included within the term "an interested party" in filing an application for a new bond: *Fidelity &c. Co. v. Wolfe*, 100 OS 332, 126 NE 414 [affirming *Wolfe v. Fidelity &c. Co.*, 11 App 58, 30 OCA 593].

8. Former GC § 10591 (see now RC § 2109.04) authorizes the probate court to take a new bond from testamentary trustees, not only when manifestly required for the protection of a trust fund, but also for a substantial reduction of the expense of protecting such fund: *Fidelity &c. Co. v. Wolfe*, 100 OS 332, 126 NE 414 [affirming *Wolfe v. Fidelity &c. Co.*, 11 App 58, 30 OCA 593].

9. A person appointed by the will executor, and also trustee, to carry on a business, must give separate bonds for each position, and a petition by him as trustee should aver that he has given bond as such: *Pittsburgh, C. &c. R. Co. v. Schmidt*, 8 CC 355, 4 CD 535.

Powers and duties of trustee

10. As a general rule, the powers of an executor are co-extensive with all the trusts devolved upon him by the will, and all acts done by him in executing such trusts will be regarded as done in his capacity as executor, unless it plainly appears from the whole will that the testator intended to create a special trust to be managed by the person named as executor in the capacity of special trustee: *Matthews v. Meek*, 23 OS 272.

11. The general rule in equity is that a trustee can acquire no personal interest in the trust property, and where he is authorized to do so by statute, the validity of his title depends, in equity, upon its bona fides: *Rammelsberg v. Mitchell*, 29 OS 22.

12. In equity, a trustee may not so manage the trust res as to make profit thereby for himself, for the beneficiaries in the trust have a right to expect and require the exercise of his best judgment, care and diligence on their behalf, and the gains resulting therefrom inure to their sole benefit: *Cox v. John*, 32 OS 522.

13. And what such trustee may not do directly, he may not do through the intervention of an agent or attorney; and it makes no difference whether such agent or attorney acts for the trustee solely, or for him and others, with a view to joint profit, for what he cannot do singly, the policy of the law will not permit him to participate in doing: *Cox v. John*, 32 OS 522.

15. A trustee under a will, who was also executor,

wrongfully converted trust funds to his own use, for which he gave his note and mortgage to a third party for his beneficiaries. Held: That a promise by the beneficiaries, if he would resign, to release the mortgage, is void: *Withers v. Ewing*, 40 OS 400.

16. If a trustee of a testamentary trust invests the trust fund according to the direction of the will of the testator, and without his fault the trust fund is imperiled by reason of want of bidders at a foreclosure sale of the property mortgaged to secure the fund, and for the purpose of protecting the fund, he purchases the property at sheriff's sale, taking the title to the same in his own name as trustee, and the cestui que trust then being under no legal disability to act for himself, without protest on his part, enters into the possession of the land and uses and occupies it, or accepts from the trustee the rents or revenues thereof in lieu of the interest earnings of the trust fund had the same been continued at interest, such cestue que trust is estopped by his conduct from questioning the right or the authority of the trustee to make such purchase, and from demanding from him an accounting of an amount equal to the interest such fund would have earned during the time he so occupies the land or accepts the rents and revenues therefrom: *Willis v. Holcomb*, 83 OS 254, 94 NE 486.

DECISIONS UNDER FORMER GC § 10606

Bond—requirement

1. Executors or administrators, whether appointed in this state or elsewhere, who have not given bond in this state, and who were original parties to the action, are not authorized to prosecute an appeal to the district court without giving an appeal bond or undertaking: *Dennison v. Talmage*, 29 OS 433.

2. An order for an administration bond must comply with the provisions of this section, which provide for what purpose such bond shall be given, and accordingly one who is devisee of realty and also executor under the will may be required to give bond as executor, even if the will provides that he shall not be required to give bond, but he cannot be required to give bond for the sole purpose of preserving the interest of the heirs in such realty if such will should be set aside: *In re Wilson*, 14 NP(NS) 443, 31 OD 663.

3. Where a will makes a person both trustee and executor, each separate from the other, such person must give separate bonds: *Pittsburgh, C. &c. R. Co. v. Schmidt*, 8 CC 355, 4 CD 535.

—Action thereon

4. Suit on administrator's bond, at the instance of the creditor, must aver a demand; an averment that the claim was allowed is not sufficient: *Woodson v. State*, 17 O 161.

5. Executor's or administrator's bond is governed by the laws in force at the time it was entered into; and such bond, describing decedent as James L. Finley, cannot, by parol evidence, be made applicable to Joseph L. Finley; therefore, the obligors thereon are not responsible for the estate of the latter: *McGovney v. State*, 20 O 93.

6. If the petition does not show the lapse of time necessary for suit on the bond, it is demurrable. Where the action is against the surviving bondsmen and administratrix of deceased bondsman, plaintiff assumes, as to such administratrix, the character of creditor of the estate. When the claim does not fall within any of the exceptions in § 98 of the administrators' act, such action cannot be maintained until the expiration of sixteen months: *Hammerle v. Kramer*, 12 OS 252.

§ 2109.05 Bond; trust created by will. (GC §§ 10506-19, 10506-20)

When deemed necessary by the probate court and not otherwise directed in the will, a bond, as provided by sections 2109.01 to 2109.58, inclusive, of the Revised Code, shall be required in all trusts created by will and not fully discharged, on the petition of an interested person and after notice to the trustee.

If such a trustee fails to give bond within the time ordered by the court, he shall be removed from his trust or be considered to have declined it. Another person may be appointed in his stead upon giving the required bond.

HISTORY: GC §§ 10506-19, 10506-20; 114 v 320 (368). Eff 10-1-53. See former GC §§ 10592, 10593.

Research Aids

New appointment on failure to give bond:

O-Jur2d: Fiduciaries §§ 15, 322

Trust created by will:

O-Jur2d: Fiduciaries § 178

Am-Jur2d: Trusts § 550

ALR

Right of surety to terminate liability as regards future defaults of principal. 118 ALR 1261.

Changes in corporate organization as affecting status of corporation as trustee. 131 ALR 753.

Necessity and sufficiency of service on removal of nonresident trustee. 15 ALR2d 610.

§ 2109.06 New or additional bond. (GC §§ 10506-9, 10506-10, 10506-11, 10506-12)

The probate court by which a fiduciary is appointed may, on its own motion or on the application of any interested party, and after notice to the fiduciary, require a new bond or sureties or an additional bond or sureties, whenever, in the opinion of such court, the interests of the trust demand it.

Immediately upon the filing of the inventory by a fiduciary, the court shall determine whether the amount of the bond of such fiduciary is sufficient and shall require new or additional bond if in the opinion of the court the interests of the trust demand it.

When a new bond is required as provided in this section, the sureties in the prior bond shall nevertheless be liable for all breaches of the conditions set forth in such bond which are committed before the new bond is approved by the court.

A fiduciary who fails within the time fixed by the court to furnish new or additional bond or sureties shall be removed and some other person appointed in his stead, as the circumstances of the case require.

HISTORY: GC §§ 10506-9, 10506-10, 10506-11, 10506-12; 114 v 320 (366). Eff 10-1-53. GC § 10506-9 analogous to former GC §§ 10864, 10924, 10925; GC § 10506-11 analogous to former GC § 10865; GC § 10506-12 analogous to former GC § 10866.

Forms

1 A&H Probate FORM 2109.06a et seq.

1 A&H Probate FORM 2111.38a et seq: New or additional bond of resident guardian.

Research Aids

Effect on sureties:

O-Jur2d: Fiduciaries § 216

Am-Jur2d: Trusts § 553

New or additional bond:

O-Jur2d: Fiduciaries §§ 179, 180

Removal by court:

O-Jur2d: Fiduciaries §§ 15, 322

ALR

Changes in corporate organization as affecting status of corporation as trustee. 131 ALR 753.

Necessity and sufficiency of service on removal of nonresident trustee. 15 ALR2d 610.

CASE NOTES AND OAG

1. A new bond given, on the old sureties becoming nonresident, is not invalid for want of consideration, and the sureties are liable: *King v. Bell*, 36 OS 460.

2. The sureties on the new bond are liable for assets embezzled by the executor while the old bond was subsisting: *Foster v. Wise*, 46 OS 20, 16 NE 687, 15 AmSt 542.

3. The liability of the sureties on the subsequent bond is secondary to that of the sureties on the bond in force at the time the estate was wasted, and if the former have made good the loss, they may recover against the latter the full amount paid by them on account thereof: *Corrigan v. Foster*, 51 OS 225, 37 NE 263.

4. Sureties on the second bond of a testamentary trustee are liable for default on the part of the trustee in not accounting for funds, which were misappropriated before the execution of the bond, where the account was filed, and the judgment finding the amount due from the trustee was rendered, after the execution of the second bond: *Smith v. Worley*, 12 App 367.

5. The journal entry showing nothing further than a new bond given by order of court, and upon motion of the guardian, the new bond containing only one of the former sureties. Held: To be a new bond and not an additional bond, and where defalcation discovered on final settlement, the presumption is that it occurred during the term of the last bond: *Pummill v. Baumgartner*, 3 NP 40, 4 OD 69.

§ 2109.07 Bond conditions, administrative; exception.

The bond required of an administrator by section 2109.04 of the Revised Code shall not be required of a surviving spouse to administer his deceased spouse's estate, where the surviving spouse is entitled to the entire net proceeds of the estate. The bond otherwise required by section 2109.04 of the Revised Code of an administrator shall be conditioned as follows:

(A) To make and return to the probate court on oath, within the time required by section 2115.02 of the Revised Code, a true inventory of all moneys, chattels, rights, and credits of the deceased that are to be administered, and that come to the administrator's possession or knowl-

edge, and an inventory of the real estate of the deceased;

(B) To administer and distribute according to law all the moneys, chattels, rights, and credits of the deceased, the proceeds of any action for wrongful death or of any settlement, with or without suit, of a wrongful death claim, and the proceeds of all his real estate sold that come to the possession of the administrator, or to the possession of any person for him;

(C) To render upon oath a just and true account of his administration at the times required by section 2109.30 of the Revised Code;

(D) To deliver the letters of administration into court in case a will of the deceased is proved and allowed.

HISTORY: GC § 10506-14; 114 v 320 (366); 119 v 394; 136 v S 145. Eff 1-1-76.

See former GC § 10618.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2109.07 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

- * Bond of administrator or executor:
 - Cal.—Probate Code, § 541
 - Ill.—Rev Stat, ch 3, § 12-1
 - Ind.—Burns' Stat, § 29-1-11-1
 - Ky.—KRS, § 395.130
 - Mich.—MCLA, § 704.3
 - N.Y.—SCPA, § 801
 - Pa.—Purdon's Stat, Tit. 20, § 3171
 - Fla.—FSA, § 733.402

Forms

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

1 A&H Probate FORM 2109.06a et seq: New or additional bond.

Research Aids

Conditions:

O-Jur2d: Fiduciaries §§ 194, 195

Am-Jur2d: Executors and Administrators § 127

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

Wrongful death claims

1. Administrator must give bond securing faithful performance of duties to administer money arising from claim for wrongful death: United States Fidelity &c. Co. v. Decker, 122 OS 285, 171 NE 333.

Action on bond

2. Heir cannot sustain an action against security on an administrator's bond, until the administrator's accounts are settled with the court, or plaintiff's right established by judgment: Treasurer of Pickaway v. Hall, 3 O 225.

3. A devastavit by an administrator cannot be suggested and proved, in a suit on the administrator's bond, against the administrator and his securities: Stewart v. Treasurer of Champaign County, 4 O 98.

4. Sureties of an administrator are liable on their

bond, for the proceeds of lands sold by the administrator, under an order of court for the payment of debts: Wade v. Graham, 4 O 126.

5. The sureties upon an administrator's bond are liable for the debt of the administrator, due the decedent, regardless of the solvency or insolvency of said administrator: Perkins v. Scott, 9 CC 207, 6 CD 226.

6. The sureties on the bond of an administrator are liable for the proceeds of life insurance, which are payable to executors, administrators, etc., paid the administrator after his appointment and not accounted for by him: Webb v. Roettinger, 12 CC 731, 4 CD 270.

7. The bond can only be enforced against the surety by a personal action, even if the bond is within the jurisdiction of the court: Gilbert v. Gilbert, 13 CC 29, 7 CD 58.

8. A probate judge is not liable for accepting a bond of an administrator with the sureties' names forged and, upon such bond, issuing letters of administration: Ingersoll v. Smith (supreme court, without report), 36 Bull 302.

§ 2109.08 Bond conditions, special administrator. (GC § 10506-15)

The bond required by section 2109.04 of the Revised Code of a special administrator shall be conditioned as follows:

(A) To make and return into the probate court, within one month, a true inventory of the moneys, chattels, rights, and credits of the deceased which have or may come to his possession or knowledge;

(B) To account on oath for the moneys, chattels, and debts of the deceased received by him as special administrator, whenever required by the court, and deliver them to the person authorized to receive them.

HISTORY: GC § 10506-15; 114 v 320 (367). Eff 10-1-53. See former GC § 10620.

Forms

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

1 A&H Probate FORM 2113.15a et seq: Special administration.

Research Aids

Conditions:

O-Jur2d: Fiduciaries § 196

AmJur2d: Executors and Administrators §§ 127, 656

§ 2109.09 Bond conditions, executors. (GC § 10506-16)

The bond required by section 2109.04 of the Revised Code of an executor shall be conditioned as follows:

(A) To make and return to the probate court on oath, within the time required by section 2115.02 of the Revised Code, a true inventory of all the moneys, chattels, rights, and credits of the testator which are to be administered and which come to his possession or knowledge, and an inventory of the real estate of the deceased;

(B) To administer and distribute according to law and the will of the testator all such testator's

moneys, chattels, rights, and credits, the proceeds of any action for wrongful death or of any settlement, with or without suit, of a wrongful death claim, and the proceeds of all his real estate sold which come to the possession of the executor or to the possession of any other person for him;

(C) To render upon oath a just and true account of his administration at the times required by section 2109.30 of the Revised Code.

HISTORY: GC § 10506-16; 114 v 320 (367); 119 v 394 (399), § 1. Eff 10-1-53.

Forms

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

1 A&H Probate FORM 2113.19a et seq: Administration de bonis non.

Research Aids

Conditions:

O-Jur2d: Fiduciaries § 197

Am-Jur2d: Executors and Administrators § 127

§ 2109.10 Bond when executor or administrator is sole residuary legatee or distributee. (GC § 10506-18)

If an executor or administrator is sole residuary legatee or distributee, instead of giving the bond prescribed by section 2109.04 of the Revised Code, he may give a bond to the satisfaction of the probate court conditioned as follows:

(A) To pay the costs of administration and all the debts and legacies of the decedent to the extent of the assets of the estate;

(B) If executor, to pay over such testator's estate to the person entitled thereto in case the will is set aside;

(C) If administrator, to pay over such testator's estate to the person entitled thereto in case a will is probated after his appointment.

The giving of such bond shall not discharge the lien on the decedent's real estate for the payment of his debts, except that part which has been lawfully sold by the executor or administrator.

HISTORY: GC § 10506-18; 114 v 320 (368); 119 v 394 (399), § 1. Eff 10-1-53. Analogous to former GC §§ 10608, 10610.

Forms

1 A&H Probate FORM 2109.10a et seq.

Research Aids

Bond of residuary legatee:

O-Jur2d: Fiduciaries § 198

CASE NOTES AND OAC

1. In an action against an executor, upon his bond as residuary legatee, it is not necessary that the petition allege the presentment of the claim for allowance, or other matters specified in GC § 10740 (see now RC § 2117.30): *Stevens v. Hartley*, 13 OS 525.

2. Where the executor is residuary legatee, this section provides a method whereby the probate court

may, in a measure, dispense with the general administration: *McBride v. Vance*, 73 OS 258, 76 NE 938, 112 AmSt 723.

3. The bond of a residuary legatee is a lien as against the legatee upon realty conveyed in trust for protection of the surety on the bond: *Tidd v. Bloch*, 4 CC(NS) 216, 16 CD 113.

4. The bond for which provision is made in this section is not a bond given by executors of an estate to secure a legacy which is payable in installments, and for the payment of which such executors have set aside certain realty, the rents of which are sufficient to pay such installments of the legacy, and to secure the payments of such rent, such bond is given: *Shields v. Matthew*, 22 CC(NS) 398, 33 CD 636.

§ 2109.11 Bond conditions, testamentary trustees. (GC § 10506-18a)

The bond required by section 2109.04 of the Revised Code of a testamentary trustee shall be conditioned as follows:

(A) To make and return to the probate court on oath, within the time required by section 2109.58 of the Revised Code, a true inventory of all moneys, chattels, rights, credits, and real estate belonging to the trust which come to his possession or knowledge;

(B) To administer and distribute according to law and the will of the testator all moneys, chattels, rights, credits, and real estate belonging to the trust which come to the possession of the trustee or to the possession of any other person for him;

(C) To render upon oath a just and true account of his administration at the times required by section 2109.30 of the Revised Code.

HISTORY: GC § 10506-18a; 119 v 394 (420), § 3. Eff 10-1-53.

Forms

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

Research Aids

Bond of testamentary trustee:

O-Jur2d: Fiduciaries § 199

Am-Jur2d: Trusts § 550 et seq

ALR

Liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes. 68 ALR3d 1265.

§ 2109.12 Bond conditions, guardians. (GC § 10506-20a)

The bond required by section 2109.04 of the Revised Code of a guardian shall be conditioned as follows:

(A) To make and return to the probate court on oath, within the time required by section 2111.14 of the Revised Code, a true inventory of all moneys, chattels, rights, credits, and real estate belonging to the ward which come to his possession or knowledge;

(B) To administer and distribute according to law all moneys, chattels, rights, credits, and real estate belonging to the ward which come to the possession of the guardian or to the possession of any other person for him;

(C) To render upon oath a just and true account of his administration at the times required by section 2109.30 of the Revised Code.

HISTORY: GC § 10506-20a; 119 v 394 (421), § 4. **EF** 10-1-53.

Cross-References to Related Sections

Guardian for veteran, RC § 5905.10.

Forms

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

1 A&H Probate FORM 2109.06a et seq: New or additional bond.

1 A&H Probate FORM 2111.37a et seq: Resident guardian of nonresident.

1 A&H Probate FORM 2111.38a et seq: Bond of resident guardian; new or additional.

Research Aids

Bond of guardian:

O-Jur2d: Fiduciaries § 200

Am-Jur2d: §§ 48, 187 et seq

CASE NOTES AND OAG

[DECISIONS UNDER FORMER ANALOGOUS SECTION]

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Appointment

1. A guardian derives his power to act from the appointment and bond. Letters of guardianship need not in fact issue: *Maxom v. Sawyer*, 12 O 195.

2. A guardian appointed by the probate court has no power to act or control the property of his ward until he has given bond with surety approved by court. Otherwise he has no power whatever: *State v. Sloane*, 20 O 327.

3. In a suit on a guardian's bond containing a recital of the appointment of such guardian by the proper authority, the obligors are estopped to deny the fact thus recited, or question the validity of the appointment: *Shroyer v. Richmond*, 16 OS 455.

Bond

6. Substituted sureties are liable for the unpaid residue, whether or not the same is partly or entirely the proceeds of sale of real estate: *Tuttle v. Northrup*, 44 OS 178, 5 NE 659.

7. Where a guardian gave a bond with three sureties, under this section, and afterward gave a special bond with two sureties for the sale of land and died insolvent and a defaulter, the sureties on both bonds were co-sureties only to the amount of the proceeds of the sale of realty: *Swesten v. McWhinney*, 64 OS 343, 60 NE 565.

Liability on bond

9. The refusal of guardian to pay over to his ward or attorney money in his hands belonging to such minor, is not a breach of his bond, and such refusal will not give the minor, by his next friend, a right to institute suit on the bond: *Favorite v. Booher*, 17 OS 548.

10. In a settlement of a guardian's account, he was credited with the payment of moneys for his ward, which in fact had not been paid. The account was subsequently corrected during the minority of the ward. Held: Liability of surety in the guardian's bond is not affected. Sureties are liable for all money received: *Scobey v. Gano*, 35 OS 550.

11. A right of action on a guardian's bond, to recover from the sureties the amount remaining in the hands of the guardian, first accrues to the ward when such amount is ascertained by the probate court on the settlement of the guardian's final account: *Newton v. Hammond*, 38 OS 430 [see also *State v. Beatty*, 52 OS 656]; *McClelland v. State ex rel Clark*, 101 OS 42, 127 NE 409 [affirming *State ex rel Clark v. McClelland*, 30 OCA 522, 35 CD 422].

12. Delay of ward, on arriving of age, to compel guardian to settle his accounts does not discharge surety: *Newton v. Hammond*, 38 OS 430 [approved, *Gorman v. Taylor*, 43 OS 86]; see also *State v. Beatty*, 52 OS 656, 44 NE 1139.

13. Where a guardian, after giving bond, embezzles money of his ward's, the subsequent discharge of the surety in the bond, and acceptance by the court of a bond with other surety, will not exonerate the surety in the first bond with respect to the money so embezzled: *Eichelberger v. Gross*, 42 OS 549.

14. Approval of a partial account, not showing that the guardian had received certain money which he had embezzled, and which he charged himself with in a later account, is not a res adjudicata in an action for them on the bond which was in force before the first account was filed: *Eichelberger v. Gross*, 42 OS 549.

15. In suit on a guardian's bond in the common pleas court to recover the amount of a judgment rendered against the guardian upon the settlement of his account, the defendant surety interposed an answer and cross-petition averring that the judgment was for a greater amount than was actually due, and was obtained by the fraud of the guardian. Held: The fact that the pleading fails to deny the amount so adjudged due in its entirety does not deprive the court of power to grant relief if the facts are found to be true: *Gantz v. Gease*, 82 OS 34, 91 NE 872.

16. A guardian of the person and estate having received, after giving bond, money of the ward and converted to his own use, the subsequent resignation and removal to and reappointment and qualification in another state, at desire of ward, and filing an account there, in which he charged himself with the amount found by the former court at time of resignation will not exonerate the sureties on the first bond for the money converted, but they will be liable on the ground of failing to perform the duties of guardian: *Penn v. McBride*, 1 CC 285, 1 CD 157.

17. No cause of action on the bond of a guardian accrues in favor of his ward until the filing of the guardianship account and the settlement of the estate

in the probate court: *Wegner v. Wiltzie*, 3 CC(NS) 410, 13 CD 302.

18. Where defalcation is discovered on final settlement, the presumption is that it occurred during the term of the last bond, there being two bonds: *Pummill v. Baumgartner*, 3 NP 40, 4 OD 69.

19. After the ward becomes of age, further dealings of guardian are not covered by bond: *In re Streit*, 12 OD(NP) 158.

20. To maintain an action on a guardian's bond against the sureties for money of the ward not paid over by the guardian, the amount must first be ascertained by the probate court upon settlement of his accounts: *Schwab v. Rappold*, 12 Bull 197.

Jurisdiction

21. The common pleas court obtains no jurisdiction of an action on a bond of a guardian, to compel an accounting and payment of funds belonging to his ward, from the fact that the guardian died without filing his account, and left no books of account or memoranda from which his indebtedness could be ascertained: *Wegner v. Wiltzie*, 3 CC(NS) 410, 13 CD 302.

22. A suit in equity on a guardian's bond to compel an accounting cannot be maintained without a showing that the powers and jurisdiction of the probate court are ineffectual to secure such accounting: *Newman v. Hammond*, 38 OS 430 [approved, *Gorman v. Taylor*, 43 OS 86].

Rights of sureties against guardian

23. An indebtedness paid by reason of suretyship on the bond of a guardian relates back to the date of the bond so as to give sureties the rights of creditors in reference to fraudulent conveyances: *Boise v. Johnson*, 1 CC(NS) 451, 15 CD 331.

Limitations

24. The four years' limitation prescribed by the act for the settlement of estates within which suits are to be commenced against executors and administrators applies to an action on a guardian's bond; and the disability of infancy will not save the plaintiff from the operation of the statute: *Favorite v. Booher*, 17 OS 548.

25. Limitations begin to run on the bond from the time of liquidation or final settlement in the probate court: *Newton v. Hammond*, 38 OS 430 [approved, *Gorman v. Taylor*, 43 OS 86]; see also *State v. Beatty*, 52 OS 656, 44 NE 1139. Contra: Under a prior statute: *State v. Humphreys*, 7 O (pt1) 223.

26. Where sureties were compelled to make good a fraudulent deficiency of a guardian, their right of action as to the fraudulent transfer accrued at the time of the transfer or at the time of their discovery of the fraud, and the statute runs from these dates and not the date of payment made under bond: *Boise v. Johnson*, 1 CC(NS) 451, 15 CD 331.

§ 2109.13 Deposit of securities in lieu of bond.

In any case where a bond is required by the probate court from a fiduciary and the value of the estate or fund is such that the court deems it inexpedient to require security in the full amount prescribed by section 2109.04 of the Revised Code[,] said court may direct the deposit of any suitable personal property belonging to the estate or fund with a savings bank, national bank, or trust company incorporated under the laws of this

state or of the United States, as may be designated by order of the court.

Such deposit shall be made in the name of the fiduciary and the personal property deposited shall not be withdrawn from the custody of such bank or trust company except upon the special order of the court. No fiduciary shall receive or collect the whole or any part of the principal represented by such personal property without the special order of such court. Such an order can be made in favor of the fiduciary only when the court within its discretion, having regard for the purpose for which such order is requested, the disposition to be made of such assets as may be released, the value of such assets as related to the total value of the estate, and the period of time such assets will remain in the possession of the fiduciary, finds that the original bond previously given and then in force will be sufficient to protect the estate; otherwise, the court, as a condition to the release of such personal property so deposited, shall require the fiduciary to execute an additional bond in such amount as the court may determine.

After such deposit has been made and after the filing with the court of a receipt for such personal property executed by the designated bank, which receipt shall acknowledge that such personal property is held by said bank subject to the order of the court, such court may fix or reduce the amount of the bond so that the amount of the penalty thereof is determined with respect to the value of the remainder only of the estate or fund, without including the value of the personal property so deposited. Neither the fiduciary nor his sureties shall be liable for any loss to the trust estate resulting from such deposit as is authorized and directed by the court pursuant to this section, provided such fiduciary has acted in good faith.

This section may be invoked simultaneously with the initial application for appointment of the fiduciary provided that an interim receipt of the bank or trust company for which the application for appointment as depository is being made, acknowledging that it already has received temporary deposit of the personal property described in the application for appointment as depository, accompanies the simultaneous applications for appointment of fiduciary and for appointment of the depository.

HISTORY: GC §§ 10506-23, 10506-25, 10506-24; 114 v 320 (368, 369); 116 v 385 (391), § 1; 125 v 411 (412); 127 v 36 (37), § 1 (Eff 9-4-57); 130 v 613, § 1. Eff 7-17-63.

GC § 10506-23 analogous to former GC § 10618-1; GC § 10506-24 analogous to former GC § 10618-2; GC § 10506-25 analogous to former GC § 10618-3.

Cross-References to Related Sections

Deposited securities excluded in computation of premium paid to surety, RC § 3929.15.

See RC § 2109.30 which refers to this section.

Comparative Legislation

Securities in lieu of bond:
Cal.—Probate Code, § 541.1
Ill.—Rev Stat, ch 3, § 12-7
N.Y.—SCPA, § 803

Forms

1 A&H Probate FORM 2109.13a et seq.

Research Aids

Deposit of securities in lieu of bond:
O-Jur2d: Fiduciaries § 188 et seq; § 287

Law Reviews

See explanatory article in 4 OBar 305.
Probate code amendments. Francis J. Eberly. 14 OSLJ 368.

CASE NOTES AND OAG

1. The provisions of GC § 10506-23 (RC § 2109.13), relative to the furnishing of bonds by fiduciaries, are properly invoked by the filing of two related applications, one for the appointment of an administrator de bonis non and the other for the designation of a depository: In re Langenbach, 70 App 132, 24 OO 447, 45 NE(2d) 129.

2. Where certificates of stocks, bonds, notes, or other securities belonging to an estate have been deposited and all provisions of the statutes have been complied with, and a fiduciary has filed an approved bond with penal sum in not less than double the value of the remainder only of the estate or fund, under GC § 9572 (RC § 3929.15), the maximum amount a probate court shall allow to be paid a surety company for becoming surety on the bond of such fiduciary must not exceed a fourth of one per cent per annum on the amount of such bond: In re Brown, 41 OO 354, 79 NE(2d) 340 (PC).

§ 2109.14 Deposit of works of art in museum authorized; reduction of bond. (GC § 10506-25a)

If the estate held by a fiduciary consists in whole or in part of works of nature or of art which are suitable for preservation and exhibition in a museum or other similar institution, the probate court may authorize and direct that any or all of such works be deposited with a corporation conducting such a museum or other similar institution; provided that no such deposit shall be authorized or directed except with a corporation having a net worth of at least ten times the value of the works to be deposited. Such deposit shall be made in the name of the fiduciary and the property deposited shall not be withdrawn from the custody of such depository or otherwise deposited except upon the special order of the court. The probate judge may impose such conditions relative to insurance and the care and protection of the property deposited as the court thinks best for the interests of the estate and the beneficiaries thereof. After such deposit has been made, a receipt for said property executed by said corporation shall be filed with the court, which receipt shall acknowledge that said property is held by said corporation subject to the order of

the court. When such receipt is filed, the court may fix or reduce the amount of the bond so that the amount of the penalty thereof is determined with respect to the value of the remainder only of the estate or fund, without including the value of the property deposited. Neither the fiduciary nor his sureties shall be liable for any loss to the trust estate resulting from a deposit authorized and directed by the court pursuant to this section, provided such fiduciary has acted in good faith.

HISTORY: GC § 10506-25a; 117 v 435 (436), § 1. Eff 10-1-53.

Cross-References to Related Sections

Bonds signed in blank, RC § 3.34.

Research Aids

Deposit of works of art:
O-Jur2d: Fiduciaries § 188 et seq

§ 2109.15 Informality of bond. (GC § 10506-32)

No bond executed by a fiduciary shall be void or held invalid because of any informality in such bond or because of informality or illegality in the appointment of such fiduciary. Such bond shall have the same effect as if the appointment had been legally made and the bond executed in proper form.

HISTORY: GC § 10506-32; 114 v 320 (370). Eff 10-1-53. Analogous to former GC § 10926.

Research Aids

Informality of bond:
O-Jur2d: Fiduciaries § 184
Am-Jur2d: Executors and Administrators § 150

CASE NOTES AND OAG

1. In a suit on a guardian's bond, containing a recital of the appointment by the proper authority, the obligors are estopped to deny the fact thus recited, or to question the validity of the appointment: Shroyer v. Richmond, 16 OS 455.

§ 2109.16 One bond for two or more wards. (GC § 10506-33)

When a person is appointed guardian of several minors who are children of the same parentage and inherit from the same estate, separate bonds shall not be required. In such cases only one application for letters of guardianship is necessary and the letters issued to such guardian shall be in one copy and not one copy for each minor. The probate court approving and recording such bond and issuing such letters shall charge the fees allowed by section 2101.16 of the Revised Code for such services. Such fees shall be charged but once for all the wards and not once for each ward.

HISTORY: GC § 10506-33; 114 v 320 (370). Eff 10-1-53. Analogous to former GC § 10927.

Forms

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

Research Aids

Single bond permitted:

O-Jur2d: Fiduciaries § 182, Guardian and Ward § 80

§ 2109.17 Sureties. (GC §§ 10506-6, 10506-7, 10506-7a)

If the bond of a fiduciary is executed by personal sureties, one or more of such sureties shall be a resident of the county in which such fiduciary applies for appointment. The sureties shall own real property worth double the sum to be secured, over and above all encumbrances, and shall have property in this state liable to execution equal to the sum to be secured. When two or more sureties are offered on the same bond they must have in the aggregate the qualifications prescribed in this section. Such sureties shall qualify under oath and may be required to exhibit to the probate court satisfactory evidence of the ownership of such real property.

No corporate surety shall be acceptable on a fiduciary's bond in such court unless such surety is acceptable to the United States government on surety bonds in like amount, as shown by the regulations issued by the secretary of the treasury of the United States, or in any other manner, to the satisfaction of the court. Such surety shall also be qualified to do business in this state.

A surety on the bond of a fiduciary shall not be held liable for any debt of such fiduciary to the estate represented by him existing at the time such fiduciary was appointed; but such surety shall be liable to the extent that such debt has been made uncollectible by wrongful act of such fiduciary after appointment.

HISTORY: GC §§ 10506-6, 10506-7, 10506-7a; 114 v 320 (365); 119 v 394 (420), § 2. Eff 10-1-53.

Cross-References to Related Sections

Qualifications of sureties, in criminal cases, RC § 2937.24.

See RC § 2127.27 which refers to this section.

Forms

1 A&H Probate FORM 2109.17a et seq.

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

Research Aids

Liability of sureties:

O-Jur2d: Fiduciaries § 211

AM-Jur2d: Executors and Administrators § 141 et seq; Trusts § 552 et seq

Qualification of corporate sureties:

O-Jur2d: Fiduciaries § 203

Qualification of personal sureties:

O-Jur2d: Fiduciaries § 202

CASE NOTES AND OAG

1. A bond with one freehold surety is sufficient if

the surety is good for the amount of the bond: Arrow-smith v. Gleason, 129 US 86, 32 LEd 630, 9 SCt 237, 6 OFD 310.

2. Sureties not discharged from liability by fraud of the executor in procuring their execution of the bond, where the beneficiaries of the estate are themselves innocent of fraud: McCaughey v. Jacoby, 54 OS 487, 44 NE 231.

§ 2109.18 Release of a fiduciary's sureties.

A surety of a fiduciary or the executor or administrator of a surety may make application at any time to the probate court to be released from the bond of such fiduciary. Such surety shall file his written request therefor with the probate judge of such court and give at least five days' notice in writing to such fiduciary. If, upon the hearing, the court is of the opinion that there is good reason therefor, it shall release such surety. The death of a surety shall always be good cause.

A fiduciary may make application at any time to the court for the release of his sureties. Such fiduciary shall file his written request therefor with the judge of such court and give at least five days' notice in writing to such sureties. If, upon the hearing, the court is of the opinion that there is good reason to release such sureties, it shall order the fiduciary to file an account, as provided by section 2109.30 of the Revised Code, and such sureties shall be released after the fiduciary files a new bond which is approved by the court.

If such fiduciary fails to give new bond as directed, he shall be removed and his letters of appointment superseded. Such original sureties shall not be released until the fiduciary gives a bond, but shall be liable for such fiduciary's acts only from the time of executing the original bond to the filing and approval by the court of the new bond.

The costs of such proceeding shall be paid by the surety applying to be released, unless it appears to the court that the fiduciary is insolvent, incompetent, or is wasting the assets of the estate.

HISTORY: GC §§ 10506-26, 10506-27, 10506-28, 10506-29; 114 v 320 (369, 370). Eff 10-1-53.

Cross-References to Related Sections

Surety on bond of county commissioner, RC § 305.04.

See RC § 2109.28 which refers to this section.

Forms

1 A&H Probate FORM 2109.18a et seq.

Outline of Procedure

Release of surety on application of fiduciary. Leyshon No. 99, A&H No. 78; Own application. Leyshon No. 98, A&H No. 77

Research Aids

New bond:

O-Jur2d: Fiduciaries § 216

Release:

O-Jur2d: Fiduciaries §§ 205, 206, 322

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1. Release of the surety on a guardian's bond and acceptance of a new bond with other surety, will not exonerate the surety in the first bond as to money embezzled by the guardian previous to his release: *Eichelberger v. Gross*, 42 OS 549.

2. Where, after a guardian has sold certain real estate of the ward and received the proceeds, one of the sureties on his general bond was released and he gave a new bond, with the other old and one new surety, and later defaulted. Held: The sureties on the last general bond are liable for the amount due the estate, whether or not the same is partly or entirely the proceeds of the sale of such real estate: *Tuttle v. Northrup*, 44 OS 178, 5 NE 659.

3. The sureties on the new bond are liable for assets embezzled by the executor while the old bond was subsisting: *Foster v. Wise*, 46 OS 20, 16 NE 687, 15 AmSt 542.

5.1 Under GC §§ 10506-26 to 10506-29, inclusive, (RC § 2109.18), a succeeding fiduciary is not authorized to file an application in the probate court for the release of the sureties on the bond of a predecessor deceased fiduciary, and such sureties may not be finally released prior to the approval of the final accounting of the representative of the deceased fiduciary: *In re Gray*, 162 OS 384, 55 OO 224, 123 NE(2d) 408.

6. Where a guardian, after converting funds of the estate to his own use, resigned, removed to another state, was appointed and qualified there, the filing of his final account there, charging himself with the amount due the estate at the time of his resignation, will not exonerate the sureties in the first bond. Nor will the fact that before such second appointment he was selected by his ward as her guardian operate to release such sureties: *Penn & Collins v. McBride*, 1 CC 285, 1 CD 157.

7. Sureties not discharged by insolvency of administrator: *Perkins v. Scott*, 9 CC 207, 6 CD 226.

8. The order for release, herein provided for, is not effectual until a new, valid, lawful bond is given: *Howenstine v. Sweet*, 13 CC 239, 7 CD 498.

9. Where defalcation is discovered on final settlement, the presumption is that it occurred during the term of the last bond: *Pummill v. Baumgartner*, 3 NP 40, 4 OD 69.

11. Where it appears that the administrator was given proper notice of the hearing on application of his sureties to be released from their bond, and an order was made releasing such sureties and ordering a new bond, the probate court could, without further notice, under the provisions of former GC § 10862 (see now RC § 2109.18), order the removal of said administrator, as such action is not governed by the

provisions of GC § 10629 (now GC § 10509-19 [RC § 2113.18]): *Swartz v. Swartz*, 12 OLA 158.

12. Release of one surety releases all: *Dowell v. Guion*, 3 Bull 735.

13. The sureties are not released by the ward's receipt in full to the guardian, after majority, without payment in fact: *Meier v. Herancourt*, 8 Bull 29.

14. This section gives full and ample protection to a surety whose confidence may be abused by his principal: *Souhrada v. David*, 15 NP(NS) 257, 29 OD 496.

16. Where the probate court released sureties on an administrator's bond, being induced to do so by a fraudulent presenting of a forged new bond, an original action in the common pleas court will lie to annul such judgment: *Howenstine v. Sweet*, 13 CC 239, 7 CD 498.

17. When debtor was executor of creditor, and he was removed as executor and his sureties released, and was then appointed administrator de bonis non, and new bond was approved, the sureties on bond as executor are liable for any shortage at time of removal, but not for the debt of executor to testator: *United States Fidelity & Co. v. Jones*, 22 App 345, 153 NE 281.

§ 2109.19 Bond of indemnity to surety.

If a fiduciary wastes or unfaithfully administers an estate, on the application of a surety on the fiduciary's bond the probate court granting letters of appointment to such fiduciary may order him to render an account and to execute to such surety a bond of indemnity with sureties approved by the court. Upon neglect or refusal to execute such bond within the time ordered, the court may remove such fiduciary, revoke his letters of appointment, and appoint another fiduciary in his place.

HISTORY: GC § 10506-30; 114 v 320 (370); 125 v 903 (965). Eff 10-1-53. Analogous to former GC § 10867.

Forms

1 A&H Probate FORM 2109.19a et seq.

1 A&H Probate FORM 2109.24 et seq: Removal of fiduciary.

1 A&H Probate FORM 2109.30a et seq: Fiduciary's account.

Research Aids**Indemnity:**

O-Jur2d: Fiduciaries § 248

Am-Jur2d: Executors and Administrators § 153; Trusts § 561

Removal of fiduciary for failure to execute bond of indemnity.

O-Jur2d: Fiduciaries §§ 15, 322

CASE NOTES AND OAG

1. The indemnity bond herein provided for covers past as well as future acts of the executor for which the obligees might be liable, if the obligees suffer loss therefrom after the date of the bond: *Buffington v. Bronson*, 61 OS 231, 56 NE 762.

§ 2109.20 Guardian may give real estate mortgage to secure bond. (GC § 10506-31)

Instead of the sureties required on his bond by section 2109.04 of the Revised Code, a guardian, of the person and estate or of the estate

only, of any ward may execute to such ward a mortgage upon unencumbered real estate. Such guardian must first furnish an abstract of his title to such real estate to the probate court and it must be shown by affidavits to the court's satisfaction that, exclusive of improvements thereon, such real estate is of a value sufficient to secure the bond. The mortgage shall be recorded in the county where the property is situated and filed with such court.

HISTORY: GC § 10506-31; 114 v 320 (370). **EF** 10-1-53. Analogous to former GC § 10921.

Forms

1 A&H Probate FORM 2109.20a et seq.

Research Aids

Mortgage to secure bond:

O-Jur2d: Fiduciaries § 204

§ 2109.21 Residence qualifications of fiduciary.

An administrator, special administrator, administrator de bonis non, or administrator with the will annexed shall be a resident of this state and shall be removed on proof that he is no longer such resident.

A guardian shall be a resident of the county, except that the court may appoint a nonresident of the county who is a resident of the state as guardian of the person, the estate, or both, and except that a nonresident of the county or of the state may be appointed a guardian, if named in a will by a parent of a minor, as provided by section 2111.12 of the Revised Code. A guardian, other than a guardian named in a will by a parent of a minor, may be removed on proof that he is no longer a resident of the county in which he resided at the time of his appointment, and shall be removed on proof that he is no longer a resident of the state.

Any fiduciary, except an executor appointed pursuant to section 2113.05 of the Revised Code, whose residence qualifications are not defined in this section shall be a resident of the state, and shall be removed on proof that he is no longer a resident of the state.

HISTORY: GC § 10506-65; 114 v 320 (378); 123 v 460; 136 v S 145. **EF** 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2109.21 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Resignation or removal of fiduciary, RC § 2109.24.

See RC § 2109.25 which refers to this section.

Comparative Legislation

Residence qualifications:

Cal.—Probate Code, § 420

Ill.—Rev Stat, ch 3, § 9-1

Ind.—Burns' Stat, § 29-1-10-1

Ky.—KRS, § 395.005

Mich.—MCLA, § 704.27

N.Y.—SCPA, § 707

Pa.—Purdon's Stat, Tit. 20, § 3151

Fla.—FSA, § 733.302

Research Aids

Removal for failure to maintain residence:

O-Jur2d: Fiduciaries § 324

Am-Jur2d: Executors and Administrators § 108; Guardian and Ward § 58; Trusts § 130

Residence qualification:

O-Jur2d: Fiduciaries § 8

Residence requirement for guardian:

O-Jur2d: Guardian and Ward § 22

Am-Jur2d: Guardian and Ward § 26

Residence requirement for personal representative:

O-Jur2d: Executors and Administrators § 43

Am-Jur2d: Executors and Administrators § 74

Residence requirement for trustee:

O-Jur2d: Trusts § 54

Am-Jur2d: Trusts § 113

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Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

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See, in case notes to RC § 2113.06, decisions under former GC § 10617.

Executor

1. A nonresident of the state who has been named in a will as one of several co-executors is entitled to appointment if he be of age and of sound mind and untainted by conviction of crime, in spite of a rule of court to the contrary: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200 [distinguishing *In re Ulhorn*, 12 CC 765, 4 CD 526].

2. A foreign trust company, appointed executor in another state under the will of a foreign testator, is not precluded by this section from suing in Ohio: *Union Sav. Bank &c. Co. v. Baltimore & O. R. Co.*, 6 NP(NS) 454, 53 Bull 180.

Administrator

6. The appointment of an administratrix, who thereafter abandoned her residence in the state of Ohio, is voidable at the instance of a proper party, but such appointment is not subject to attack by a party who has no real interest in the administration of the assets of the estate: *In re Fannin*, 24 OApp (2d) 1, 53 OO(2d) 28, 262 NE(2d) 883.

7. Notwithstanding this section, under the treaty with Italy, the consul of that government has the right to intervene in the case of the death of a citizen of Italy in this country: *Estate of Arduino*, 9 NP (NS) 369, 20 OD 461.

8. Where the accredited representative of the Austro-Hungarian government appoints a representative to act, in his absence, as administrator of a deceased citizen of the Austro-Hungarian monarchy, and the appointment is made a matter of record in the probate court of the county in which the death of the decedent occurred, it becomes the duty of the probate court to appoint such accredited representative as administrator of the estate of the said decedent, statutory provisions to the contrary notwithstanding: *In re Stingacs*, 12 NP(NS) 107, 22 OD 88.

9. Where an heir of the decedent is eligible to appointment as administrator of the estate of a deceased Italian, his claim thereto is superior to that of the Italian consul, and letters must of necessity be issued to him: *In re Costanzo*, 15 NP(NS) 225, 60 Bull 413.

10. A consular agent of the kingdom of Italy has neither an exclusive nor a naked right, under treaty stipulations or within the class designated in this section, to appointment as administrator of the estate of an Italian subject dying intestate in this state, where one of the next of kin is a resident of the state; nor is he entitled to notice of the death of a subject of the king of Italy, unless there are no known heirs in this country and he is himself a resident of the county in which the appointment is to be made or has a representative in such county who has been duly certified to the court: *In re Todarello*, 15 NP(NS) 593, 62 Bull 201.

11. The procuring of an alien consul to act as the administrator of a deceased resident of Ohio does not, in an action against other residents of Ohio, present such a case of diverse citizenship as to give jurisdiction to a federal court. The appointment of such alien consul will be regarded as having been procured collusively and fraudulently if the testimony discloses that the sole purpose in having the said consul named as administrator was to give the federal court jurisdiction of the action for wrongful death thereafter brought by him: *Cerri v. Akron-Peoples Tel. Co.*, 219 Fed 285, 13 OLR 425.

Guardian

21. Appointment by the probate court is necessary even in case of a guardian appointed by the last will of a parent under former GC § 10930 (see now RC § 2111.12), in order to prevent the appointment of any unsuitable person as guardian for an infant of tender years, since former GC § 10492 (see now RC § 2101.24) (paragraph [D]) confers upon the probate court the authority to appoint and remove guardians, and to direct and control their conduct and settle their accounts: *Henicle v. Flack*, 3 App 444, 23 CC (NS) 447.

22. The provisions of this section are mandatory in requiring the removal of a guardian, other than a guardian named in a will by a parent of a minor, on proof that he is no longer a resident of the state: *In re Lloyd*, 8 OApp(2d) 223, 32 OO(2d) 128, 197 NE(2d) 377.

23. Former GC § 10936 (see now RC §§ 2109.21, 2109.24) provided that the removal from the state of a person appointed guardian, of itself should determine the guardianship of such person, and this provision was construed to mean that the powers of a guardian appointed in this state ceased ipso facto by the removal of the guardian from the state: *Merchants &c. Sav. Bank v. Schirk*, 5 CC 569, 7 CD 125.

24: Where a court at the time of the appointment of a guardian elected to exercise its statutory discretion under this section, by appointing one a guardian even though such person was not a resident of the county of the court, such court would not be

justified, upon being confronted at some future date with an objection to its original appointment based upon nonresidence alone, in removing such guardian: *In re Price*, 83 OLA 149, 162 NE(2d) 494 (PC).

§ 2109.22 Marriage no disqualification for fiduciary.

The marriage of any person does not disqualify him from acting as fiduciary, whether the marriage occurs before or after his appointment and qualification, and all his acts in such capacity shall have the same validity as though he were unmarried.

HISTORY: GC § 10506-66; 114 v 320 (378); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10636, 10958.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2109.22 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Text Discussion

1 *Anderson Fam. L.* § 7.7.

Research Aids

Marriage no disqualification for fiduciary:

O-Jur2d: Fiduciaries § 9; Trusts § 53; Husband and Wife § 21

Am-Jur2d: Executors and Administrators § 70; Trusts § 113

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Under a former statute (Swan's Stat 344, § 28) when a woman, who was an administratrix, married, that extinguished her authority as administratrix. But if an order of sale was once begun in her favor, it was not abated by her marriage: *Craig v. Fox*, 16 O 563.

2. Under a former statute marriage terminated the guardianship of a woman: *Habighurst v. Stevenson*, 10 DecRep 162, 19 Bull 106.

§ 2109.23 Allowance of compensation. (GC § 10506-52)

When compensation is not fixed by law, the probate court shall make allowance to fiduciaries for their services and expenses in executing their trusts. Such compensation shall be charged to income or principal, or part to each, as the court may allow. The court shall have the same fees as in the settlements of administrators and executors.

HISTORY: GC § 10506-52; 114 v 320 (375); 119 v 394 (403), § 1. Eff 10-1-53. Analogous to former GC §§ 10953, 11034.

Cross-References to Related Sections

Allowance for expenses, tombstone and cemetery lot, RC §§ 2113.36, 2113.37.

Compensation of executors and administrators, RC §§ 2113.35, 2113.36.

Fees of a guardian in proceedings for the registration of land titles, RC § 5310.15.

Guardian under veterans' guardianship law, RC § 5905.13.

Comparative Legislation

Compensation of fiduciary:

Cal.—Probate Code, § 900

Ill.—Rev Stat, ch 3, § 27-1

Ind.—Burns' Stat, § 29-1-10-13

Ky.—KRS, § 395.150

Mich.—MCLA, § 704.33

N.Y.—SCPA, § 2307

Pa.—Purdon's Stat, Tit. 20, § 3537

Fla.—FSA, § 733.106

Forms

1 A&H Probate FORM 2109.23a et seq.

Research Aids

Compensation:

O-Jur2d: Fiduciaries § 273 et seq; Guardian and Ward § 219; Trusts § 171; Infants § 49

Am-Jur2d: Trusts § 534 et seq; Guardian and Ward §§ 184-186

ALR

Validity and effect of provision of contract or trust instrument limiting amount of fees of trustee. 161 ALR 860.

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Practical considerations in probate practice. Address by Judge Chase M. Davies of Cincinnati. 22 OBar (No. 19) 277.

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1. A claim of a guardian for services to an imbecile is to be determined by the court settling the guardian's account and, it not being a personal claim against the ward, it need not in case of his decease be presented to his personal representatives: Scattergood v. Ingram, 86 OS 76, 98 NE 923 [for a later report in same case, see 89 OS 460, which reversed, in memorandum opinion, Ingram v. Scattergood, 15 CC(NS) 93, 23 CD 269].

1.1 By virtue of this section a probate court is authorized to make an allowance to a trustee for personal services rendered by him to his beneficiary, if the terms and conditions of the trust are such as to justify the invoking of this section: In re Riddle, 69 App 136, 23 OO 559, 43 NE(2d) 362.

1.2 A reviewing court will not reverse a judgment of the probate court allowing compensation to a trustee for a missing person and for legal services rendered unless the compensation is so excessive as to show an abuse of discretion: In re Parrett, 86 App 162, 41 OO 20, 90 NE(2d) 425.

1.3 Where a nominated trustee under a will undertakes and performs a duty ordinarily performed by the named executrix in the will, but which duty the named executrix fails and refuses to perform, such nominated trustee is entitled to reasonable compensation for the services rendered: In re Allison, 9 OApp(2d) 333, 38 OO(2d) 388, 224 NE(2d) 386.

2. The probate court may in its discretion allow compensation where the services are beneficial to the estate, even though there may be some irregularities: In re Chambers, 16 OO 519 (App) [appeal dismissed, 136 OS 202].

3. Whenever a fiduciary converts to his own use funds belonging to his trust, he is not administering the same for the interest of the beneficiaries, and he is not entitled to any compensation where the amount of such misappropriation is large and must necessarily have been intentional with knowledge of wrongdoing: In re Chambers, 16 OO 519 (App) [appeal dismissed, 136 OS 202].

4. This section and GC §§ 10509-192, 10509-193, 10510-45 and 10510-46 (RC §§ 2113.35, 2113.36, 2127.37 and 2127.38) are in pari materia and should be construed together to give legal effect to the provisions of each and every section: In re Ohmer, 22 OO 147 (PC).

5. When a guardian and his attorney perform services and incur expenses for a ward, this section specifically confers jurisdiction on the probate court appointing such guardian and his attorney to determine the value of such services and expenses rendered during the lifetime of the ward, whether the application to determine the reasonable value of said services and expenses is made before or after the death of the ward: In re Schueneman, 36 OO 513, 78 NE (2d) 688 (PC).

5.1 Since a guardian is entitled to no compensation for services as such until it is approved by the court, failure to apply for any such payment during several accounting periods does not result in a bar to its later payment, upon proper application, either by virtue of a waiver or by operation of a statute of limitations: In re Webb, 11 OMisc 21, 40 OO(2d) 97, 225 NE(2d) 868.

5.2 Fees for legal services performed for the purpose of obtaining payment to the person serving as guardian of the compensation due for services performed in that capacity may not be charged to the guardianship funds, since it is beneficial to neither the ward nor his trust estate: In re Webb, 11 OMisc 21, 40 OO(2d) 97, 225 NE(2d) 868.

6. Former GC § 10953 (see now RC § 2109.23) invests the probate court with sole power of allowing compensation, but the same is subject to review: In re Jaymes, 18 OLA 613.

7. Total compensation to a defaulting trustee of approximately ten per cent of the money handled for the benefit of the trust is not excessive in the absence of proof of a rule of the court to the contrary, and is not an abuse of the discretion vested in the court by this section to fix allowances to fiduciaries for their

services and expenses in executing trusts: *Schieble v. Phalen*, 32 OLA 252.

9. Incorrect accounts of a guardian will not necessarily deprive him of compensation: *In re Strickland*, 7 NP 233, 1 OD 702.

10. Where the record shows affirmatively that the minor was without estate, the appointment of a guardian is void, and there can be no compensation: *In re Baier*, 8 NP 107, 11 OD 47.

11. Where an attorney rendered services to a guardianship, in getting one guardian removed and having a successor appointed and in securing the release of the ward from the state hospital, then fees should be allowed not only to the amount the estate was benefited but also for the services which were beneficial to the ward by reason of the removal proceedings: *In re Miller*, 62 OLA 505, 107 NE(2d) 626 (App).

12. Compensation for extraordinary services and for payment of attorney's fees employed by cotrustee allowed: *In re Haggerty*, 70 OLA 463, 128 NE(2d) 680.

§ 2109.24 Resignation or removal of fiduciary. (GC § 10506-53)

The probate court at any time may accept the resignation of any fiduciary upon his proper accounting, if such fiduciary was appointed by, is under the control of, or is accountable to such court.

If a fiduciary fails to make and file an inventory as required by sections 2109.58, 2111.14, and 2115.02 of the Revised Code, or to render upon oath a just and true account of his administration at the times required by section 2109.30 of the Revised Code, and if such failure continues for thirty days after such fiduciary has been notified by the court of the expiration of such time, the fiduciary may forthwith be removed by the court and shall receive no allowance for his services unless the court enters upon its journal that such delay was necessary and reasonable.

The court may remove any such fiduciary, after giving such fiduciary not less than ten days' notice, for habitual drunkenness, neglect of duty, incompetency, fraudulent conduct, because the interest of the trust demands it, or for any other cause authorized by law.

The court may remove a trustee upon the written application of more than one half of the persons having an interest in the estate controlled by such trustee, but the trustee himself is not to be considered as a person having an interest in such estate under such proceedings; except that no trustee appointed under a will shall be removed upon such written application unless for a good cause.

HISTORY: GC § 10506-53; 114 v 320 (375); 119 v 394 (403), § 1. Eff 10-1-53. Analogous to former GC §§ 10627, 10936, 11305.

Comparative Legislation

Resignation or removal of fiduciary:

Cal.—Probate Code, § 520

Ill.—Rev Stat, ch 3, § 23-1

Ind.—Burns' Stat, § 29-1-10-2

Ky.—KRS, § 395.160

Mich.—MCLA, § 704.48

N.Y.—SCPA, § 715

Pa.—Purdon's Stat, Tit. 20, § 3182

Fla.—FSA, § 733.504

Forms

1 A&H Probate FORM 2109.24a et seq.

1 A&H Probate FORM 2109.30a et seq: Fiduciary's account.

Outline of Procedure

Removal of fiduciary in general. Leyshon No. 100; A&H No. 80.

Research Aids

Fiduciary's duty to account upon resignation or removal:

O-Jur2d: Fiduciaries § 258

Am-Jur2d: Executors and Administrators § 121; Trusts § 505 et seq

Forfeiture of allowance for services:

O-Jur2d: Fiduciaries § 278

Am-Jur2d: Trusts § 549; Executors and Administrators § 111

Removal by court:

O-Jur2d: Fiduciaries § 320 et seq

Am-Jur2d: Executors and Administrators § 109 et seq; Trusts § 129 et seq

Resignation:

O-Jur2d: Fiduciaries § 317

Am-Jur2d: Executors and Administrators §§ 119, 120, and 123; Trusts § 128

ALR

Changes in corporate organization as affecting status of corporation as trustee. 131 ALR 753.

Necessity and sufficiency of service on removal of nonresident trustee. 15 ALR2d 610.

Personal interest of executor, administrator adverse to or conflicting with those of other persons interested in estate as ground for revocation of letters or removal. 119 ALR 306.

Improper handling of funds, investments or assets as ground for removal of guardian. 128 ALR 535.

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Removal of executor or administrator

1. One claiming the estate of a decedent is among the class of "persons interested" within the meaning of former GC § 10629 (see now RC §§ 2109.24, 2113.18), who are entitled to attack the appointment of an administrator: *In re Gingery*, 103 OS 559, 134 NE 449.

2. A motion to revoke the appointment under GC § 10629 (see now RC §§ 2109.24, 2113.18), is not a collateral but a direct attack upon the appointment of an administrator when such motion is filed under that section and in the same court wherein letters of administration were granted: *In re Gingery*, 103 OS 559, 134 NE 449.

2.1 The probate court has proven, due opportunity for a hearing having been given, to revoke letters of administration *de bonis non* where such appointment was obtained by fraud practiced upon the court, or for refusal of such administrator to obey the orders of the court duly and lawfully made; and where such fraud and refusal to obey orders injuriously affect a creditor of an heir of the estate, and such heir was an active participant in the fraud, and he and the administrator are benefited thereby, to the detriment of the creditor, the creditor has such an interest in the administration of the estate as entitles him to invoke the exercise of said power by motion: *In re Adams*, 71 App 113, 25 OO 477, 48 NE(2d) 127.

3. A broad discretion is given the probate court in the removal of a fiduciary under the provisions of this section, which, after enumerating certain specific causes, provides that a fiduciary may be removed "because the interest of the trust demands it": *In re Marshall*, 78 App 1, 33 OO 375, 65 NE(2d) 523.

5. Under this section notice of a removal proceeding is required to be given to the fiduciary, but the persons interested in the trust are not considered necessary parties to the determination of the issue, and notice to them is not required: *In re Marshall*, 78 App 1, 33 OO 375, 65 NE(2d) 523.

6. A sister, heir at law and next of kin of the deceased, has such an interest in the estate as would authorize her to file an application for removal of an administrator: *Hopkins v. Barger*, 21 OLA 386.

8. There is no irreconcilable inconsistency between GC § 10605 (see now RC §§ 2109.21, 2113.05), which makes the appointment of the executor named in the will mandatory, and this section, which confers a discretion upon the probate court to remove for non-residence: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

10. This section defines, perhaps, what is meant by "unsuitable" in the third clause of GC § 10617 (see now RC §§ 2109.21, 2113.06, 2113.07), providing as to who shall be appointed administrator: *Long v. Bowersox*, 8 NP(NS) 249, 19 OD 494.

Power to remove

15. The probate court, for good cause, may remove an executor or administrator: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

16. The authority of the probate court to remove

an executor is complete and exclusive; and if the court exercises its discretion, its action cannot be questioned by any appellate proceeding: *Stafford v. American Missionary Assn.*, 22 CC 399, 12 CD 442.

17. This section does not require the court to remove an executor or administrator because he has become a nonresident of the state after appointment, but it leaves it within the discretion of the court whether to remove him or not: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

18. The court has broad discretion as to removal of an executor, but narrow as to appointment thereof: *In re Sultzbach*, 5 NP 218, 5 OD 524; same rule, *Estate of Sells*, 5 NP(NS) 629, 52 Bull 610 [for opinion on right of appeal, see *In re Sells*, 8 NP(NS) 175, 19 OD 567].

19. The determination by the probate court that a trust company is legally competent to act as executor cannot be collaterally attacked: *Smith v. Western Union Telegraph Co.*, 7 NP(NS) 609, 19 OD 537.

Notice and hearing

20. Where an application is filed by the probate court for the removal of a fiduciary upon any one or more of the specific grounds set forth in GC § 10506-53 (as amended Aug. 22, 1941) (RC § 2109.24) other than for failure to make and file an inventory in the manner and within the time required by law, the fiduciary is entitled to receive not less than ten days' notice thereof, and is further entitled to a hearing upon the charges made therein. In such case, it is the duty of the court to receive and hear all relevant and proper evidence proffered upon the issues made by the claims and denials of the respective parties: *In re Paull*, 90 App 403, 46 OO 52, 101 NE(2d) 209.

Grounds for removal

26. The filing of an account in the probate court by an executor or administrator, denominated "Final Account," does not operate to terminate the trust, as long as there remain assets under his jurisdiction subject to the payment of valid debts of the decedent, and the failure of the fiduciary to proceed with the administration of the trust, while under some circumstances may justify a removal of the officer, does not constitute, *ipso facto*, an abandonment of the trust: *Johnson v. Schwenck*, 99 OS 59, 124 NE 61, 8 ALR 170.

26.1 Where trustees appealed judgments construing will and in so doing assumed a position contrary to the best interests of their beneficiary, such conduct violated the first precept of a trustee—loyalty to the cestuis que trustent, and such conduct demands they be removed from office. *In re Yost*, 102 App 62, 2 OO(2d) 44, 141 NE(2d) 176.

26.2 An administratrix may not be deprived of the compensation due to her under the provisions of RC § 2113.35 for her services for mere delay in making and returning the inventory of the estate, when she has not been given an order requiring her, at an early date therein named, to return same, as prescribed by RC § 2115.03, or has not been notified by the court of the expiration of the time to file such inventory, as prescribed by this section: *In re Burchett*, 16 OApp(2d) 45, 45 OO(2d) 133, 241 NE(2d) 787.

27. The fact that a number of beneficiaries from the proceeds of a farm operated by the administratrix do not maintain friendly relationships to the administratrix and are of opinion that the best interests of all beneficiaries would be conserved by the administratrix's removal, is not decisive but may properly be considered with other facts and circum-

stances in a proceeding to remove the administratrix: *Boedecker v. Herr*, 30 OLA 374.

27.1 That the wife and brother of the incompetent are willing to serve without compensation as guardian and counsel, respectively, is sufficient cause to remove a paid guardian: *In re Marshall*, 67 OLA 314.

28. Where, upon motion for the removal of an executor, the gist of the charge is fraud, it is error to grant an order of removal where no attempt has been made to show fraud: *Estate of Breckinridge*, 7 CC (NS) 86, 17 CD 688.

29. Failure to return inventory within three months, upon the order of the court, is ground for removal: *In re Estate of Pickards*, 5 NP 493, 7 OD 476.

30. An application for the removal of an executor or administrator must state the facts which constitute the alleged causes of removal, specifically. Purchase of property, by an executor, at his own sale, although forbidden, is not in itself ground for his removal, if nothing else be shown; nor is the fact alone that he is indebted to the estate: *Fox v. Keister*, 6 NP 327, 9 OD 316.

31. The fact that the personal claim of an executor against the estate was unsettled at testator's death is no ground for removal if all the parties in interest have entered into a contract for the liquidation of such debt and the settlement of the estate: *In re Worthington's Estate*, 5 NP 63, 5 OD 524.

32. If a person who is named as executor in a will is not of sufficient business ability to manage the estate to the best interest of the parties, such lack of ability may be ground for removing such executor, after he is appointed; but it does not authorize the court to refuse to appoint him: *In re March*, 60 Bull 5.

32.1 The court is vested with a broad discretion under this section in determining when a guardian's adverse interest is of such consequence as to authorize removal "because the interest of the trust demands it" and in the absence of proof that a fiduciary is actually exercising her authority in a manner adverse to the interests of her trust, such fiduciary will not be removed unless such adverse interest is of such a nature that potentially irreparable damage to the trust might ensue: *In re Price*, 83 OLA 149, 162 NE(2d) 494 (PC).

32.2 Removal of a guardian requires substantial evidence that will clearly convince the court that the interests of the ward cannot otherwise be preserved, in order to establish that the interest of the trust demands it, as required by this section: *In re Conley*, 39 OO(2d) 292, 10 OMisc 197, 224 NE(2d) 183 (PC).

Effect of removal

33. The acts of an executor or administrator, who is afterwards superseded by removal or otherwise, are as valid as if he had continued to perform the trust until the final settlement of the estate: *Bigelow v. Bigelow*, 4 O 138.

34. All parties in interest are bound to take notice of the removal of one, and the appointment of a second administrator, and when a removed executor or administrator has settled with the court, and the balance in his hands is ascertained, suit may be sustained against his sureties without first obtaining a personal and separate judgment against him; and in such suit it is not necessary to aver that the removed administrator has had notice of his successor's appointment: *Treasurer v. McIlvain*, 5 O 200.

36. The removal of the executor or administrator terminates his authority over the assets received, as well as over those not received: *Weaver v. Reese*, 6 O 418.

37. Where the appointment of an administrator is revoked by the probate court, but on appeal the administrator is restored to his office and duties, the period during which he was suspended from his office is to be deducted in fixing the two years' limitation for the bringing of an action against him as such administrator: *Badger v. Orr*, 1 App 293, 17 CC(NS) 312, 24 CD 328.

Appeal from order removing

42. An appeal will not lie to the court of common pleas from an order of the probate court removing an executor or administrator: *Estate of Still*, 15 OS 484; but see note to *Estate of Sells*, 8 NP(NS) 175, 19 OD 567 [for opinion on merits, see *In re Sells*, 5 NP(NS) 629, 52 Bull 610].

43. There is no right of appeal to the court of common pleas, from an order of the probate court refusing to remove an administrator: *Ebersole v. Schiller*, 50 OS 701, 35 NE 793.

44. A proceeding filed in the probate court to remove an administrator de bonis non for the reason that his predecessor was still rightfully in office is appealable under GC § 11206 (see now RC § 2101.42): *Johnson v. Schwenck*, 99 OS 59, 124 NE 61, 8 ALR 170.

45. An order of the probate court removing an executor is not the subject of review on petition in error in the court of common pleas: *Monger v. Jeffries*, 62 OS 149, 56 NE 654 [affirming *Munger v. Jeffries*, 7 NP 55, 10 OD 12]; see also *Campbell v. Miner*, 62 OS 659, 58 NE 1097 [affirming judgment of circuit court which affirmed 3 NP 138, 4 OD 96], and *Martin v. Dershem*, 65 OS 556, 63 NE 1130, 46 Bull 172.

45.1 An action in the court of probate for the removal of a testamentary trustee is one in chancery and therefore appealable to the court of appeals on questions of law and fact: *In re Yost*, 163 OS 593, 57 OO 24, 128 NE(2d) 12.

46. The procedure to remove a fiduciary under this section is statutory and is not appealable as a chancery case: *In re Thomas*, 58 OLA 477 (App).

47. Error cannot be prosecuted to an order removing an administrator under this section: *Ferguson v. Ferguson*, 3 NP(NS) 549, 16 OD 486.

48. When an order is made by the probate court removing an executor, it is directed against him and he is affected by it, and he has the right of appeal therefrom, notwithstanding he is not an heir, devisee, or other interested person under the will: *In re Estate of Sells*, 8 NP(NS) 175, 19 OD 567 [for opinion on merits, see *In re Sells*, 5 NP(NS) 629, 52 Bull 610].

49. The judgment entry of the probate court, in a proceeding for the removal of an administrator, will be accepted by the reviewing court where the record discloses that the application was heard on the evidence, in the absence of a bill of exceptions disclosing an abuse of discretion: *Speer v. McKee*, 21 OLA 77.

Resignation of executor or administrator

50. A resignation in Mississippi of an executor of an estate in Ohio, accepted by the orphans' court of the former state, is void, because of want of authority in the state of Mississippi to accept such resignation: *Veazie v. McGugin*, 40 OS 365.

51. The probate court, for good cause shown, may accept the resignation of an executor or administrator: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

52. Acceptance is necessary to give validity to the resignation: *Reiter v. State*, 51 OS 74, 36 NE 943.

53. The receiving of the resignation of an executor or administrator by the probate court appointing such officer, and the filing of the document by the

judge thereof, followed by the appointment of a successor, is a sufficient compliance with the requirements of former GC § 10627 (see now RC §§ 2109.24, 2109.25), and the new appointment so made is in all respects a valid one: *Johnson v. Schwenck*, 99 OS 59, 124 NE 61, 8 ALR 170.

54. The language used in this section, that the court "may accept the resignation of any fiduciary upon his proper accounting," gives the appointing court a discretion to determine what is a proper accounting: *Thrasher v. Kelly*, 25 OO 101 (CP).

Resignation or removal of guardian

60. When a guardian is superseded and another appointed in his stead, proceedings in an action against the former, as such, after he has been superseded, will not operate against or bind the ward or the succeeding guardian: *Este v. Strong*, 2 O 401.

62. Where joint guardians are unable to agree, one being friendly with one set of next of kin of the ward, and the other friendly with another set, and frequently appear before the court for advice, it is within the discretion of the probate court, given by this section, to remove such guardians: *Gorsuch v. Stabler*, 16 OLA 250.

Resignation or removal of trustee

67. When one of the trustees named in the will died, and another removed to a place unknown, the probate court had power to fill such vacancies, although there was a surviving trustee capable of executing the trust: *Sowers v. Cyrenius*, 39 OS 27.

68. Where it is manifest that testator did not intend that trust (to run fifty years or more) should be controlled by present beneficiaries, and that property might be dissipated and lost, a court will refuse an application by heirs, next of kin and legatees for removal of a bank, as trustee, where the legality of its appointment is not questioned and no ground for removal is stated: *In re Hartman's Will*, 28 NP (NS) 75.

69. The court under former GC § 11035 (see now RC § 2109.24) has power to remove and appoint a successor for a trustee created by a deed for certain lands to "a trustee, his successors, heirs and assigns, forever," to manage and control the land conveyed for a certain named beneficiary; for the grant was not intended to create a personal interest in the trustee, but only to facilitate the execution of the trust: *Pheron v. Mitchell*, 12 App 336, 31 OCA 333.

71. A proceeding on a motion to dismiss a trustee, pursuant to this section, is not a chancery case: *In re Marshall*, 78 App 45, 33 OO 399, 65 NE(2d) 95.

72. Paragraph 4 of this section has reference only to a trustee as distinguished from an administrator or executor notwithstanding the use of the broader term "fiduciary" in other parts of that section in dealing with the probate court's power of removal: *In re Stauffer*, 40 OLA 254 (App).

73. The jurisdiction of the probate court over the guardianship, having once attached, cannot be ousted by the removal of the guardian from the state in which the appointment was made, or by the removal of the trust property: *Netting v. Strickland*, 18 CC 136, 9 CD 841.

74. This section vests the probate court with complete and exclusive jurisdiction to remove a trustee appointed by it under a will, and an order of such court removing such trustee is not subject to review on petition in error: *Stafford v. American Missionary Assn.*, 22 CC 339, 12 CD 442; see *Gilbert v. Gilbert*, 13 CC 29, 7 CD 58.

75. Probate court has power to compel a settlement by a nonresident guardian, or on his default to ascer-

tain the amount upon evidence: *Schwab v. Rappold*, 9 DecRep 340, 12 Bull 197.

§ 2109.25 Fiduciary in military service; removal and reinstatement. (GC § 10506-54)

Whenever it appears to the satisfaction of the probate court that a fiduciary is unable to perform his duties because he is engaged or is about to engage in military service as defined by this section, the court may remove such fiduciary and appoint a substitute or authorize the remaining fiduciaries to execute the trust. Such action may be taken on the court's own motion or on the application of any party in interest, including the fiduciary or cofiduciary, either without notice or upon notice to such persons and in such manner as the court shall direct.

If any of the duties of such office remain unexecuted when a fiduciary who has resigned or been removed on account of his military service ceases to be in such military service, he shall be reappointed as fiduciary upon his application to the court and upon such notice as the court may direct, provided he is at the time a suitable and competent person and has the qualifications as to residence required by section 2109.21 of the Revised Code. If such person is reappointed, the court shall remove the substitute fiduciary and revoke his letters of appointment, and make such further order or decree as justice requires.

"Military service," as used in this section, means any service, work, or occupation which in the opinion of the court is directly or indirectly in furtherance of any military effort of the United States. Such definition includes internment in an enemy country, residence in any foreign country, or residence in any possession or dependency of the United States, if by reason thereof the fiduciary is unable to return to this state.

HISTORY: GC § 10506-54; 120 v 649 (654), § 1. Eff 10-1-53. Not analogous to former GC § 10506-54 [114 v 320 (375)], repealed in 119 v 394 (425), § 11. For a present analogous section, see RC § 1339.14.

Cross-References to Related Sections

Appointment of co-trustee to be approved by court of common pleas, RC § 1339.14.

Research Aids

Fiduciary in military service:

O-Jur2d: Fiduciaries §§ 16, 17 and 329

Law Reviews

Recent changes in probate law. Article by James B. Danaher of the Cleveland bar. 17 OBar (No. 22) 271.

§ 2109.26 Vacancy before termination of the trust; accounting; successor fiduciary. (GC § 10506-55)

If a sole fiduciary dies, is dissolved, declines to accept, resigns, is removed, or becomes incapacitated prior to the termination of the trust,

the probate court shall require a final account of all dealings of such trust to be filed forthwith by such fiduciary if a living person and able to act. If such fiduciary is a living person but unable to act, such final account shall be filed by his guardian, or if there is no guardian by some other suitable person in his behalf, appointed or approved by the court. If such fiduciary is a deceased person, such account shall be filed by his executor or administrator. If such fiduciary is a dissolved corporation, such account shall be filed by such persons as are charged by law with winding up the affairs of such corporation. Thereupon the court shall cause such proceedings to be had as are provided by sections 2109.30 to 2109.36, inclusive, of the Revised Code.

Whenever such a vacancy occurs and such contingency is not otherwise provided for by law or by the instrument creating the trust, or whenever such instrument names no fiduciary, the court shall, on its own motion or on the application of any person beneficially interested, issue letters of appointment as fiduciary to some competent person or persons who shall qualify according to law and execute the trust to its proper termination. Such vacancy and the appointment of a successor fiduciary shall not affect the liability of the former fiduciary or his sureties which was previously incurred.

HISTORY: GC § 10506-55; 114 v 320 (375); 125 v 903 (965). Eff 10-1-53. See former GC §§ 10596, 10627, 10628.

Forms

- 1 A&H Probate FORM 2109.26a et seq.

Outline of Procedure

Account filed in removal of fiduciary. Leyshon Nos. 30, 100; A&H Nos. 1, 80

Research Aids

Accounting:

O-Jur2d: Fiduciaries § 257

Am-Jur2d: Executors and Administrators § 508 et seq

Appointment of fiduciary when none named in instrument:

O-Jur2d: Fiduciaries § 7; Trusts § 51

Am-Jur2d: Trusts §§ 120, 121

Effect of appointment on liability of former fiduciary:

O-Jur2d: Fiduciaries §§ 19, 207

¶ Vacancy before termination of trust:

O-Jur2d: Fiduciaries § 15; Trusts §§ 51, 60, 62

Am-Jur2d: Trusts § 132 et seq

ALR

Appointment and qualification of one of several trustees named in will as affecting power or duty of court to appoint a co-trustee. 151 ALR 1308. Changes in corporate organization as affecting status of corporation as trustee. 131 ALR 753.

Trusts: duty of personal representative of deceased trustee to render account. 36 ALR3d 1071.

Law Reviews

Uniform trusts act. Article by Prof. Harry W.

Vanneman (OSU) and Prof. Frank S. Rowley (UC). 13 CinLRev 157, 5 OSLJ 145.

Does the executor in Ohio take an estate or a power? Does the power survive? Article by Charles C. White of the Cleveland bar. 15 CinLRev 1.

CASE NOTES AND OAG

1. The surety is liable for the payment of all sums adjudicated to be due from its principal and it is immaterial, under this section, that the probate court's determination of liability was made subsequent to the death of the administrator: *Massachusetts Bonding &c. Co. v. Winters Nat. Bank &c. Co.*, 130 F(2d) 5, 24 OO 225.

2. Where the executor and trustee named in a will dies during the administration of the estate and trust, no application for the appointment of a trustee is filed by a person beneficially interested and the court, on its own motion, does not appoint a trustee but an administrator *de bonis non* with the will annexed is appointed but not as trustee, the duty devolves such administrator to act also as trustee and administer the trust until a trustee is appointed: *In re Rothstein*, 108 App 487, 9 OO(2d) 469, 162 NE(2d) 547.

3. Court will not permit trust estate to fail for want of trustee: *Francis v. Anthony*, 46 App 121, 187 NE 782, 38 OLR 69.

4. For historical background of this statute, see *Clark v. Neil*, 24 NP(NS) 589.

5. The commissions fixed by statute for executors and administrators are, in contemplation of law, in full payment for all ordinary services rendered; and where it becomes necessary that an administrator *de bonis non* should be appointed to complete the settlement of the estate, the commissions should be equitably apportioned between the original and succeeding representatives of the estate in proportion to the value of the services rendered by them respectively: *Bates v. Creed*, 2 App 59, 15 CC(NS) 433.

6. Where an administrator died before filing a final account, the probate court properly appointed an administrator for the deceased administrator for the sole purpose of filing a final account in the original estate: *In re Chambers*, 30 OLA 420.

DECISIONS CONSTRUING FORMER GC § 10596

1. An executor derives his power over testator's real estate from the will, and acts as the trustee of the testator to fulfill a personal trust, while the authority of an administrator with the will annexed emanates from and is dependent on legislative enactments: *Wills v. Cowper*, 2 O 124 [adhered to on rehearing, sub nomine, *Wills v. Cooper*, 3 O 386]; *Henry v. Doctor*, 9 O 49.

2. Neither the negligence nor death of the trustee, nor other circumstances, will be permitted to defeat the interest of those for whose benefit the trust was created: *Wills v. Cowper*, 2 O 124 [adhered to on rehearing, sub nomine, *Wills v. Cooper*, 3 O 486]; *Henry v. Doctor*, 9 O 49; see also *Taylor v. Galloway*, 1 O 232; *Dabney v. Manning*, 3 O 321; *Steele v. Worthington*, 2 O 182; *Hunt v. Freeman*, 1 O 490.

3. Where one of the trustees named in a will died, and another removed to a place unknown, the probate court had power to fill such vacancies, although there was a surviving trustee capable of executing the trust: *Sowers v. Cyrenius*, 39 OS 29.

4. Former GC § 10596 (see now RC § 2109.26) does not apply where the will has conferred personal discretion upon the individual who is named as trustee.

tee: *Rogers v. Rea*, 98 OS 315, 120 NE 828 [reversing court of appeals, which was on appeal from *Rea v. Griffin*, 21 NP(NS) 129, 29 OD 174].

6. Jurisdiction cannot be conferred upon the probate court by will or any other private appointment, or by consent, empowering it to act as a court in supervising the administration of a testamentary trust: *Pike v. White*, 22 CC(NS) 61, 33 CD 453.

7. Former GC §§ 10492, 10493, 10857 and 11031 (see now RC §§ 2101.24, 2107.45 and 2109.32) do not confer upon the probate court jurisdiction to supervise or control the administration of a testamentary trust: *Pike v. White*, 22 CC(NS) 61, 33 CD 453 [affirmed, without opinion, May 4, 1915].

10. Where a will named an executor and trustee, giving him power to sell certain real estate, and he died, the administrator with the will annexed has authority, under the will, to sell said real estate without an order of court: *Avery v. Howard*, 7 NP(NS) 97, 19 OD 71.

13. If testator names two executors in his will, and one of them dies before testator, the court should appoint the survivor as sole executor of the will, if he is legally competent: *In re March*, 60 Bull 5.

DECISIONS CONSTRUING FORMER GC § 10627

1. A resignation in Mississippi of an executor of an estate in Ohio, accepted by the orphans' court of the former state, is void, because of want of authority in the state of Mississippi to accept such resignation: *Veazie v. McGugin*, 40 OS 365.

2. The probate court, for good cause shown, may accept the resignation of an executor or administrator: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

3. Acceptance is necessary to give validity to the resignation: *Reiter v. State*, 51 OS 74, 36 NE 943, 23 LRA 681.

4. The receiving of the resignation of an executor or administrator by the probate court appointing such officer, and the filing of the document by the judge thereof, followed by the appointment of a successor, is a sufficient compliance with the requirements of GC § 10627 (see now RC § 2109.26), and the new appointment so made is in all respects a valid one: *Johnson v. Schwenck*, 99 OS 59, 124 NE 61, 8 ALR 170.

DECISIONS CONSTRUING FORMER GC § 10628

1. By accepting the resignation of an administrator pending the settlement of his accounts, the probate court does not thereby lose its jurisdiction over his person or the settlement of his accounts, and may proceed to hear and determine exceptions thereto, and ascertain the amount due from him to the estate in like manner as if he had continued in the execution of his trust: *Slagle v. Entekin*, 44 OS 637, 10 NE 675.

2. But where the court accepts the resignation and discharges the administrator, he will not be liable for maladministration in failing to answer a summons served on him thereafter in a proceeding involving the estate: *State v. Moffitt*, 13 CC(NS) 152, 23 CD 238.

§ 2109.27 Surviving fiduciaries. (GC § 10506-56)

When two or more fiduciaries have been appointed jointly to execute a trust and one or more of them dies, declines, resigns, or is removed, the title shall pass to the remaining fiduciaries who shall execute the trust, unless

the creating instrument expresses a contrary intention or unless the probate court on the application of persons interested in the trust determines otherwise. The remaining fiduciaries shall within ninety days after the death, resignation, or removal of a co-fiduciary, file in the court a complete account covering all matters to the time of such death, resignation, or removal.

HISTORY: GC § 10506-56; 114 v 320 (376). **EFF** 10-1-53. Analogous to former GC § 10595.

Comparative Legislation

Surviving fiduciaries:

Cal.—Probate Code, § 510

Ill.—Rev Stat, ch 3, § 23-7

Ind.—Burns' Stat, § 29-1-10-9

Ky.—KRS, § 395.060

Mich.—MCLA, § 704.51

N.Y.—SCPA, § 706

Pa.—Purdon's Stat, Tit. 20, § 3327

Fla.—FSA, § 733.503

Research Aids

Effect of death on surviving fiduciaries:

O-Jur2d: Fiduciaries §§ 18, 346; Trusts § 142

Am-Jur2d: Trusts § 301

ALR

Right of surviving or remaining trustee or trustees to act without substitution of another trustee in place of one who has died, resigned, or been removed, where will or other trust instrument provides for substitution or replacement. 142 ALR 1099.

Appointment and qualification of one of several trustees named in will as affecting power or duty of court to appoint cotrustee. 151 ALR 1308.

CASE NOTES AND OAG

1. Where an estate is devised to certain trustees and their successors, the limitation over to successors is void: *Lessee of Miles v. Fisher*, 10 O 1.

2. Where the duty of making sale of real estate and dividing the proceeds is imposed by will on the executors, and one of them declines to qualify, the duty of executing the trust devolves upon the other: *Collier v. Grimesey*, 36 OS 17.

3. Under this section, where one of two cotrustees dies, the probate court does not have power to appoint a successor co-trustee unless the instrument creating the trust provides for such appointment or unless an application is made by one or more of the beneficiaries or other persons interested in the trust to have a successor cotrustee appointed: *In re Labold*, 148 OS 332, 35 OO 318, 74 NE(2d) 251.

4. The appointment by the probate court of a successor co-trustee, under the exceptions in this section, on the court's own motion, without proper notice and hearing, and in the absence of a contrary intention expressed in the creating instrument and in the absence of an application by one or more of the beneficiaries or other persons interested in the trust in disregard of the expressed or implied intent of the settlor, is arbitrary and constitutes an abuse of the discretion of the court in the appointment and removal of trustees: *In re Labold*, 148 OS 332, 35 OO 318, 74 NE(2d) 251.

5. This section does not require the one of two co-administrators who resigns to accompany his resignation with an account: *Thrasher v. Kelly*, 73 App 304, 28 OO 457, 55 NE(2d) 873 [reversing 25 OO 101 (CP)].

§ 2109.28 Merger of fiduciaries. (GC § 10506-57)

A trust company or state or national bank having trust powers, resulting from merger or consolidation shall, upon filing proof thereof in the probate court, and without a new appointment, succeed to the rights and duties of all predecessor companies, as fiduciary. A purchase of substantially all the assets and assumption of substantially all the liabilities is a merger for the purposes of sections 2109.01 to 2109.58, inclusive, of the Revised Code. In all cases of merger or consolidation the bond given by any predecessor fiduciary shall remain liable for all acts of the successor fiduciary except as to any surety released upon application as provided in section 2109.18 of the Revised Code.

HISTORY: GC § 10506-57; 114 v 320 (376). **EFF 10-1-53.**

Forms

1 A&H Probate FORM 2109.28a et seq.

Research Aids

Liability on bond of predecessor fiduciary:

O-Jur2d: Fiduciaries § 207

Merger:

O-Jur2d: Fiduciaries § 347

§ 2109.29 Rights as to shares in corporation. (GC § 10506-58)

A corporation need not, unless ordered by a court, take notice of any duty of a fiduciary, or any restriction or limitation of the right, capacity, authority, or interest of such fiduciary, or see to the performance of any duty or requirement imposed upon such fiduciary by Chapters 2101. to 2131., inclusive, of the Revised Code, as to any of such corporation's shares of record in the name of or owned by such fiduciary or in the name of or owned by a decedent, ward, or beneficiary for whom such fiduciary is acting.

HISTORY: GC § 10506-58; 114 v 320 (376). **EFF 10-1-53.**

Research Aids

Corporation's relationship with fiduciary:

O-Jur2d: Fiduciaries § 146

ALR

Guardian's purchase from corporation of which he is officer or stockholder as voidable or as ground for surcharging his account. 105 ALR 449.

Law Reviews

The new Ohio securities transfer statute and conflict of laws. Article by Henry Pirtle of the Cleveland bar. 22 OO 539.

§ 2109.30 Accounts of fiduciaries.

(A) Within seven months after his appointment, every executor and administrator shall render an account of his administration, and shall render further accounts at least once each year thereafter. Every other fiduciary shall render an account of the administration of his estate or trust

at least once in each two years. An account shall be rendered by any fiduciary at any time other than that mentioned in this section upon the order of the court either at its own instance, or upon the motion of any person interested in the estate or trust, for good cause shown. Every fiduciary shall render a final account within thirty days after completing the administration of the estate or the termination of his trust, or within such other period of time as the court may order.

Every account shall include an itemized statement of all receipts of the fiduciary during the accounting period and of all disbursements and distributions made by him during the accounting period, verified by vouchers or proof. In addition, the account shall include an itemized statement of all funds, assets, and investments of the estate or trust known to or in the possession of the fiduciary at the end of the accounting period, and shall show any changes in investments since the last previous account. The accounts of testamentary trustees shall, and the accounts of other fiduciaries may, show receipts and disbursements separately identified as to principal and income.

Every account shall be upon the signature and oath of the fiduciary. When an account is rendered by two or more joint fiduciaries, the court may allow the account upon the signature and oath of one of them.

Upon the filing of every account the fiduciary, except corporate fiduciaries subject to section 1109.16 of the Revised Code, shall exhibit to the court, for its examination, the securities shown in the account as being in the hands of the fiduciary, or the certificate of the person in possession of the securities, if held as collateral or pursuant to section 2109.13 or 2131.21 of the Revised Code, and a passbook or certified bank statement showing as to each depository the fund deposited to the credit of the trust. The court may designate a deputy clerk, an agent of a corporate surety on the bond of the fiduciary, or another suitable person whom the court appoints as commissioner to make such examination and report his findings to the court. When securities are located outside the county, the court may appoint a commissioner or request another probate court to make the examination and report its findings to the court. The court may examine the fiduciary under oath touching the account.

When a fiduciary is authorized by law or by the instrument governing distribution to distribute the assets of the estate or trust, in whole or in part, he may do so and include a report of the distribution in his succeeding account.

An account showing complete administration before distribution of assets shall be designated "final account." An account filed subsequent to the final account and showing distribution of assets shall be designated "account of distribution." An

account showing complete administration and distribution of assets shall be designated "final and distributive account."

(B) In estates of decedents where the sole legatee or heir is also the executor or administrator, no partial accountings are required.

In estates of decedents where none of the legatees or heirs is under a legal disability, each partial accounting of the executor or administrator may be waived by the written consent of all the legatees or heirs filed in lieu of a partial accounting otherwise required.

HISTORY: GC § 10506-34; 114 v 320 (371); 120 v 649; 121 v 270; 125 v 903 (965) (E# 10-1-53); 133 v H 176 (E# 10-2-69); 133 v S 185 (E# 1-1-71); 134 v S 500 (E# 10-16-72); 136 v S 145. E# 1-1-76.

Analogous to former GC §§ 10821, 10933, 11029 and 10509-170, 10509-176.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2109.30 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Duty to pay estate taxes, RC § 5731.01 et seq.
Guardian under veterans' guardianship law, § 5905.11.

See RC §§ 2109.09, 2109.11, 2109.12, 2109.18, 2109.24, 2109.31, 2109.32, 2113.28 which refer to this section.

See RC § 2109.26 which refers to § 2109.30 et seq.

Comparative Legislation

Accounts:

Cal.—Probate Code, § 921
Ill.—Rev Stat, ch 3, § 24-1
Ind.—Burns' Stat, § 29-1-16-1
Ky.—KRS § 395.170
Mich.—MCLA, § 704.38
N.Y.—SCPA, § 2202
Pa.—Purdon's Stat, Tit. 20, § 3501.1
Fla.—FSA, § 733.604

Forms

1 A&H Probate FORM 2109.30a et seq.
1 A&H Probate FORM 2109.32a et seq: Hearing on account.

1 A&H Probate FORM 2109.33a et seq: Publication of notice.

1 A&H Probate FORM 2113.01a et seq: Executors and administrators; appointment, powers, duties.

Outline of Procedure

Account, filing of and exceptions thereto. Leyshon No. 30; A&H No. 1.

Research Aids

Accounting by fiduciaries—generally:

O-Jur2d: Fiduciaries § 252 et seq
Am-Jur2d: Trusts § 505 et seq; Executors and Administrators § 506 et seq

Duty to account:

O-Jur2d: Fiduciaries § 253
Am-Jur2d: Executors and Administrators §§ 508-512

Final account:

O-Jur2d: Fiduciaries § 256

Am-Jur2d: Executors and Administrators § 545; Trusts § 520

Form and contents:

O-Jur2d: Fiduciaries § 264 et seq

Am-Jur2d: Trusts § 507; Executors and Administrators §§ 516-518

Waiver of accounting requirement:

O-Jur2d: Fiduciaries § 255

When required or permitted:

O-Jur2d: Fiduciaries § 255; Executors and Administrators § 378

Am-Jur2d: Executors and Administrators §§ 519, 520

ALR

Jurisdiction of suit involving trust as affected by location of res, residence of parties to trust, service, and appearance. 15 ALR2d 610.

Law Reviews

Distribution and accounts. C. Terry Johnson. 43 OBar (No. 11) 321.

Recent changes in probate law. Article by James B. Danaher of the Cleveland bar. 17 OBar (No. 22) 271.

Real estate taxes in Ohio are charges ad rem only. Article by Ansel B. Curtiss of the Cleveland bar. 10 CinLRev 1.

CASE NOTES AND OAG

[DECISIONS CONSTRUING LAW PRIOR TO SB 145 AMENDMENT]

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1. General Code § 10509-176 (see now RC § 2109.30) does not require that a certificate should be filed with the account showing that real estate taxes have been paid: In re Kastelic, 3 OO 164.

2. A guardian may, in his account filed for settlement in the probate court, charge all proper debts due from his ward, although accruing prior to guardianship, for he cannot bring an action against himself or his ward while the relationship continues. The probate court has no discretion to refuse to settle them, though it should disallow items which are improper charges: Davis v. Ford, 7 O (pt.2), 104.

3. When a guardian closes his account with his ward by filing a final account in the probate court, an amount being due his ward, for which he induces her to sign a receipt as for money paid, he agreeing to be responsible to her for the amount, with interest, an action may be maintained upon such agreement by the ward, and the sum actually due recovered from the guardian without in any way opening or reviewing the accounts which had been settled in the probate court: Lindsay v. Lindsay, 28 OS 157.

4. No limitation of time exists which will bar the

issuing of a citation requiring a guardian to file an account of his trust: *McClelland v. State ex rel Clark*, 101 OS 42, 127 NE 409 [affirming *State ex rel Clark v. McClelland*, 30 OCA 522, 35 CD 422; *Philips v. State ex rel Harter*, 5 OS 122, disapproved and overruled].

4.1 A clause in the deed that the trustee "shall not be required to render any account of his trusteeship to any court but a settlement between the parties shall be final and conclusive" does not supersede the jurisdiction of the probate court over the accounting in case no settlement has been made between the parties: *Pherson v. Mitchell*, 12 App 336, 31 OCA 333.

5. A mere sworn statement without vouchers, filed by a guardian in lieu of an itemized final account as provided for in this section, is sufficient to authorize the probate court to hear proof of the matters therein set forth, permit exceptions to be filed thereto and fully dispose of the matter in accordance with the provisions of GC §§ 10501-53 and 10506-39 (RC §§ 2101.24 and 2109.32): *Marks v. Marks*, 58 App 266, 12 OO 158, 16 NE(2d) 509.

5.1 Where, in the reporting of sales of personal property and in making an accounting thereof to the probate court by an administrator, an objection is raised and an issue presented, such administrator is required to comply with the provisions of RC § 2109.30, that, "every account shall include an itemized statement of all receipts of the fiduciary during the accounting period and of all disbursements and distributions made by him during such period, verified by vouchers or proof": *In re Brown*, 98 App 297, 57 OO 342, 129 NE(2d) 509.

6. Where the court on its own motion does not order a formal hearing on the final account of an administrator as authorized by GC §§ 10506-34 to 10506-40 (RC §§ 2109.30 to 2109.35), within the period after publication of the notice of the filing of said account as fixed by a rule of the court, or the fiduciary or an interested party does not request such a hearing within such time, the probate court has full power under Const., Art. IV, § 8 to approve the final account of an administrator and order his discharge: *In re Johnson*, 27 OO 131, 12 OSupp 148 (PC).

7. Where a former ward, many years after he became of age, asks for an accounting by his former guardian, some legal notice must be given the guardian before the accounting may be had, and where upon an action on the bond the surety alone defends, the surety cannot be met with the objections that there had been an accounting in the probate court without notice to the former guardian or surety, and almost twenty years after the bond had been given: *Gilbert v. Gilbert*, 13 CC 29, 7 CD 58.

8. Approval by the probate court on exceptions by guardian to the allowance and payment by a former guardian of a claim against the ward in favor of an estate in which he was executor is conclusive against the present guardian suing such executor to get back the money, although the court believes such claim was unfounded: *Lynch v. Cogswell*, 18 CC 641, 7 CD 12.

9. The administrator of a deceased guardian should file the account of the deceased guardian and turn over the money in his hands to the newly appointed guardian, immediately after his appointment: *In re Estate of Bruckmann*, 1 NP(NS) 7, 48 Bull 637.

10. A long delay in filing exceptions to his guardian's account, there being no excuse for such delay, is laches, especially where the filing is delayed until after the death of the guardian, thus depriving the sureties of their main witness: *In re Streit*, 12 OD (NP) 158.

11. Money which the guardian had no right to receive, being paid him by an executor under an order of court without jurisdiction, and belonging in fact to other persons, must be accounted for as assets by him and his sureties, and they are estopped to set up the illegality or the title of others: *In re Cloud*, 20 Bull 455.

12. The duty of guardian to pay over funds to ward arises expressly by reason of this section, without any order of distribution: *Lamkin v. Robinson*, 10 NP (NS) 1, 21 OD 13 [appealed, 15 CC(NS) 126, 24 CD 91, which was affirmed, without opinion, 88 OS 603, 106 NE 1065, and *Stevens v. Robinson*, 88 OS 603, 106 NE 1081]. For a later opinion, see *Lamkin v. Robinson*, 16 App 440, 32 OCA 401, 35 CD 767 [motion to certify record overruled, 20 OLR 367].

13. A failure to account under this section is a violation of the Canons of Professional Ethics and grounds for an indefinite suspension from the practice of law: *Columbus Bar Assn. v. Margulis*, 174 OS 263, 22 OO(2d) 328, 189 NE(2d) 88.

14. A hearing by a probate court for the purpose of settling the "final and distributive account" of a receiver is not one of the equitable actions encompassed by RC § 2501.02: *In re Wissner & Gabler*, 5 OS(2d) 89, 34 OO(2d) 217, 214 NE(2d) 92.

15. Executors are not required to show receipts and disbursements separately identified as to principal and income: *In re Gamble*, 36 OO(2d) 388, 8 OMisc 314, 220 NE(2d) 621.

16. Under the provisions of RC § 2109.30 every executor must render an account of his administration within nine months after his appointment, and must render further accounts at least once each year thereafter: *Starr v. Rupp*, 53 OO(2d) 169, 25 OMisc 224, 421 F(2d) 999.

DECISIONS CONSTRUING FORMER

GC § 10509-170 (114 v 320 [439])

Account, 11 et seq

Effect, 21 et seq

Jurisdiction, 1 et seq

Jurisdiction

1. The settlement of estates is within the probate court, and a creditor cannot, at his option, transfer such settlement to another court: *McDonald v. Aten*, 1 OS 293.

2. The court has power to order final settlement, and there is no constitutional impediment to conferring such jurisdiction. Under such jurisdiction, the court can determine all disputes or submit them to a jury. Order of distribution may be enforced by execution. The power of the court is exhausted when it orders distribution and it cannot entertain a petition to enforce collection of amounts distributed: *McLaughlin v. McLaughlin*, 4 OS 508.

3. Upon final settlement of an administrator's accounts, the probate court has no jurisdiction to determine the state of accounts between the administrator and the several distributees to whom any balance found in his hands may be payable. The court can only order distribution of such balance according to law, leaving the state of accounts between the parties to be inquired into when such order of distribution is sought to be enforced by the respective distributees: *Cox v. John*, 32 OS 532.

4. If a trust is terminated by a mutual agreement, by which the former trustee obtains control of the property, he is an agent who can be compelled to account in the court of common pleas; and not an executor or a trustee under the will who can be compelled to account in the probate court: *Culver v.*

Culver, 58 OS 172, 50 NE 505.

5. An Ohio probate court, although it has admitted to probate an Ohio will, and has issued letters to the executor, has not power to review the accounts of such executor respecting property situate in the state of Michigan, and for which he has duly accounted to the proper court in that state under the ancillary administration granted him by the laws of that state: *In re Crawford*, 68 OS 58, 65 NE 156, 96 AmSt 648 [affirming 21 CC 554, 11 CD 605].

6. The probate court has jurisdiction of the person of the administrator until his accounts are settled. And that jurisdiction is not ousted by the fact that the court orders his removal and appoints a successor: *In re Morrison*, 68 OS 252, 67 NE 567.

Account

11. Where the widow and minor children were assigned a homestead out of intestate's lands, and the balance of the estate was sold to pay debts, leaving a balance of such debts unpaid, and twenty years thereafter the lands embraced in the homestead were sold for the payment of the residue of the debts, the personal representative must account according to law: *Taylor v. Thorn*, 29 OS 569.

12. Personal estate was devised to a wife for life and then so much "as was unconsumed" was to be divided among certain heirs, with no requirement that the executor should collect and distribute that which was unconsumed at the death of the widow. Held: The widow had a right to consume and dispose of the whole estate, and it was the duty of the executor to deliver possession thereof to her, and he is not responsible for the disposition of it by the widow, nor is he required to account therefor: *Posegate v. South*, 46 OS 391, 21 NE 641.

13. The allowance to an administrator for extraordinary services is part of the statement of his account: *McMahon v. Ambach & Co.*, 79 OS 103, 86 NE 512.

14. The amount of fees for services rendered by attorneys employed by an executor or administrator in the settlement of the estate in his hands, may be included as an item in the settlement account of the executor or administrator; or an application upon due and legal notice to all parties in interest may be made to the probate court to allow the claim and fix the amount thereof: *Trumpler v. Royer*, 95 OS 194, 115 NE 1018 [affirming *Royer v. Trumpler*, 7 App 312, 27 OCA 117, 28 CD 186; for a later report, overruling motion to certify record, see *Trumpler v. Royer*, 16 OLR 108, 63 Bull 223].

15. When an administrator by virtue of his office takes the unexpired term of his decedent's lease for years and sells the same, the proceeds of such sale are by law appropriated to the original lessor to the extent of the unpaid rents of the original lease, and such administrator will be required to account to his decedent's estate only for the excess beyond the sum required to pay the rents reserved in the original lease: *Steward v. Barry*, 102 OS 129, 131 NE 492.

16. An account of an administrator is settled to perpetuate evidence of payments. It is not an adjudication of the right to receive payments: *Burton v. Greif*, 11 App 102, 30 OCA 577 [motion to certify record overruled, *Greif v. Burton*, 17 OLR 94, 64 Bull 218].

Effect

21. The settlement of an account of an executor or administrator by the probate court is conclusive, as against parties with actual notice of the settlement of all matters specified therein, and as to such matters the party cannot be required to account a

second time, unless the same be impeached for fraud or manifest error. But such account is not final, as to bar further inquiry, in regard to other assets in the hands of the executor or administrator, not accounted for or passed on. And for such matters the court may, at any time within the limits of the statute, compel a further settlement by the process indicated: *McAfee v. Phillips*, 25 OS 374.

22. As to what extent partial and final accounts are conclusive, see *Piatt v. Longworth*, 27 OS 159.

23. Upon the settlement of the final account of an administrator, it is not the duty of the probate judge to provide for the payment of claims against the estate which no creditor is asserting: *Cox v. John*, 32 OS 532.

24. An order approving a partial account is conclusive unless attacked in the mode provided by statute, but this is only in respect to matters adjudicated therein: *Eichelberger v. Gross*, 42 OS 549.

25. As long as there are assets in the administrator's hands, his authority to administer the same is not extinguished by an order, made upon what purports to be the settlement of his final account, directing that he be discharged from his trust: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

26. The settlement of a final account showing payment of money to a person not entitled thereto (as to the child of a deceased legatee instead of to the legatee's administrator) is no bar to a subsequent action against him for the recovery of the money by one who is legally entitled to the same: *Banning v. Gotshall*, 62 OS 210, 56 NE 1030.

27. The filing of an account in the probate court by an executor or administrator, denominated "Final Account," does not operate to terminate the trust, as long as there remain assets under his jurisdiction subject to the payment of valid debts of the decedent, and the failure of the fiduciary to proceed with the administration of the trust, while under some circumstances justifying a removal of the officer, does not constitute, ipso facto, an abandonment of the trust: *Johnson v. Schwenck*, 99 OS 59, 124 NE 61, 8 ALR 170.

DECISIONS CONSTRUING FORMER

GC § 10509-176 (116 v 385 [401])

1. As this section existed from January 1, 1932, until September 2, 1935, there was considerable difference of opinion as to whether or not it was necessary to file with the account certificates showing that taxes which had accrued on real property of the decedent at the time of his death had been paid. Many probate courts held that it was necessary to file such certificates regarding real estate taxes with the account. However, the common pleas court of Cuyahoga county held that the provisions of GC § 10509-176 (see now RC § 2109.30) and related sections did not require that a certificate of the county auditor and county treasurer be filed showing that the real estate taxes charged against the estate had been paid, before the final account may be approved: *In re Kastelic*, 3 OO 164.

3. Under this section as it existed between January 1, 1932, and September 2, 1935, the attorney general rendered an opinion that by virtue of this section, it was not mandatory that the certificates of the county treasurer and county auditor that all taxes charged against the estate of the decedent had been paid, be filed by the administrator or executor at the time of the filing of a "partial account" but such certificates must be filed at or before the time of the filing of the final account: 1933 OAG 546.

4. The attorney general had also rendered another

opinion in which he had held that the certificates of the county auditor and county treasurer filed with the probate court pursuant to this section, must certify that all taxes, including real estate taxes charged against property coming into the control of the executor, charged against the estate of the decedent, had been paid: 1933 OAG 546.

5. Under GC § 10509-176 (116 v 401) (see now RC § 2109.30), the probate court may not legally require that executors or administrators, in filing their final account, produce a certificate from the county treasurer and county auditor showing that all returns for personal property taxation have been made and that all personal property taxes charged against the estate have been paid: 1935 OAG No.5022.

§ 2109.31 Citation to file account. (GC § 10506-35)

If a fiduciary neglects or refuses to file an account when due according to section 2109.30 of the Revised Code or when ordered by the probate court, the court at its own instance may, and on the application of any interested party or of any of the next of kin of any ward shall, issue a citation to such fiduciary, by publication or otherwise, to compel the filing of the overdue account. In case the fiduciary fails to file such account within thirty days after he has been served with such citation, no allowance shall be made for his services if the court finds that such delay was unreasonable.

HISTORY: GC § 10506-35; 114 v 320 (371); 120 v 649 (651); 121 v 270 (274), § 1. Eff 10-1-53. Analogous to former GC § 10506-36 (114 v 320).

Cross-References to Related Sections

Guardian under veterans' guardianship law, RC § 5905.12.

Forms

1 A&H Probate FORM 2109.31a et seq.

Research Aids

Forfeiture of compensation:

O-Jur2d: Fiduciaries § 278

Joint executors and administrators:

O-Jur2d: Fiduciaries §§ 26 to 29

Am-Jur2d: Executors, Etc., § 624 et seq

Proceedings to compel accounting:

O-Jur2d: Fiduciaries §§ 259, 262

ALR

Neglect or violation of duties as affecting compensation of trustee. 110 ALR 566.

Law Reviews

Final accounts by probate fiduciaries. Address by Rodney M. Love of Dayton. 16 OBar (No. 49) 647.

CASE NOTES AND OAG

1. No limitation of time exists which will bar the issuing of a citation requiring a guardian to file an account of his trust: *McClelland v. State*, 101 OS 42, 127 NE 409.

2. An administratrix may not be deprived of the compensation due to her under RC § 2113.35 for her services for mere delay in making and returning the inventory of the estate, when she has not been given

an order requiring her, at an early date therein named, to return same, as prescribed by RC § 2115.03, or has not been notified by the court of the expiration of the time to file such inventory, as prescribed by RC § 2109.24: *In re Burchett*, 16 OApp(2d) 45, 45 OO(2d) 133, 241 NE(2d) 787.

3. This section, providing that a guardian who fails to file his account within thirty days after he has been served with a citation to file the same is not entitled to compensation if the court finds that the delay is unreasonable, has application only after a citation is served on the guardian, and compensation cannot be denied under this section merely because the guardian failed to comply with the verbal request of the court: *In re O'Brien*, 74 OLA 366, 140 NE (2d) 806 (App).

§ 2109.32 Hearing on account; notice.

Every fiduciary's account required by section 2109.30 of the Revised Code shall be set for hearing before the probate court. Within one month after an account is filed, the court shall cause notice of the filing of the account and the time and place of the hearing thereon to be published once in some newspaper of general circulation in the county. The hearing on the account shall be set not earlier than thirty days after the publication of the notice. The costs of the notice, if more than one account is specified in the same notice, shall be paid in equal proportions by the fiduciaries.

At the hearing upon an account, the court shall inquire into, consider, and determine all matters relative to the account and the manner in which the fiduciary has executed his trust, including the investment of trust funds, and may order the account approved and settled or make any other order as the court deems proper. If, at the hearing upon an account, the court finds that the fiduciary has fully and lawfully administered the estate or trust and has distributed the assets thereof in accordance with the law or the instrument governing distribution, as shown in the account, the court shall order the account approved and settled and may order the fiduciary discharged.

The probate court shall not approve the final account of any executor or administrator until the following events have occurred:

(A) Four months have passed since the appointment of the executor or administrator;

(B) The surviving spouse has filed an election to take under or against the will, or the time for making the election has expired.

HISTORY: GC §§ 10506-36, 10506-39; 114 v 320 (372); 120 v 649; 121 v 270; 125 v 903 (966) (Eff 10-1-53); 136 v S 145. Eff 1-1-76.

GC § 10509-39 analogous to former GC § 11031; analogous in part to former GC § 10509-188.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2109.32 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Guardian under veterans' guardianship law, RC § 5905.11.

Notice given by probate court in recording relief of encumbrance from real estate, RC § 5301.27.

See RC §§ 2109.33, 2109.34, 2109.35 which refer to this section.

Comparative Legislation

Hearing on account:

Cal.—Probate Code, § 927

Ind.—Burns' Stat, § 29-1-16-6

Mich.—MCLA, § 704.39

N.Y.—SCPA, § 2211

Pa.—Purdon's Stat, Tit. 20, § 3514

Forms

1 A&H Probate FORM 2109.32a et seq.

1 A&H Probate FORM 2109.30a et seq: Fiduciary's account.

1 A&H Probate FORM 2109.33a et seq: Publication of notice.

1 A&H Probate FORM 2113.01a et seq: Executors and administrators; appointment, powers, duties.

Outline of Procedure

Account, requirement of. Leyshon No. 31; A&H No. 2.

Research Aids

Approval and settlement of accounts:

O-Jur2d: Fiduciaries §§ 294, 305; Executors and Administrators § 378

Am-Jur2d: Trusts § 520

Costs of notice:

O-Jur2d: Fiduciaries § 296

Hearing:

O-Jur2d: Fiduciaries §§ 279, 280

Am-Jur2d: Trusts § 519

Notice:

O-Jur2d: Fiduciaries §§ 281-283

Am-Jur2d: Executors and Administrators § 514

Scope of inquiry:

O-Jur2d: Fiduciaries § 286

Law Review

Distribution and accounts. C. Terry Johnson. 43 OBar (No. 11) 321.

Final accounts by probate fiduciaries. Address by Rodney M. Love of Dayton. 16 OBar (No. 49) 647.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Under Const., Art. IV, § 8 and GC §§ 10501-53 and 10506-39 (RC §§ 2101.24 and 2109.32), the probate court has plenary power at law and in equity to hear, determine and finally dispose of all matters relative to the manner in which a guardian has executed his trust and to require such guardian to account not only for all of the estate of his ward which came into the guardian's hands, but as well for all the estate of his ward which should have come into his hands through the exercise of reasonable diligence and that care of his ward's estate which a reasonable man

would have used in the account of his own affairs: In re Zimmerman, 141 OS 207, 25 OO 326, 47 NE (2d) 782.

2. There are no provisions in GC § 10506-39 (RC § 2109.32), or any other statute, specifically making the matter of the allowance of a claim against an estate the subject of exceptions to an account: In re Blue, 67 App 37, 14 OO 447, 32 NE(2d) 499.

3. Where the final and distributive account of the administrators of an estate has been approved and settled and they have been discharged from their trust pursuant to this section, and that order of approval, settlement and discharge has not been vacated pursuant to RC § 2109.35, where some asset remains upon which administration has not been exhausted and for some lawful purpose relating to that asset administration is required, an administrator may be appointed to complete such administration only in a manner similar to, and with the same formalities as, the original appointment of an administrator: In re George, 20 OApp(2d) 87, 49 OO(2d) 110, 252 NE(2d) 176 [reversed 24 OS(2d) 18, 53 OO(2d) 10, 262 NE(2d) 872].

4. Items which were included in a first account which was approved by the court and not appealed are res judicata though* included also in a second account: In re Norris, 84 OLA 92, 169 NE(2d) 639 (App).

3. A court is without jurisdiction to hear and determine a motion to fix the compensation due an executor and trustee for extraordinary services in such capacity, where no notice of the pendency of such motion was given to the beneficiaries under the will: Ballard v. Mack, 3 OLR 249, 17 CD 839.

§ 2109.33 Service of additional notice; exceptions to account. (GC §§ 10506-37, 10506-38)

In addition to the notice required by section 2109.32 of the Revised Code, a fiduciary may serve notice of the hearing upon his account, or may cause such notice to be served, upon any person who is interested in the estate or trust. The probate court, after notice to the fiduciary, either upon the motion of any interested person for good cause shown or at its own instance, may order that such additional notice be served upon such persons as the court designates.

Such notice shall set forth the time and place of the hearing and shall specify the account to be considered and acted upon by the court at the hearing and the period of time covered by such account. It shall contain a statement to the effect that the person notified is required to examine such account, to inquire into the contents thereof and into all matters that may come before the court at the hearing thereon, and to file any exceptions which such person may have to such account at least five days prior to the hearing on the account, and that upon his failure to file exceptions thereto, the account may be approved without further notice. If the person to be notified was not a party to the proceeding wherein any prior account was settled, such notice, for the purpose of barring any rights possessed by such

person, may include and specify such prior accounts and the periods of time covered thereby. In such event, the notice shall inform the person notified that the approval of the account filed most recently will terminate any rights possessed by him to vacate the order settling each prior account so specified, except as provided in section 2109.35 of the Revised Code, and shall further inform such person that, under penalty of losing such rights, he forthwith shall examine each prior account so specified, shall inquire into the contents thereof, and, if he deems it necessary to protect his rights, shall take such action with respect thereto as is permitted by law.

Such notice of the hearing upon an account shall be served at least fifteen days prior to the hearing thereon. Prior to the hearing, an affidavit proving service of such notice shall be filed by the fiduciary or by the person who was ordered by the court to serve the notice. Any competent person may waive service of notice and consent to the approval of any account by the court. Waivers of service, consents to approval, and affidavits proving service of notice shall be recorded with the account.

Any person interested in an estate or trust may file exceptions to an account or to matters pertaining to the execution of the trust. All exceptions shall be specific and written. Exceptions shall be filed and a copy thereof furnished to the fiduciary by the exceptor, not less than five days prior to the hearing on the account. The court for cause may allow further time to file exceptions. If exceptions are filed to an account the court may allow further time for serving notice of the hearing upon any person who may be affected by an order disposing of such exceptions and who has not already been served with notice of the hearing in accordance with this section.

HISTORY: GC §§ 10506-37, 10506-38; 114 v 320 (371, 372); 120 v 649 (652); 121 v 270 (274, 275), § 1. Eff 10-1-53. GC § 10506-37 analogous to former GC § 11201; GC § 10506-38 not analogous to former GC § 10506-38.

Cross-References to Related Sections

Notice given by probate court in recording relief of encumbrance from real estate, RC § 5301.27.

See RC § 2109.35 which refers to this section.

Forms

1 A&H Probate FORM 2109.33a et seq.

Outline of Procedure

Account, filing of and exceptions thereto. Leyshon No. 30; A&H No. 1.

Research Aids

Exceptions to account:

O-Jur2d: Fiduciaries §§ 288-292

Am-Jur2d: Executors and Administrators § 521

Service of additional notice:

O-Jur2d: Fiduciaries §§ 282, 283

Am-Jur2d: Executors and Administrators § 514

ALR

Notice to one or more co-administrators or co-executors as notice to all. 115 ALR 390.

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1. The First National Bank, as trustee, was under an unqualified duty, upon acceptance of the trust property from itself, as executor, to take action to recover for the benefit of the beneficiaries that portion of the trust property which had been wrongfully disbursed by the bank while acting as executor. Inasmuch as appellee's liability is based upon its failure to discharge its responsibilities as trustee, the failure of appellant to file exceptions to the final account of the executor does not preclude her from filing exceptions to appellee's account in its capacity as trustee: In re First National Bank of Mansfield, 37 OS(2d) 60, 66 OO(2d) 162, 307 NE(2d) 23 (1974).

2. A bonding company, surety on the bond of joint guardians as to whose accounts exceptions have been sustained and findings made that large sums of money were due from said guardians to the wards, is an interested party under the provisions of GC § 10506-37 (RC § 2109.33): In re Zimmerman, 78 App 297, 34 OO 17, 70 NE(2d) 153.

3. Where a guardian of an estate is appointed solely on the ground of the ward's physical incapacity, the ward's mental capacity is not impaired, and such appointment is made with the consent of the ward, a daughter of such ward may, under this section which provides that any person interested in an estate may file exceptions to an account, file exceptions to such guardian's account: In re Tillman, 100 App 291, 60 OO 254, 136 NE(2d) 291.

4. A surviving spouse who has entered into an antenuptial agreement whereby she relinquishes all claims which she might or could have in or to her deceased husband's estate is not an "interested person" within the scope of this section: In re Matusoff, 10 OApp(2d) 113, 39 OO(2d) 187, 226 NE(2d) 140.

5. Where specific written exceptions to a final account of an executor have been timely filed, it is within the power of the probate court to sustain such exceptions to the account and modify an allowance of fees made at a prior term of court, where such an allowance was made without notice to the interested party and no objections were made by such party at the time of the determination of the amount of the fees: In re Alexander, 103 App 514, 4 OO(2d) 19, 146 NE(2d) 315.

6. An executor has no right of appeal from an order of the probate court fixing the amount of attorney fees, on the ground that the amount of the fees fixed is excessive: In re Verbeck, 114 App 155, 18 OO(2d) 465, 180 NE(2d) 599.

7. The overruling of exceptions to the inventory and final account of an administrator filed after approval and confirmation of such account is proper where the record discloses a strict compliance with the provisions of GC § 10506-37 (RC § 2109.33) on the subject of notice, and the bill of exceptions fails to reveal that the exceptors did not have actual notice of the filing and time set for hearing, thereby placing

the exceptors outside the scope of the saving provision of GC § 10506-40 (RC § 2109.35): *In re Kopczynski*, 38 OLA 306, 49 NE(2d) 960 (App).

8. When a trust is created under a will and the trustee is given the power to nominate beneficiaries of the remainder of the trust, anyone so nominated by the will of said trustee is a beneficiary of the trust, takes under the trust and not under the trustee's will, and as such beneficiary is entitled to file exceptions to the trustee's final account (filed after death of trustee when rights of beneficiaries fixed): *In re Post*, 56 OLA 240, 91 NE(2d) 698 (App).

9. Exception to account will be sustained where all transactions are not fully set forth: *In re Brown*, 67 OLA 291, [affirmed 75 OLA 282].

10. A court is without jurisdiction to hear and determine a motion to fix the compensation due an executor and trustee for extraordinary services in such capacity, where no notice of the pendency of such motion was given to the beneficiaries under the will: *Ballard v. Mack*, 3 OLR 249, 17 CD 839.

§ 2109.34 Representation in account proceeding. (GC § 10506-38a)

If an interest in an estate or trust is or may be possessed by persons who will compose a certain class upon the happening of any future event, the unborn members of such class shall be deemed to be represented in any hearing upon a fiduciary's account required by section 2109.32 of the Revised Code, if any living member of the class is made a party to such proceeding or if a trustee for the proceeding is appointed by the probate court. The unborn members of such class need not be served by publication. An order made in such proceeding shall be binding upon all members of such class, except that such order may be vacated for fraud as provided in section 2109.35 of the Revised Code.

If the beneficiaries, both present and future, of a charitable trust are not represented by a trustee or an existing corporation or other organization they shall be represented in any such proceeding by the attorney general if he is made a party thereto. Any order made in the proceeding shall be binding upon such beneficiaries, except for fraud.

HISTORY: GC § 10506-38a; 120 v 649 (650); 121 v 270 (278), § 1; 125 v 903 (967). **EFF** 10-1-53.

Cross-References to Related Sections

See RC § 2109.35 which refers to this section.

Research Aids

Representation:

O-Jur2d: Fiduciaries § 285

§ 2109.35 Effect of order settling account. (GC § 10506-40)

The order of the probate court upon the settlement of a fiduciary's account shall have the effect of a judgment and may be vacated only as follows:

(A) Such order may be vacated for fraud, upon motion of any person affected thereby or upon

the court's own order, if such motion is filed or order is made within one year after discovery of the existence of the fraud. Any person who is subject to any legal disability may file such motion at any time within one year after the removal of such disability or within one year after he discovers the existence of the fraud, whichever is later, or his guardian or a successor guardian may do so during the period of such disability. If the death of any person occurs during the period within which he could have filed such motion, his administrator or executor may file such motion within one year after death.

(B) Such order may be vacated for good cause shown, other than fraud, upon motion of any person affected thereby who was not a party to the proceeding wherein such order was made and who had no knowledge of such proceeding in time to appear therein; provided that if the account settled by such order is included and specified in the notice to such person of the proceeding wherein a subsequent account is settled, the right of such person to vacate such order shall terminate upon the settlement of the subsequent account. A person affected by an order settling an account shall be deemed to have been a party to the proceeding wherein such order was made if such person was served with notice of the hearing thereon in accordance with section 2109.33 of the Revised Code, waived such notice, consented to the approval of the account, filed exceptions thereto, or is bound by section 2109.34 of the Revised Code; but no person in being who is under legal disability at the time of such proceeding shall be deemed to have been a party thereto unless he was represented therein as provided in section 2111.23 of the Revised Code. Neither the fiduciary nor his surety shall incur any liability as a result of the vacation of an order settling an account in accordance with division (B) of this section, if the motion to vacate such order is filed more than three years following the settlement of the fiduciary's account showing complete distribution of assets; but the limitation prescribed shall not affect the liability of any heir, devisee, or distributee either before or after the expiration of such period.

(C) Such order may be vacated for good cause shown, other than fraud, upon motion of any person affected thereby who was a party to the proceeding wherein such order was made solely by reason of his having been served by publication in a newspaper in accordance with section 2109.33 of the Revised Code, if such motion is filed within one year after such person acquires knowledge of such proceeding and in any event within three years after such order is made. Such person must establish to the satisfaction of the court that he had no knowledge of the proceed-

ing in time to appear therein.

(D) Such order may be vacated for good cause shown upon motion of the fiduciary, if such motion is filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust.

A motion to vacate an order settling an account shall set forth the items of the account with respect to which complaint is made and the reasons for complaining thereof, verified by affidavit.

The person filing a motion to vacate an order settling an account, or such other person as the court may designate, shall cause notice of the hearing thereon to be served upon all interested parties who may be adversely affected by the order of the court granting such motion.

An order settling an account shall not be vacated unless the court determines that there is good cause for doing so and the burden of proving good cause shall be upon the complaining party.

The vacation of an order settling an account, made after notice given in the manner provided in section 2109.32 or 2109.33 of the Revised Code, shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith; provided that if the fiduciary has effected any such sale, lease, or encumbrance, any person prejudiced thereby may, after vacation of such order, proceed against any distributee benefiting therefrom to the extent of the amount received by such distributee on distribution of the estate or trust, or if any heir, devisee, or distributee has effected any such sale, lease, or encumbrance, any person prejudiced thereby may, after the vacation of such order, proceed against such heir, devisee, or distributee, to the extent of the value at the time of alienation of the property aliened by him, with legal interest.

HISTORY: GC § 10506-40; 114 v 320 (372); 120 v 649 (653); 121 v 270 (276), § 1; 125 v 903 (967). **EFF** 10-1-53. Analogous to former GC §§ 10834, 10835, 11033.

Cross-References to Related Sections

See RC §§ 2109.33, 2109.34, 2109.36, 2113.56 which refer to this section.

Forms

- 1 A&H Probate FORM 2109.35a et seq.
- 1 A&H Probate FORM 2109.30a et seq: Fiduciary's account.
- 1 A&H Probate FORM 2113.01a et seq: Executors and administrators; appointment, powers, duties.

Research Aids

Effect of settlement:

O-Jur2d: Fiduciaries § 297 et seq

Am-Jur2d: Executors and Administrators § 545; Trust § 520

Effect of vacation:

O-Jur2d: Fiduciaries § 315

Vacation for cause other than fraud; by nonparty who was affected by the order:

O-Jur2d: Fiduciaries § 311

Vacation for cause other than fraud; by party:

O-Jur2d: Fiduciaries § 312

Vacation for fraud:

O-Jur2d: Fiduciaries §§ 309, 310

Vacation of order:

O-Jur2d: Fiduciaries § 307 et seq

Am-Jur2d: Executors and Administrators § 547; Trusts § 521

ALR

Order or decree of distribution of decedent's estate as protection of executor or administrator against claims of one not named therein who is entitled to a share of the estate. 106 ALR 817.

Decree settling account of executor who is also trustee as res judicata in respect of his liability in capacity of trustee. 116 ALR 1290.

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1. In a proceeding arising under this section, prior to its amendment in 120 v 653, where fraud or collusion or a violation of rights which are saved by statute to persons under disability is shown to have been practiced in the administration of an executor's trust, the determination of the probate court approving the final account is thereby vacated: In re Stafford, 146 OS 253, 32 OO 262, 65 NE(2d) 701.

2. Prior to the amendment of this section (120 v 653), effective September 20, 1943, the statutory law of this state prescribed no limitation of time within which the approval of the final account of an executor could be challenged and vacated on the ground: (a) that fraud or collusion had been practiced in connection with such final account; or (b) that such approval was against rights which are saved by statute to persons under disability: In re Stafford, 146 OS 253, 32 OO 262, 65 NE(2d) 701.

2.1 Where the assets of an estate have (in accordance with the terms of a will) been distributed to life tenants, the estate has been closed and the final account has been settled and determined, and the life tenants die, in the absence of a motion, filed in accordance with this section to vacate the order of the probate court, such court lacks jurisdiction to entertain an application by the remaindermen to

commit securities formerly in the estate to a trustee: *State ex rel Beedle v. Kiracofe*, 176 OS 149, 27 OO (2d) 25, 198 NE(2d) 61.

3. Probate court could open up and reconsider accounts of executor previously adjudicated in partial account: *United States Fidelity & Co. v. Wood*, 35 App 224, 172 NE 383.

4. This section does not specifically provide as to whether or not the probate court would have jurisdiction to set aside its judgment of settlement of the final account on the ground of fraud after the lapse of some two and one-half years: *Abicht v. O'Donnell*, 52 App 513, 6 OO 462, 3 NE(2d) 993.

5. Under Art. IV, § 8, of the constitution and this section, and related sections of the probate code, the probate court has jurisdiction to reopen a final account on application of a creditor on grounds of fraud and manifest error, though such application is filed after confirmation of the final account. In any event the common pleas court has jurisdiction to pass upon such questions on appeal from the probate court: *In re Steltenpohl*, 53 App 541, 7 OO 120, 5 NE(2d) 954.

6. Where no exceptions are filed to an executor's first partial account, its settlement by the probate court is not of an adversary character but *ex parte* only: *In re Russell*, 60 App 385, 13 OO 239, 21 NE (2d) 604.

7. Where a widow elects to take under the will of her deceased husband, the appraisers of the personal property of her husband's estate fail to make an allowance to her for a year's support and to set off exempted property pursuant to the provisions of GC § 10509-54 (RC § 2115.13), and the omission of the executrix to have the same done by the appraisers or the court is not occasioned by fraud, the rights of the widow are governed by subdivision (B) of this section, and the failure of the widow or her representatives to file exceptions to the final account of the executrix of the husband's estate in accordance therewith within the prescribed time limit will bar any recovery thereafter: *Eckhart v. Wiles*, 61 App 32, 15 OO 61, 22 NE(2d) 289 [appeal dismissed, 134 OS 491].

8. By virtue of this section, an order of the probate court settling the first and final account of the executrix of an estate of a husband from which account it appears that no allowance has been made to the widow for her year's support and no property set off to her as exempt, and there is no balance in the hands of the executrix and that said estate has been fully administered, operates as a judgment at law or decree in equity adjudicating that the widow had no right to any distributive share, allowance for year's support, or to exempt property in the estate: *Eckhart v. Wiles*, 61 App 32, 15 OO 61, 22 NE(2d) 289 [appeal dismissed, 134 OS 491].

9. An administrator of the estate of a surviving spouse who died subsequent to her husband and before receiving her statutory widow's exemption and allowance is entitled under this section, in case of fraud or collusion, to have the husband's estate reopened more than eight months after the filing of the final account in his estate, have an administrator *de bonis non* appointed therefor, and obtain the widow's exemption and allowance as a part of her estate: *In re Shive*, 65 App 166, 18 OO 358, 29 NE (2d) 565.

10. A representation by an administrator that decedent left no surviving spouse, when in fact the surviving spouse lived for seven months after her husband's death, is a misstatement of fact sufficient to constitute a fraud on the probate court within this section, authorizing that court to reopen a decedent's estate: *In re Shive*, 65 App 166, 18 OO 358, 29 NE (2d) 565.

11. Revised Code § 2315.22 (separate findings) has no application to proceedings under this section (vacation of order settling accounts): *In re Sloane*, 109 App 110, 112, 10 OO(2d) 269, 163 NE(2d) 915.

12. Although prior accounts have been formally approved by the court, without exceptions being filed thereto, the exceptors in filing exceptions to a second and final account can open up previous accounts for the purpose of having the court determine matters with reference to the investment of trust funds: *In re Conover*, 10 OO 481 (PC).

13. An allegation of constructive fraud is insufficient under this section to permit the probate court to say that its determination on the settlement of the final account is of no effect as against a claimant who seeks to have the confirmation of the final account set aside: *Pangelly v. Thomas*, 15 OO 216 (PC).

14. Beneficiaries may invoke their remedy through exceptions to an account, with a request that former accounts be opened up for correction of errors or mistakes and fraud on the part of the administrator, in concealing from the court the fact that he did not have the funds on hand as set out in his accounts: *In re Chambers*, 16 OO 519 (App) [appeal dismissed, 136 OS 202].

15. Orders of the probate court approving and confirming an executor's accounts did not, under this section or otherwise, bind or conclude the state with respect to an assessment of shares of stock which were a part of the estate: *Gamble v. Evatt*, 23 OO 392, 8 OSupp 1 (BTA).

15.1 A judgment of the probate court settling the accounts of a fiduciary may be vacated by the probate court during the time specified and for the reasons set forth in RC § 2109.35: *Border v. Ohio Sav. & Trust Co.*, 55 OO(2d) 410, 26 OMisc 273, 267 NE(2d) 120 (CP).

15.2 A declaratory judgment proceeding is not one of the methods provided in RC § 2109.35 for vacating an order of the probate court upon the settlement of a fiduciary's account: *Third Nat. Bank v. Gardner*, 53 OO(2d) 261, 24 OMisc 223, 262 NE(2d) 430 (CP).

16. This section, relative to opening up an account, is not applicable to a case arising before it became effective: *In re Jaymes*, 18 OLA 613.

17. The pro forma approval by probate court of partial accounts of the guardian of an incompetent, not excepted to, is not final under this section "in case of fraud," and may be inquired into on exceptions filed to a later account: *In re Lodge*, 19 OLA 316.

18. Claimants who filed their exceptions to final accounts in the probate court had the right to rely upon the provisions of this section and to assume that the settlement of the final account by the probate court would be *res judicata* unless the judgment of that court was appealed: *In re Binder*, 25 OLA 472 (CP).

19. Under this section the general rule that in cases where trial has been had upon issues of fact drawn between the parties, such factual question may not be reviewed on appeal until the trial court has been given an opportunity to reconsider the weight of the evidence, is not applicable to an appeal from an order of the probate court overruling exceptions to a guardian's final account, and consequently the bill of exceptions to such an order will not be stricken because no motion for a new trial was filed after the action by the trial court in overruling the exceptions to the account: *In re Bireley*, 41 OLA 601, 59 NE (2d) 71 (App).

20. A holding that for "good cause" or "suspicion of fraud" the settlement entry of judgment is vacated,

does not comply with the requirements of this section and a vacation of the settlement of the account of the administrator of an estate for such reasons, without a finding by clear and convincing evidence that fraud has been established, must be reversed as contrary to law: *In re Nyhuis*, 65 OLA 65, 113 NE (2d) 700 (App).

21. Under the provisions of this section, providing for the settlement of accounts by an executor, the knowledge of the proceeding on the part of the party affected means actual knowledge of the filing of such accounts, either by the party or his duly authorized agent: *In re Bentley*, 66 OLA 363, 116 NE(2d) 738 (App).

22. Failure of executor to set aside assets to meet a contingent claim is not ground for vacation of an order of approval of an account: *In re Robbins*, 28 OO(2d) 399, 94 OLA 561, 200 NE(2d) 735.

23. Under this section the probate court has jurisdiction upon settlement of the tenth account to open all former accounts for the purpose of correcting errors therein on condition that such errors did not constitute "matter in dispute" previously determined by the court, and also has jurisdiction to reopen such accounts "in case of fraud": *Massachusetts Bonding & Co. v. Winters Nat. Bank & Co.*, 130 F(2d) 5, 24 OO 225.

24. For history of this section, see *In re Lodge*, 32 NP(NS) 40.

25. The lack of an adverse party of sufficient mental capacity to challenge the items of a partial account, relating to character of investments there shown, was a good cause for leave to open a former disputed account: *In re Lodge*, 32 NP(NS) 40.

26. The language of this section must be construed to include not merely clerical errors contained in former accounts, but matters of substance as well, such as the question of the lawfulness of an investment shown in such previous accounts: *In re Lodge*, 32 NP(NS) 40.

27. The filing of a partial account by the guardian of the estate of an incompetent is an ex parte proceeding which becomes adversary only upon the filing of exceptions: *In re Lodge*, 32 NP(NS) 40.

28. Exceptions filed to a subsequent account will reach all former accounts which were ex parte and not made adversary by the filing of exceptions thereto: *In re Lodge*, 32 NP(NS) 40.

DECISIONS UNDER FORMER GC § 10834

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Jurisdiction

1. On exceptions to an account, where it is charged that an executor or administrator has failed to charge himself with a debt of his own to the deceased, the court may hear evidence and determine the validity of the claim: *Raab's Estate*, 16 OS 273.

2. The probate court has power, upon hearing exceptions, to determine as to fraud of the executor,

and to charge him in his account accordingly: *Reed v. Brown*, 10 CC 44, 6 CD 15.

3. Fraud by one standing in a fiduciary relation will avoid the settlement of the account induced thereby, and such final settlement may be attacked in a court of equity in an independent action upon a complaint that the final settlement was obtained by fraud; and the common pleas has jurisdiction in such action: *Rote v. Stratton*, 2 NP 27, 3 OD 156.

4. There is no authority in the probate court to set aside the final account of an administrator and reopen the estate, where no exception was filed by a party in interest within eight months of the settlement of said account, which is conclusive unless attacked for fraud or corrected by the court upon the filing of a subsequent and correct account. But where a mistake has been made in the former and final account as to the existence of debts against the estate and credits due the administrator, said former and final account may be opened up by the probate court upon the filing of a subsequent account showing the existence of such debts and credits: *Hunter v. Yocum*, 18 NP(NS) 14, 27 OD 31.

Opening account

5. The settlement of an account is conclusive as to all matters set out and specified therein, and the party rendering same cannot be required to account a second time unless the account be impeached for fraud or manifest error: *McAfee v. Phillips*, 25 OS 374.

6. A settlement by agreement with the heirs is final except as to minors, who may, on coming of age, disaffirm same and compel a final settlement to be made in a proper court: *Piatt v. Longworth*, 27 OS 159.

7. After the expiration of the eight months allowed by this section for filing exceptions when the account is settled in the absence of a person interested and without actual notice to him, the judgment of a probate court settling the final account of an executor or an administrator becomes absolute and conclusive and cannot be attacked except for fraud of the prevailing party: *Crawford v. Zeigler*, 84 OS 224, 95 NE 743.

8. An account containing items of credit for statutory commissions, extra services and attorney's fees, which was duly allowed and confirmed by the probate court, cannot, on the filing of a second account more than one year thereafter, be reopened for hearing, and such items be disallowed, on exceptions filed thereto, when it is not claimed or found that there was any error or mistake therein, or in their allowance: *Campbell v. McCormick*, 1 CC 504, 1 CD 281.

9. One cannot maintain a suit in equity to open an executor's account unless the judgment of the probate court was obtained by fraud. Where the objection to the accounts is not that the executor omitted items but that payments by him were not authorized by the will, this raised no question of fraud, and it will be presumed that the probate court passed on this question: *Woodward v. Curtis*, 19 CC 15, 10 CD 400 [affirmed, without opinion, 63 OS 575].

10. The settlement of the final account of an executor or administrator, which shows a false payment of a debt against the estate, no such debt having existed, is not a bar to a subsequent action against such executor or administrator for the recovery of such money by one who is legally entitled thereto: *Burton v. Greif*, 11 App 102, 30 OCA 577 [motion to certify record overruled, *Greif v. Burton*, 17 OLR 94, 64 Bull 218].

11. Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband

to pay debts, to which no error was prosecuted or appeal taken, cannot be attacked collaterally by exception to her account as administratrix of the said estate: *In re Hess*, 14 CC(NS) 463, 23 CD 449.

12. An administrator *de bonis non* procured a reopening of his predecessor's account and a finding of an amount due the predecessor. After appeal and the death of the administrator *de bonis non*, held, the proceedings were not ended by his death and may be revived: *In re Ziegler*, 4 NP 182, 6 OD 244 [for opinion on motion to dismiss appeal, see 3 NP 307, 6 OD 54].

13. Where an administrator died pending exceptions to his account and his executrix filed a final account for him as administrator, to which similar exceptions were taken, the executor was incompetent to testify in support of his exceptions: *Estate of Runyan*, 4 NP 335, 7 OD 236.

14. The finding made upon a final account cannot be attacked in a collateral action. An unpaid creditor of the settled estate cannot intervene in a suit by the administrator of an heir to sell the real estate inherited from the ancestor to pay debts: *Smith v. Hayward*, 5 NP 501, 5 OD 462.

15. The settled accounts of an administrator are conclusive between him and the estate, except as provided by the statutes: *Lamkin v. Robinson*, 10 NP(NS) 1, 21 OD 13 [appealed, 15 CC(NS) 126, 24 CD 91, which was affirmed, without opinion, 88 OS 603, and *Stevens v. Robinson*, 88 OS 603; for a later opinion, see *Lamkin v. Robinson*, 16 App 440, 32 OCA 401, 35 CD 767; motion to certify record overruled, 20 OLR 367].

16. If the facts prescribed in this section for opening an account do not exist, an account can be corrected only under former GC § 10835 (see now RC § 2109.35), and mistakes or errors must be shown. An intentional payment of claims which it is now claimed should not have been allowed or paid is not an error or mistake: *In re Campbell*, 13 NP(NS) 386, 22 OD 578, 57 Bull 353 (Ed) [judgment of circuit court affirmed, without opinion, 90 OS 406].

DECISIONS UNDER FORMER GC § 10835

1. This section does not authorize the probate court to open up or vacate, at the instance of either party, a former order by the court of common pleas on appeal, in the settlement of a former account: *In Matter of Stayner*, 33 OS 481.

2. Upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein, except as to matters in dispute between two parties which had been previously heard and determined by the court: *Watts v. Watts*, 38 OS 480.

3. This includes the power to correct all errors or mistakes of the court, as well as of the executor or administrator, found in former settlements, whether as to items embraced in or omitted from such former accounts: *Watts v. Watts*, 38 OS 480.

4. An Ohio probate court, although it has admitted to probate an Ohio will, and has issued letters testamentary to the executor named therein, has not power to review the accounts of such executor respecting property situate in the state of Michigan, and for which he has duly accounted to the proper court of that state: *Estate of Crawford*, 68 OS 58, 67 NE 156, 96 AmSt 648 [affirming 21 CC 554, 11 CD 605].

5. Upon settlement of an account, all former accounts may be opened to correct mistake or error, even though no exception was filed to the original account: *Lambright v. Lambright*, 74 OS 198, 78

NE 265.

6. The probate court will not go back of a settlement made in the common pleas court, which involves the same matters of dispute, but will look to the entry of the upper court for its limitation: *In Matter of Seeger*, 7 NP 207, 1 OD 113.

7. This section is remedial and should receive a reasonable construction, so as to suppress the mischief and advance the remedy. Uncontested partial settlement accounts may, upon proper exceptions at final hearing, be opened up for fraud, mistake or error under favor of this section, and where such accounts have been contested and adjudicated, they may be opened up by leave of court: *In re Leidigh*, 15 OD (NP) 193.

8. The administrator's settlement will not be opened up forty years after the estate was closed in order to let in the claim of the widow for her first year's support, where no such claim was asserted at the time the estate was being settled: *Evans v. Evans*, 13 CC(NS) 62, 21 CD 635.

DECISIONS UNDER FORMER GC § 11033

1. Under this section accounts of a trustee, previously filed, can be opened up so far as to correct any mistakes or errors, none of which had been previously subjected to any special hearing or determination by the probate court: *Watts v. Watts*, 38 OS 480; *Lambright v. Lambright*, 74 OS 198, 78 NE 265; *In re Couden*, 9 App 207.

2. A judgment in a former proceeding, determining the amount due from the trustee, may be treated as *res judicata*: *Smith v. Worley*, 12 App 367.

3. The sureties of a guardian may on their own motion become parties to the settlement of final account for the purpose of correcting errors in that of a former account: *Porter v. Brown*, 9 DecRep 646, 16 Bull 69.

4. Jurisdiction in common pleas court is auxiliary to that conferred on the probate court, only to be exercised in exceptional cases where the probate jurisdiction is inadequate: *Rato v. Stratton*, 2 NP 27, 3 OD 156.

§ 2109.36 Order of distribution. (GC § 10506-40a)

An application for an order of distribution of the assets of an estate or trust held by a fiduciary may be set for hearing before the probate court at such time as the court shall designate. The fiduciary may serve notice of the hearing upon such application, or cause such notice to be served, upon any person who may be affected by an order disposing thereof; or the court, upon motion of any interested person for good cause shown or at its own instance, may order such notice to be served upon any such person. Such notice shall set forth the time and place of the hearing and shall be accompanied by a statement of the proposed distribution. At the hearing upon the application the court shall inquire into, consider, and determine all matters relative thereto, and make such order as the court deems proper. If the court makes an order of distribution, the fiduciary shall comply therewith and shall account to the court for his distribution,

verified by vouchers or proof. An order of distribution shall have the effect of a judgment. Such order may be reviewed upon appeal and may be vacated as provided in section 2109.35 of the Revised Code.

HISTORY: GC § 10506-40a; 120 v 649 (653); 121 v 270 (277), § 1. Eff 10-1-53.

Cross-References to Related Sections

See RC § 2101.16 which refers to this section.

Comment

The purpose of this section is to enable the fiduciary to protect himself, by obtaining an order of distribution which will be binding upon persons interested in the estate or trust, before he parts with possession of the assets.

The procedure is substantially the same as that provided for the settlement of an account. After filing an application for an order of distribution, the fiduciary may, at his option, serve notice of the hearing on the application, or cause notice to be served, upon any person who may be affected thereby. If the fiduciary does not elect to do so, the court may order such notice to be served. Such notice shall set forth the time and place of hearing and shall be accompanied by a statement of the proposed distribution. Compare RC § 2109.33, which contains similar provisions relative to notice of the hearing on an account.

The order of distribution shall have the force and effect of a judgment, except that it may be vacated as provided in RC § 2109.35 for vacation of an order settling an account. As in the case of an account, this section does not require that notice of the hearing be served on anyone. A person who is served with notice will not be entitled to vacate the order under RC § 2109.35, paragraph (B). A person who is not served may avail himself of RC § 2109.35. Until the order is vacated, however, it has the same effect, regardless of whether or not notice is served on the parties in interest.

It should be noted that the order of distribution does not relieve the fiduciary of the duty to account for the distribution when it is made.

Forms

1 A&H Probate FORM 2109.36a et seq.

Research Aids

Application for order of distribution:

O-Jur2d: Fiduciaries § 152

Fiduciary's duty to account for distributions:

O-Jur2d: Fiduciaries § 272

Order of distribution:

O-Jur2d: Fiduciaries § 295

Law Review

Distribution and accounts. C. Terry Johnson. 43 OBar (No.10) 291.

CASE NOTES AND OAG

1. This section does not govern attempts to force distribution of trust income: In re Gallagher, 118 App 477, 25 OO(2d) 394, 195 NE(2d) 601.

2. A probate court has no jurisdiction to consider the validity or effect of a contract between the distributees of a decedent's estate and one who contracted to collect their share of the estate for a percentage thereof, where the purported contract has no bearing on the assets of the estate, the duties of the administrator or the court's supervision of his administration: In re Porter, 46

OO(2d) 180, 17 OMisc 136, 243 NE(2d) 794 (PC).

3. Federal courts have no jurisdiction under this section: Starr v. Rupp, 53 OO(2d) 169, 25 OMisc 224, 421 F(2d) 999.

§ 2109.37 Investment authority.

Except as otherwise provided by law or by the instrument creating the trust, a fiduciary having funds belonging to a trust which are to be invested may invest them in the following:

(A) Bonds or other obligations of the United States or of this state;

(B) Bonds or other interest-bearing obligations of any county, municipal corporation, school district, or other legally constituted political taxing subdivision within the state, provided such county, municipal corporation, school district, or other subdivision has not defaulted in the payment of the interest on any of its bonds or interest-bearing obligations, for more than one hundred twenty days during the ten years immediately preceding the investment by such fiduciary in such bonds or other obligations, and provided that such county, municipal corporation, school district, or other subdivision, is not, at the time of such investment, in default in the payment of principal or interest on any of its bonds or other interest-bearing obligations;

(C) Bonds or other interest-bearing obligations of any other state of the United States which, within twenty years prior to the making of such investment, has not defaulted for more than ninety days in the payment of principal or interest on any of its bonds or other interest-bearing obligations;

(D) Any bonds issued by or for federal land banks and any debentures issued by or for federal intermediate credit banks under the act of congress known as the "Federal Farm Loan Act of 1916," 39 Stat. 360, 12 U.S.C. 641 and amendments thereto; any debentures issued by or for banks for cooperatives under the act of congress known as the "Farm Credit Act of 1933," 48 Stat. 257, 12 U.S.C. 131 and amendments thereto;

(E) Notes which are: (1) secured by a first mortgage on real estate held in fee and located in the state, improved by a unit designed principally for residential use for not more than four families or by a combination of such dwelling unit and business property, the area designed or used for nonresidential purposes not to exceed fifty per cent of the total floor area; (2) secured by a first mortgage on real estate held in fee and located in the state, improved with a building designed for residential use for more than four families or with a building used primarily for business purposes, if the unpaid principal of the notes secured by such mortgage does not exceed

ten per cent of the value of the estate or trust or does not exceed five thousand dollars, whichever is greater; (3) secured by a first mortgage on an improved farm held in fee and located in the state, provided such mortgage requires that the buildings on the mortgaged property shall be well insured against loss by fire, and so kept, for the benefit of the mortgagee, until the debt is paid, and provided that the unpaid principal of said notes secured by the mortgage, shall not exceed fifty per cent of the fair value of the mortgaged real estate at the time such investment is made, and such notes shall be payable not more than five years after the date on which the investment therein is made; except that the unpaid principal of such notes may equal sixty per cent of the fair value of the mortgaged real estate at the time such investment is made, and may be payable over a period of fifteen years following the date of the investment therein by the fiduciary if regular installment payments are required sufficient to amortize four per cent or more of the principal of said outstanding notes per annum and if the unpaid principal and interest become due and payable at the option of the holder upon any default in the payment of any installment of interest or principal upon the notes, or of taxes, assessments, or insurance premiums upon the mortgaged premises or upon the failure to cure any such default within any grace period provided therein not exceeding ninety days in duration;

(F) Life, endowment, or annuity contracts of legal reserve life insurance companies regulated by sections 3907.01 to 3907.21, inclusive, 3909.01 to 3909.17, inclusive, 3911.01 to 3911.24, inclusive, 3913.01 to 3913.10, inclusive, 3915.01 to 3915.15, inclusive, and 3917.01 to 3917.05, inclusive, of the Revised Code, and licensed by the superintendent of insurance to transact business within the state, provided the purchase of contracts authorized by this division shall be limited to executors or the successors to their powers when specifically authorized by will and to guardians and trustees, which contracts may be issued on the life of a ward, a beneficiary of a trust fund, or according to a will, or upon the life of a person in whom such ward or beneficiary has an insurable interest and such contracts shall be drawn by the insuring company so that the proceeds thereof shall be the sole property of the person whose funds are invested therein;

(G) Notes or bonds secured by mortgages and insured by the federal housing administrator or debentures issued by such administrator;

(H) Obligations issued by a federal home loan bank created under an act of congress entitled the "Federal Home Loan Bank Act of 1932," 47 Stat. 725, 12 U.S.C. 1421, approved July 22, 1932, and amendments thereto;

(I) Shares and certificates or other evidences

of deposits issued by a federal savings and loan association organized and incorporated under an act of congress entitled the "Home Owners' Loan Act of 1933," 48 Stat. 128, 12 U.S.C. 1461, and amendments thereto, to the extent and only to the extent that said shares or certificates or other evidences of deposits are insured under subchapter IV of the "National Housing Act," 48 Stat. 1246 (1934), 12 U.S.C. 1701, and the amendments heretofore and hereafter made thereto;

(J) Bonds issued by the home owners' loan corporation created under an act of congress entitled the "Home Owners' Loan Act of 1933," 48 Stat. 128, 12 U.S.C. 1461, and amendments thereto;

(K) Obligations issued by national mortgage association created under the "National Housing Act," 48 Stat. 1246 (1934), 12 U.S.C. 1701, and amendments thereto;

(L) Shares and certificates or other evidences of deposits issued by a state chartered building and loan association organized under the laws of the state which association has obtained insurance of accounts as provided in subchapter IV of the "National Housing Act," 48 Stat. 1246 (1934), 12 U.S.C. 1701, and amendments thereto, or as may be hereafter provided by law, only to the extent that said evidences of deposits are insured under said act and the amendments heretofore and hereafter made thereto;

(M) Shares and certificates or other evidences of deposits issued by a state chartered building and loan association organized under the laws of the state and a member of a deposit guaranty association organized under the provisions of sections 1151.80 to 1151.92, inclusive, of the Revised Code;

(N) Shares and certificates or other evidences of deposits issued by a state chartered building and loan association organized under the laws of the state, provided that no fiduciary may invest such deposits except with the approval of the probate court, and then in an amount not to exceed the amount which the fiduciary is permitted to invest under division (L) of this section;

(O) In savings accounts in a national bank located in the state or a state bank located in and organized under the laws of the state by depositing such funds therein, and such national or state bank when itself acting in a fiduciary capacity may deposit such funds in savings accounts in its own savings department; provided that no deposit shall be made by any fiduciary, individual, or corporate, unless the deposits of the depository bank are insured by the federal deposit insurance corporation created under an act of congress, entitled the "Federal Deposit Insurance Corporation Act of 1933," 48 Stat. 162, 12 U.S.C. 264, and amendments thereto, and provided that the deposit of the funds of any one trust in any such savings accounts in any one

bank shall not exceed the sum insured under said act and the amendments heretofore and hereafter made thereto;

(P) Obligations consisting of notes, bonds, debentures, or equipment trust certificates issued under an indenture, which are the direct obligations, or in the case of equipment trust certificates are secured by direct obligations, of a railroad or industrial corporation, or a corporation engaged directly and primarily in the production, transportation, distribution, or sale of electricity or gas, or the operation of telephone or telegraph systems or waterworks, or in some combination of them; provided the obligor corporation is one which is incorporated under the laws of the United States, or any state thereof, or of the District of Columbia, and said obligations are rated at the time of purchase in the highest or next highest classification established by at least two standard rating services selected from a list of the standard rating services which shall be prescribed by the superintendent of banks; provided every such list shall be certified by such superintendent to the clerk of each probate court in the state, and shall continue in effect until a different list is prescribed and certified as provided in this section;

(Q) Obligations issued, assumed, or guaranteed by the international bank for reconstruction and development, the Asian development bank or the inter-American development bank, provided said obligations are rated at the time of the purchase in the highest or next highest classification established by at least one standard rating service selected from a list of standard rating services which shall be prescribed by the superintendent of banks.

No administrator or executor may invest funds belonging to the estate in any asset other than a direct obligation of the United States having a maturity date not exceeding one year from the date of such investment, except with the approval of the court or with the permission of the instruments creating the trust.

In addition to the investments allowed by this section, a guardian or trustee may, with the approval of the court, invest funds belonging to the trust in productive real estate located within the state, provided, neither the guardian nor the trustee nor any member of the family of either has any interest in such real estate or in the proceeds of the purchase price paid therefor. The title to any real estate so purchased by a guardian must be taken in the name of the ward.

Notwithstanding the above provisions, the court may permit the funds to be used to purchase or acquire a home for the ward or an interest in a home for the ward in which a member of the ward's family may have an interest.

HISTORY: GC § 10506-41; 114 v 320 (372); 115 v 396; 115 v Pt II 284; 116 v 250; 117 v 458; 118 v 503; 119 v 394;

123 v 667; 125 v 903 (969); 127 v 27; 128 v 939; 129 v 582 (733) (EF 1-1-61); 131 v 619 (EF 9-28-65); 131 v 623 (EF 10-6-65); 133 v S 176 (EF 10-24-69); 133 v S 171. EF 11-6-69.

Analogous to former GC §§ 10933, 11021, 11214.

Cross-References to Related Sections

Cemetery endowment funds, RC § 1721.21

Dealers in milk, dairy cooperatives, investments by, RC § 917.14.

Investments by trustees of state teachers retirement system, RC § 3307.15; by trustees of public school employees retirement system, RC § 3309.15.

Investment of funds of public employees retirement system, RC § 145.11.

Investment of funds from sale of entailed or other estates, RC § 5303.27.

Investment of trust funds by trust company, RC § 1109.10.

See RC §§ 2109.37.1, 2109.38, 2109.42 which refer to this section.

Comparative Legislation

Investments of fiduciaries:

Cal.—Probate Code, § 584.1

Ill.—Rev Stat, ch 3, § 21-1

Ind.—Burns' Stat, § 30-1-5-1

Ky.—KRS § 386.020

Mich.—MCLA, § 704.37

Pa.—Purdon's Stat, Tit. 20, § 7301

Fla.—FSA, § 733.612

Forms

1 A&H Probate FORM 2109.37a et seq.

Research Aids

Investments generally:

O-Jur2d: Fiduciaries § 36 et seq

Am-Jur2d: Executors and Administrators § 227 et seq; Trusts § 374 et seq

Legal investments:

O-Jur2d: Fiduciaries §§ 50-64

Am-Jur2d: Trusts § 384 et seq

Power to retain:

O-Jur2d: Fiduciaries §§ 37, 38

Am-Jur2d: Trusts § 380

ALR

Duty of trustee to diversify investments, and liability for failure to do so, 24 ALR3d 730.

Measure of trustee's liability for breach of trust in selling investment property or changing investments in good faith, 58 ALR2d 674.

Authorization by trust instrument of investment of nonlegal investments, 78 ALR2d 7.

Liability of trustee for loss on investment as affected by fact that it was taken in his own name without indication of fiduciary capacity, 106 ALR 271.

Surchargeability of trustee in respect of mortgage investment as affected by matters relating to value of property, 117 ALR 871.

Power and duty of executor or administrator as to protection of investment in stock by submitting to voluntary assessment, 104 ALR 979.

Ownership in his own right of stock in corporation in which executor or administrator holds stock in his fiduciary capacity, 106 ALR 220.

Fiduciary's liability for depreciation in value of securities, as affected by appreciation of other securities, 171 ALR 1422.

Right of corporate trustee to invest in or retain its own stock, 157 ALR 1429.

Right of trustee to invest trust funds in stock of private corporation. 122 ALR 657.

Validity and construction of statute permitting court to approve investment of trust funds in security of class other than those to which the trustee would otherwise be limited by statute or trust instrument. 128 ALR 968.

Duty and liability of trustee as to diversification of investment. 131 ALR 1158.

Corporate trustee's right to invest in or retain his own stock. 134 ALR 1324.

Law Reviews

See explanatory article in 4 OBar 305.

Investment of trust funds. Article by Samuel Freifield of the Steubenville bar. 5 CinLRev 1.

Investments by fiduciaries under the new probate code. Article by Samuel Freifield of the Steubenville bar. 5 CinLRev 429.

Some applications of the trustee's duty of loyalty to trust investments in corporate stock. (Editorial note.) 16 CinLRev 63.

Uniform trusts act. Article by Prof. Harry W. Vanneman (OSU) and Prof. Frank S. Rowley (UC). 13 CinLRev 157, 5 OSLJ 145.

Investment legals for corporate fiduciaries. Article by Prof. Frank S. Rowley of Univ. of Cinti. 14 CinLRev 156.

Trusts; the Ohio trust investment statute. (Case note.) 6 OSLJ 342.

The development of the prudent man rule for fiduciary investment in the United States in the twentieth century. Mayo Adams Shattuck. 12 OSLJ 491.

Beneficiaries' rights in life insurance policies. Address by Virgil D. Parish. 25 OBar (No. 29) 513.

Probate code amendments. Francis J. Eberly, 14 OSLJ 368.

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

CASE NOTES AND OAG

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See also case notes under RC § 2109.41.

1. Where a testator, in leaving the residue of his estate in trust, provides for no specific amount of income to be paid to charitable beneficiaries and provides for no specific amount of the corpus of the trust to be distributed to the charitable beneficiaries but does provide "that all investments or capital . . . shall be in interest bearing securities issued by the United States of America or by any state of the United States of America or by any governmental subdivision of the state of Ohio," a court is not justified in the absence of an existing emergency in permitting the trustee to deviate from this restrictive

investment provision because of general inflationary factors and changing economic conditions covering a twenty-year period: Toledo Trust Co. v. Toledo Hospital, 174 OS 124, 21 OO(2d) 386, 187 NE(2d) 36 [affirming 117 App 425, 24 OO(2d) 237, 192 NE(2d) 674].

1.1 In the absence of fraud or bad faith, an executor of an estate may not be called to account for not selling stocks belonging to the estate: In re Bentley, 163 OS 568, 57 OO 5, 127 NE(2d) 749.

1.2 The investment of guardianship funds in land trust certificates, when GC § 11214 (see now RC § 2109.37) was in effect and authorized guardians to invest in securities approved by the probate court, may be approved by that court in an adversary proceeding after the repeal of that section and the enactment of this section, which omitted the authorization as to investing in securities approved by that court: In re Baker, 65 App 550, 19 OO 252, 31 NE(2d) 869.

1.3 Under the provisions of this section a trustee had no authority to use income from trust to purchase life insurance contract on his life, such income not being funds in the hands of the trustee which he is authorized to invest, rather such income is payable only to the life tenant. Holmes v. Hrobon, 93 App 1, 50 OO 178, 103 NE(2d) 845.

1.4 In an action brought in the probate court by a testamentary trustee pursuant to request of the beneficiaries thereof seeking authority to deviate from the administrative provisions of the will with respect to permissible investments and permission to invest in those investments authorized under RC §§ 2109.37 and 2109.37.1, the court is without authority to permit a trustee to deviate from the terms of such trust unless it clearly appears that compliance would be illegal, impossible, or would defeat or substantially impair the accomplishment of the purpose of such trust: Toledo Trust Co. v. Toledo Hosp., 117 App 425, 24 OO(2d) 237, 192 NE(2d) 674 [affirmed case note 1, supra].

1.5 An executor is entitled to credits for losses on investments of funds of the estate only when he acted in good faith and exercised the care men of ordinary prudence would exercise in the management of their own affairs. The burden of establishing the validity of such credits is upon the executor: In re Howison, 49 App 421, 3 OO 301, 197 NE 333.

1.6 A guardian who invests the funds of his ward by depositing them in a bank, such investment not being authorized by GC § 10506-41, or by the probate court, is liable for any loss that may be occasioned thereby, regardless of the question of due care on the part of the guardian: In re Flavin, 59 App 443, 12 OO 262, 18 NE(2d) 514.

2. An action for a declaratory judgment, brought by the beneficiaries of a testamentary trust estate, to determine the right of the corporate fiduciary to invest in certain securities not specified in this section, is authorized by the provisions of GC § 12102-4 (RC § 2721.05), subsecs. (B) and (C): Neff v. Cleveland Trust Co., 21 OO 461 (CP).

3. The policy of detailed and explicit statement further defining the investment authority of corporate fiduciaries, as evidenced by the language used in this section, subsec. (N), and GC §§ 10506-45, 10506-49 (RC §§ 2109.41, 2109.44), negatives the inference that by the general terms of the proviso "except as may be otherwise provided by law," in the opening sentence of this section, the legislature intended to grant to corporate fiduciaries the additional investment authority set forth in the applicable sections of the banking act: Neff v. Cleveland Trust Co., 21 OO 461 (CP).

4. A corporate fiduciary is limited in its investment authority to those securities specifically designated in

this section: *Neff v. Cleveland Trust Co.*, 21 OO 461 (CP).

5. This section, as to the character of investments by a fiduciary, applies only to a fiduciary appointed by and accountable to an Ohio probate court: *Girard Trust Co. v. Dunham*, 29 OO 324, 15 OSupp 5 (CP).

5.1 Where the trustee has substantial funds which are not needed for refunding the original bonds for some considerable length of time, it has the inherent power to invest said funds so long as said investment complies with the terms of this section which sets out the investments in which fiduciaries may invest funds in their hands and the terms of the trust agreement: *State ex rel Edwards v. County Commrs.*, 33 OO(2d) 322, 4 OMisc 221, 212 NE(2d) 196 (CP).

5.2 Where testatrix in her will gives the testamentary trustee full power to sell any trust property and to reinvest the proceeds thereof, the trustee has authority to invest any funds of the trust estate without regard to the limitations in kind, class, category, or amount contained in RC §§ 2109.37 and 2109.37.1: *Vacha v. Vacha*, 19 OO(2d) 35 (PC).

5.3 Pooling of funds of various trusts was not approved in this case: *In re Wright*, 26 OLA 285.

5.4 Investments in land trust certificates and bank stock were disapproved: *In re Dimond*, 37 OLA 248, 46 NE(2d) 788 (App).

5.5 A corporate trustee has, under the provisions of this section, the capacity and power to be a limited partner insofar as the trust estate is concerned, and to accept and hold as part of the trust estate the interest in a limited partnership assigned to it by the executors of the estate. *Cleveland Trust Co. v. Ingalls*, 91 OLA 70, 23 OO(2d) 124 (PC).

6. A confirmation of an investment by the court may be made after the effective date of this section, and the approval of the guardian's account setting forth such investment is an approval of the investment: *Warner v. Hoffman*, 18 OLA 403.

7. A guardian may not legally invest the funds of his ward in federal home loan bonds, since his investments are specifically limited to those mentioned in this section: 1933 OAG No.1830.

8. This section, as amended (115 v 396), requires all fiduciaries, including trust companies administering estates with funds to be invested, to obtain the approval of the probate court for investing in the classes of investments authorized: 1934 OAG No. 2780.

9. Under the terms of this section, subdiv. (E) [now (L) et seq], a fiduciary may invest such funds belonging to his trust, as are to be invested, in shares and certificates or other evidences of deposit issued by a state chartered building and loan association, but where such building and loan association has no insurance of accounts, the fiduciary may invest such funds in shares or certificates of such association, provided he secure the approval of the probate court; the amount of such investment shall not exceed five thousand dollars: 1939 OAG No.1037.

DECISIONS UNDER FORMER GC § 10933

1. A guardian is bound to employ money of an infant so as to make interest if practicable, and he is chargeable with interest if he fails to do so: *Armstrong v. Miller*, 6 O 118.

2. If a guardian convert land scrip, receivable at the land office in the purchase of public lands, into money, by investing it in land for himself and others, and accounting with his wards for the scrip, with interest from the time of its investment, he cannot, if he acted in good faith, be charged as a trustee of the land purchased, or compelled to account for the

profits growing out of the purchase: *Davies v. Lowrey*, 15 O 655.

3. One who buys notes bearing on their face the marks of a trust fund, is put upon inquiry: *Strong v. Strauss*, 40 OS 87.

4. Where a guardian has had the opportunity to show, by his own oath or otherwise, his inability to invest, and does not, inability to invest will not be presumed to excuse him from interest: *Armstrong v. Miller*, W 562.

5. The use by a guardian of ward's money in his own business and its loss thereby, to constitute embezzlement must be with fraudulent purpose, although the statute is silent as to intent: *State v. Meyer*, 23 Bull 251.

6. Where a guardian holding purchase money, notes and a mortgage received on sale of the vendor's land, sold them before maturity by representing that the proceeds were to be used to pay debts of the ward, but he appropriated part of the proceeds. Held: As to such part, the buyers could not recover on foreclosure: *McFarland v. Harper*, 33 Bull 87.

7. Where a guardian-bank became insolvent after making unlawful investment of ward's funds by exchanging mortgages for participating trust certificates, the successor-guardian is entitled to an equitable lien on the certificates to secure repayment of the amounts invested in certificates, with interest at six per cent: *In re Lodge*, 32 NP(NS) 40.

8. A transaction within the trust department of guardian-bank, by which the ward's mortgages were sold to trust department and became a part of the mortgages against which certificates were issued in exchange therefor, was invalid, being contrary to the principle that a fiduciary cannot deal with himself: *In re Lodge*, 32 NP(NS) 40.

[DECISIONS UNDER FORMER GC § 11214]

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Approval of court, 11, 14
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Permissive, not mandatory, 2

1. Administrator not chargeable with interest on money which has yielded him no profit which he has not been ordered to pay out, or which is tied up in litigation in good faith: *James v. West*, 67 OS 28, 65 NE 156.

2. This section is permissive, not mandatory. *Willis v. Braucher*, 79 OS 290, 87 NE 185, 44 LRA(NS) 873.

3. The provisions of former GC § 11214 (see now RC § 2109.37) do not authorize the investment of trust funds in the stock of a building and loan association, and such authority is not conferred by the direction of the testator that such funds "shall be held in trust and invested or placed at interest": *Home Sav. &c. Co. v. Strain*, 130 OS 53, 3 OO 104, 196 NE 770.

4. Authority of a testamentary trustee in the investment of trust funds was limited to those securities enumerated in the statute or expressly approved by the court having control of the administration of the trust, unless the provisions of the will creating the trust and conferring power upon the trustee removed the restrictions imposed by such statute: *Home Sav. &c. Co. v. Strain*, 130 OS 53, 3 OO 104, 196 NE 770.

5. The purchase of stock in a corporation, upon which dividends may possibly be paid, is contrary to GC § 11214 (see now RC § 2109.37), which authorizes

an executor to invest funds: In re Couden, 9 App 207.

6. Probate court's approval of earlier account listing securities purchased without authority does not relieve guardian from liability for unauthorized investment (GC § 11214 [see now RC § 2109.37]): *Soliday v. Ash*, 40 App 498, 179 NE 150.

7. Where will directed trustee to invest fund in safe securities of trustee's own choosing with approval of probate court, and trustee invested only in securities authorized by statute, and court subsequently approved trustee's reports, trustee's failure to obtain court's express approval prior to investment held not to render trustee liable for depreciation, but placed burden on trustee, on exceptions to final account, to show legality of investment and absence of injudicious conduct: In re *Tischer's Trusteeship*, 46 App 405, 188 NE 876, 39 OLR 451 [affirming 30 NP(NS) 419].

9. All statutes relating to procedure are remedial in their nature and should be liberally construed and applied to effect their respective purposes: *Wellston Iron Furnace Co. v. Rinehart*, 108 OS 117, 140 NE 623 [affirming *Rinehart v. Wellston Iron Furnace Co.*, 32 OCA 476, 35 CD 817].

10. A guardian is protected in depositing funds of the ward in a designated depository, under GC § 10506-45 (RC § 2109.41), only so long as no investment of the type designated in this section is available: In re *Michael*, 18 OLA 629.

11. After investment is made by the guardian and reports in the form of accounts are filed with the probate court setting forth the type of investment, the amount thereof and where carried, the action of the court in settling and approving the accounts is equivalent to an approval of the investment under GC § 11214 (repealed, 114 v 320; see GC § 10506-41 [RC § 2109.37]): *Warner v. Hoffman*, 21 OLA 225 [appeal dismissed, 132 OS 136].

12. The investment by a guardian of his ward's funds with a building and loan association is proper, under GC § 11214 (repealed, 114 v 320; see GC § 10506-41 [RC § 2109.37]), if approved by the probate court: *Schick v. Kroeger*, 22 OLA 389.

14. The probate court's order for distribution of stock described as having distributive value is an approval of trustee's investment in such stock even though not listed in GC § 11214 (repealed, 114 v 320; see GC § 10506-41 [RC § 2109.37]) as an authorized investment: *Witmeier v. Sheets*, 24 OLA 59.

[§ 2109.37.1] § 2109.371 Additional investment authority.

In addition to those investments made eligible by section 2109.37 of the Revised Code, investments may be made by a fiduciary, including a guardian, other than a guardian under sections 5905.01 to 5905.19, inclusive, of the Revised Code, and subject to the restriction placed on an administrator or executor by section 2109.37 of the Revised Code, in the following kinds and classes of securities, provided the same may be lawfully sold in Ohio and investment is made only in such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of their capital:

(A) Securities of corporations organized and existing under the laws of the United States or of the District of Columbia or of any state of

the United States including, but not by way of limitation, bonds, debentures, notes, equipment trust obligations, or other evidences of indebtedness, and shares of common and preferred stocks of such corporations;

(B) Securities of any open-end or closed-end management type investment company or investment trust;

(C) Bonds or other interest-bearing obligations of any state or territory of the United States, or of any county, city, village, school district, or other legally constituted political taxing subdivision of any state or territory of the United States, not otherwise eligible under divisions [division] (B) or (C) of section 2109.37 of the Revised Code.

No investment shall be made pursuant to this section which, at the time such investment is made, causes the aggregate market value of the investments, not made eligible by section 2109.37 of the Revised Code, to exceed sixty per cent of the aggregate market value at that time of all of the property of the fund held by such fiduciary. No sale or other liquidation of any investment shall be required solely because of any change in the relative market value of those investments made eligible by this section and those made eligible by section 2109.37 of the Revised Code; provided, that in the event of a sale of investments authorized by this section, the proceeds therefrom may be reinvested in the kinds and classes of securities authorized by this section without regard to the percentage limitation provided in this section. In determining the aggregate market value of the property of a fund and the percentage of a fund to be invested under this section, a fiduciary may rely upon published market quotations as to those investments for which such quotations are available and upon such valuations of other investments as in his best judgment seem fair and reasonable according to available information.

This section shall govern fiduciaries acting on its effective date, or appointed subsequent thereto.

HISTORY: 125 v 812; 129 v 582 (736) (Eff 1-10-61); 131 v 627 (Eff 10-6-65); 132 v H 1 (Eff 2-21-67); 133 v H 655. Eff 1-1-71.

Comment

Ohio's limited or modified "Prudent Man Rule" is patterned after the New York law. See New York Consolidated Laws, Personal Property, § 21.

Revised Code § 2109.37.1 provides that investments may be made by a fiduciary in certain kinds and classes of securities which may be lawfully sold in Ohio, but has stipulated that such investments can be made only in such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and the preservation of THEIR capital.

No administrator or executor, under RC § 2109.37, may invest funds belonging to an estate except with the approval of the court or with the permission of

the instrument creating the trust, and hence no administrator or executor may invest funds under RC § 2109.37.1 except with the approval of the court unless the instrument creating the trust permits such investments. Guardians and testamentary trustees may make investments under the provision of RC § 2109.37.1 without court authority. A guardian appointed under the Veterans' Guardianship Law may not invest moneys received from the Veterans' Administration under RC § 2109.37.1. [For additional comment see Addams and Hosford's Ohio Probate Practice, Davies' Revision.]

Cross-References to Related Sections

Cemetery endowment funds, RC § 1721.21

Deposit of funds pending distribution or investment, RC § 2109.41.

Entailed or other estates, investment of funds from sale of, RC § 5303.27.

Investment of trust funds by trust company, RC § 1109.10.

Investment or deposit of excess funds within reasonable time, RC § 2109.42.

Personal use of funds prohibited, RC § 2109.43.

Retention of any part of trust estate received, RC § 2109.38.

Securities, kinds and classes which may be sold in Ohio, RC § 1707.01 et seq.

Self dealing prohibited, RC § 2109.44.

Veterans' guardianship law, investment under, RC §§ 5905.01 et seq, 5905.14.

See RC §§ 2109.38, 2109.42 which refer to this section.

Comparative Legislation

Additional authority—investments:

Cal.—Probate Code, § 584.5

Ill.—Rev Stat, ch 3, § 21-1.06

Ky.—KRS, § 386.030

Pa.—Purdon's Stat, Tit. 20, § 7302

Forms

1 A&H Probate FORM 2109.37a et seq: Investments by fiduciary.

Research Aids

Additional investments—prudent investor rule:

O-Jur2d: Fiduciaries § 62

Am-Jur2d: Trusts § 418 et seq

ALR

For effect of beneficiaries consent to, acquiescence or ratification of improper investments by a fiduciary. 128 ALR 4.

For authority of a fiduciary to invest trust funds in a single security or pool of securities. 125 ALR 669.

A trust fund should not be commingled with other funds controlled by a fiduciary. 117 ALR 179.

Law Reviews

New limited prudent man rule. Charles F. Johnston. 14 OSLJ 500.

Liberalization of Ohio's legal list for fiduciary investment: "prudent man" standard engrafted. Richard F. Sater. 26 OBar (No.43) 749.

O.S.B. Service Letter

Ohio's prudent man rule—present and proposed. Harley A. Watkins. Probate Law Edition, Oct. 1964.

CASE NOTES AND OAG

1. In determining whether a trustee has acted with reasonable prudence and diligence, the facts must be

taken as they existed at the time of their occurrence, not aided or enlightened by those that subsequently took place: In re City Bank Farmers Trust Co., 68 NYSupp(2d) 43.

2. A provision in a will giving a fiduciary discretion to invest, free from statutory restriction, does not deprive the court of the power to review the exercise of such discretion, nor does it relieve the trustee of the duty to employ such diligence in management as prudent men of discretion employ in like matters of their own: In re Whitmore's Estate, 15 NYSupp(2d) 379.

3. When the fiduciary is a corporate executor and trustee, with greater skill and facilities for handling trust estates than those possessed by the "ordinary prudent man," such fiduciary is held to a higher degree of care, consonant with his greater skill and facilities: Union Commerce Bank v. Kusse, 49 OO(2d) 413, 21 OMisc 217, 251 NE(2d) 884 (PC 1969).

§ 2109.38 Retention of unauthorized investments.

Sections 2109.37 and 2109.371 [2109.37.1] of the Revised Code do not prohibit a fiduciary from retaining any part of a trust estate as received by him, even though such part is not of the class or percentage permitted to fiduciaries or from retaining any investment made by him after such investment ceases to be of a class or exceeds the percentage permitted by law, provided the circumstances are not such as to require the fiduciary to dispose of such investment in the performance of his duties.

HISTORY: GC § 10506-42; 114 v 320 (373); 119 v 394 (402), § 1; 131 v 628. **EFF** 10-6-65.

Research Aids

Retention of nonlegals:

O-Jur2d: Fiduciaries §§ 37, 38

Am-Jur2d: Trusts §§ 425, 426

ALR

Construction and application of provisions in trust instrument relating to amendment or modification. 128 ALR 1173.

Fiduciary's liability for depreciation in value of securities, as affected by appreciation of other securities. 171 ALR 1422.

CASE NOTES AND OAG

1. This section and GC § 10506-43 (RC § 2109.39) permit fiduciaries to retain securities received by them even though not of the approved class designated in GC § 10506-41 (RC § 2109.37), and to retain any securities received as part of a distribution in kind: Neff v. Cleveland Trust Co., 21 OO 461 (CP).

2. Provisions in wills or trust instruments authorizing the fiduciary to retain any property coming to him do not relieve him of his duty to exercise due care and prudence with reference to the retention or disposal of such property: Union Commerce Bank v. Kusse, 49 OO(2d) 413, 21 OMisc 217, 251 NE(2d) 884 (PC 1969).

§ 2109.39 Receiving distribution in kind. (GC § 10506-43)

A fiduciary entitled to a distributive share of the assets of an estate or trust has the same

right as other beneficiaries to accept or demand distribution in kind and may retain any security or investment so distributed to him as though it were a part of the original estate received by him.

HISTORY: GC § 10506-43; 114 v 320 (373). **EFF** 10-1-53.

Research Aids

Power to retain:

O-Jur2d: Fiduciaries § 37

§ 2109.40 Participation in corporate reorganization. (GC § 10506-44)

Unless the instrument creating a trust forbids, a fiduciary may do all of the things which an individual holder might do with respect to securities held by him, including the exercise or sale of subscription rights, the acceptance of new stock in the same corporation in place of the stock held, or in the event of reorganization, sale, or merger in a different corporation, and with the approval of the probate court, the investment of additional funds where required of all shareholders participating in a reorganization.

HISTORY: GC § 10506-44; 114 v 320 (373). **EFF** 10-1-53.

Research Aids

Dealings in corporate affairs:

O-Jur 2d: Fiduciaries § 351

ALR

Guardian's purchase from corporation of which he is officer or stockholder as voidable or as ground for surcharging his account. 105 ALR 449.

CASE NOTES AND OAG

1. The authority contained in this section authorizing fiduciaries in cases of reorganization, sale or merger and with the approval of the court to invest additional funds "where required of all shareholders," constitutes an exception to the mandatory requirements of GC § 10506-41 (RC § 2109.37), and would seem to come squarely within the terms of the proviso in the opening sentence of that section: *Neff v. Cleveland Trust Co.*, 21 OO 461 (CP).

2. By virtue of this section, an administrator or an executor has the authority, when in the use of his discretion it is advisable, to participate in the merger or reorganization of a corporation, to exchange shares of stock, which are part of the assets of the estate, for shares of stock in the new corporation, and it is not necessary, although probably advisable, to obtain the consent of the probate court to such transaction, unless it is necessary to invest additional funds from the estate in order to effect such merger: 1932 OAG No.4108.

§ 2109.41 Deposit of funds.

Immediately after his appointment and throughout the administration of a trust every fiduciary, pending payment of current obligations of his trust, distribution, or investment pursuant to law, shall deposit all funds received by him in his name as such fiduciary in one or more depositories. Each depository must be a national bank located in the state, or a bank organized under the laws of the state, or a federal or insured savings and loan association located

in the state, or a building and loan association operating under the laws of the state which is a member of a deposit guarantee association organized under the provisions of sections 1151.80 to 1151.92, inclusive, of the Revised Code, or, if first approved by the probate court, any other building and loan association operating under the laws of the state. A corporate fiduciary, authorized to receive deposits of fiduciaries, may be the depository of funds held by it as such fiduciary. All deposits made pursuant to this section shall be in such class of account as will be most advantageous to the trust and each depository shall pay interest at the highest rate customarily paid to its patrons on deposits in accounts of the same class.

The placing of such funds in such depositories under the joint control of the fiduciary and a surety on the bond of the fiduciary shall not increase the liability of the fiduciary.

HISTORY: GC § 10506-45; 114 v 320 (374); 116 v 385 (391), § 1; 118 v 503 (505); 119 v 394 (403), § 1; 129 v 345 (346), § 1 (**EFF** 8-25-61); 131 v 628. **EFF** 10-6-65.

Comment

It has been held that a deposit made by a corporate fiduciary in its banking department is not a preferred claim as against general creditors in the event of the insolvency of the bank: *McDonald v. Fulton*, 125 OS 507, 510, 182 NE 504. But the rule in that case was abrogated by the legislature by amending GC § 710-165 (RC § 1107.12), effective June 14, 1933, so that such a deposit is now preferred. However, where an ordinary fiduciary makes a deposit in a bank and the bank becomes insolvent, then the claim of the fiduciary is still not a preferred one as against general creditors of the bank: *Lamb v. Fulton*, 44 App 366, 185 NE 888.

Comparative Legislation

Deposits:

Cal.—Probate Code, § 585

Ill.—Rev Stat, ch 3, § 21-2.06

Ind.—Burns' Stat, § 29-1-13-15

Ky.—KRS, § 386.130

Mich.—MCLA, § 704.37

N.Y.—SCPA, § 1910

Pa.—Purdon's Stat, Tit. 20, § 7313

Uniform fiduciaries act:

Ill.—Rev Stat, ch 98, § 324

Ind.—Burns' Stat, § 30-2-4-1

Ky.—KRS, § 386.010

N.Y.—Gen Bus, § 359i

Pa.—Purdon's Stat, ch 7, § 6351

Forms

1 A&H Probate FORM 2109.41a et seq.

Research Aids

Deposit of funds:

O-Jur2d: Fiduciaries §§ 75-83; Trusts § 194

Am-Jur2d: Trusts § 367 et seq

ALR

Guardian's liability for interest on ward's funds. 72 ALR2d 757.

CASE NOTES AND OAG

See also case notes under RC § 2109.37.

1. A deposit in the form of a demand savings deposit account, drawing three per cent interest, is lawful under this section: *Stickle v. Guardian Trust Co.*, 133 OS 472, 11 OO 157, 14 NE(2d) 600.

2. By the clear and plain wording of this section,

a deposit in a bank is permissible only pending distribution or investment according to law, and it is not permissible to make such a deposit as a permanent investment: In re Flavin, 59 App 443, 12 OO 262, 18 NE(2d) 514.

3. A guardian who leaves money in a bank as an investment, rather than as a deposit pending investment or distribution according to law, is liable for loss to his ward, regardless of any question of good faith or due care: In re Flavin, 59 App 443, 12 OO 262, 18 NE(2d) 514.

4. Violation of this statute justified permanent disbarment: Toledo Bar Assn. v. Bartlett, 39 OS(2d) 100, 68 OO(2d) 59, 313 NE(2d) 834 (1974).

5. A guardian, exercising the same measure of care and diligence as would be exercised by a man of ordinary prudence and skill in the management of his own business, is not liable for the loss of his ward's fund through the failure of the bank in which he temporarily deposited such funds, before the enactment of this section, earmarked to show their trust character, in good faith, for safe-keeping, in a generally regarded financially sound and solvent incorporated bank situated in the state of residence of himself and his ward, with the approval of the probate court, pending distribution, investment, or payment of current bills of the ward, for a reasonable time and without interest, but not as a permanent investment: In re McIntire, 65 App 143, 18 OO 349, 29 NE(2d) 568.

6. A guardian is protected in depositing funds of the ward in a designated depository, under this section, only so long as no investment of the type designated in GC § 10506-41 (RC § 2109.37) is available: In re Michael, 18 OLA 629.

7. An administrator holding funds awaiting distribution may deposit such money in a building association and such deposit does not constitute an investment: In re Smith, 32 NP(NS) 260.

§ 2109.42 Liability for failure to invest.

A fiduciary who has funds belonging to a trust which are not required for payment of current obligations of his trust or distribution shall, unless otherwise ordered by the probate court, invest such funds within a reasonable time according to section 2109.37 or 2109.371 [2109.37.1] of the Revised Code. On failure to do so, such fiduciary shall account to the trust for such loss of interest as is found by the court to be due to his negligence.

HISTORY: GC § 10506-46; 114 v 320 (374); 131 v 629. Eff 10-6-65.

Research Aids

Liability for failure to invest:

O-Jur2d: Fiduciaries §§ 39, 66

Am-Jur2d: Trusts § 381

ALR

Liability of trustee or other fiduciary for loss on investment as affected by the fact that it was taken in his own name without indication of fiduciary capacity. 150 ALR 805.

Liability of third party for inducing or participating in fiduciary's exchange for or purchase of unauthorized securities. 170 ALR 358.

Rate of interest chargeable against guardians, executors or administrators, and trustees. 156 ALR 936.

Limitation by agreement of guardian's control over funds as affecting his liability. 102 ALR 1108.

Liability, in absence of mandatory statute, of guardian for loss of funds as affected by failure to obtain court order authorizing investment. 116 ALR 437.

Fiduciary's liability for depreciation in value of securities, as affected by appreciation of other securities. 171 ALR 1422.

CASE NOTES AND OAG

1. Under the provisions of this section, a fiduciary who has funds belonging to a trust which are not required for current expenditures shall, unless otherwise ordered by the probate court, invest or deposit such funds within a reasonable time according to RC § 2109.37, and, on failure to do so, such fiduciary shall account to the trust for such loss of interest as is found by the court to be due to his negligence: In re Sachs, 173 OS 270, 19 OO(2d) 122, 181 NE (2d) 464.

1.1 Where a testator provides that the amount of a legacy shall be invested in government bonds at all times and the maximum rate of interest paid on such bonds is 2½% per year, it is not error to require the executor to pay interest at that rate instead of the statutory rate during delay in paying the legacy beginning nine months after the notice of the executor's appointment: In re Shanafelt, 164 OS 258, 58 OO 7, 129 NE(2d) 816.

1.2 A judgment predicated upon a finding of an amount due from a guardian to its ward comes within the provisions of this section, and is one upon which interest should be included; and where entry does not include interest, the court may provide for it: Union Trust Co. v. Repine, 18 OLA 206.

2. Where an administrator is put on notice at all times that a settlement of the estate could not be concluded for such a period of time as that he would have opportunity safely to invest the funds in his possession, so as to return interest, he is charged with the duty of investing such funds and liable for interest for failure to perform such duty: In re Marker, 24 OLA 400.

3. Where executors of an estate have resigned and funds in their possession are to be turned over to their successor, after deducting an allowance for extraordinary compensation for services rendered, interest is not chargeable against such executors on and after the date of judgment entry, allowing such compensation, as to the balance of such funds: Chapman v. Menke, 45 OLA 625, 68 NE(2d) 361 (App).

§ 2109.43 Personal use of trust property prohibited. (GC §§ 10506-47, 10506-48)

No fiduciary shall make any personal use of the funds or property belonging to a trust. For violation of this section, such fiduciary and his bond shall be liable in an action for any loss occasioned by such use and for such additional amount by way of forfeiture, not exceeding the amount of the loss occasioned by such use, as may be fixed by the probate court hearing such cause. Such amounts shall be payable for the benefit of the beneficiary, if living, and to his estate if he is deceased.

Any action under this section shall be brought not later than one year after the termination of the trust or the discovery of such loss.

HISTORY: GC §§ 10506-47, 10506-48; 114 v 320 (374). Eff 10-1-53.

Research Aids

Personal use of trust res:

O-Jur2d: Fiduciaries § 124

Am-Jur2d: Trusts § 315 et seq

ALR

Power of court or guardian to make noncharitable gifts or allowances out of funds of incompetent ward, 24 ALR3d 863.

CASE NOTES AND OAC

1. General Code § 10506-48 (RC § 2109.43) has no application to exceptions filed to the accounts of the testamentary trustee by the remaindermen and a hearing on such exceptions; the statutes relative to the filing of accounts and hearing of exceptions there-to apply: In re Deibel, 86 App 346, 41 OO 380, 91 NE(2d) 812.

2. Where the succeeding administrator does not seek a penalty in an action, this section is not applicable: Massachusetts Bonding &c. Co. v. Winters Nat. Bank &c. Co., 130 F(2d) 5, 24 OO 225.

3. A guardian does not have the right to make personal use of the ward's car: In re O'Brien, 74 OLA 366, 140 NE(2d) 806 (App).

4. Violation of this statute justified permanent disbarment: Toledo Bar Assn. v. Bartlett, 39 OS(2d) 100, 68 OO(2d) 59, 313 NE(2d) 834 (1974).

5. Power of guardian to use funds of an incompetent for the benefit of persons other than the incompetent discussed: In re Tillman, 73 OLA 534, 137 NE(2d) 172 [for related action see 100 App 291, 60 OO 254, 136 NE(2d) 291].

§ 2109.44 Fiduciaries not allowed to have dealings with estate; exception. (GC § 10506-49)

Fiduciaries shall not buy from or sell to themselves nor shall they in their individual capacities have any dealings with the estate, except as expressly authorized by the instrument creating the trust and then only with the approval of the probate court in each instance; but no corporate fiduciary shall be permitted to deal with the estate, any power in the instrument creating the trust to the contrary notwithstanding. This section does not prohibit a fiduciary from making an advancement, when such advancement has been expressly authorized by the instrument creating the trust or when the probate court approves.

HISTORY: GC § 10506-49; 114 v 320 (374); 116 v 385 (392), § 1. Eff 10-1-53.

Forms

1 A&H Probate FORM 2109.44a et seq

Research Aids

Accountability of fiduciary for self-dealing:

O-Jur2d: Fiduciaries §§ 130, 135

Am-Jur2d: Trusts §§ 469-472; Executors and Administrators §§ 386-388

Exceptions to rule prohibiting self-dealing:

O-Jur2d: Fiduciaries §§ 129, 136

Am-Jur2d: Executors and Administrators § 389; Trusts § 461

Self-dealing prohibited:

O-Jur2d: Fiduciaries §§ 126-128, 131-134; Trusts §§ 174, 180

Am-Jur2d: Trusts §§ 319, 410, 460 et seq; Executors and Administrators §§ 383-388

ALR

Transaction between corporate trustee, administrator, executor, or guardian, and affiliated corporation as violation of rule against self-dealing. 151 ALR 905.

Independent advice as essential to validity of transaction between persons occupying confidential or fiduciary relationship. 123 ALR 1505.

Spouse's or relatives' interest in transaction as affecting applicability of principle which condemns transactions in which trustee or other fiduciary acts in own interest adversely to beneficiary or others whom he represents. 131 ALR 990.

Failure of trustee to disclose self-dealing as ground for vacating order or decree settling account. 132 ALR 1522.

Validity and construction of trust provision authorizing trustee to purchase trust property. 39 ALR 3d 836.

Law Reviews

See explanatory article in 4 OBar 305.

Uniform trusts act. Article by Prof. Harry W. Vanneman (OSU) and Prof. Frank S. Rowley (UC). 13 CinLRev 157, 5 OSLJ 145.

It can't be done. Article by William R. Kinney. 19 OBar (No. 13) 225.

Trusts; management and disposal of trust property; individual interest in trust property. (Case note.) 15 CinLRev 113.

Sale by administrator to spouse. (Case note.) 30 CinLRev 232.

CASE NOTES AND OAC

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1. For history of this section, see In re Binder, 137 OS 26, 17 OO 364, 27 NE(2d) 939.

1.1 Where a court of probate issues an order for the private sale of realty by the administratrix of an estate and she then makes such a sale to her spouse, the sale is voidable at the election of the heirs: Magee v. Troutwine, 166 OS 466, 2 OO(2d) 471, 143 NE(2d) 581.

2. A sale of estate property by an administrator to his spouse is voidable at the election of the heirs: Christman v. Christman, 171 OS 152, 12 OO(2d) 172, 168 NE(2d) 153.

3. As to any fiduciary relationship created on and after January 1, 1968, RC § 1109.10 specifies whether and how a trust company may vote its own shares held by it in such fiduciary capacity: Cleveland Trust Co. v. Eaton, 21 OS(2d) 129, 50 OO(2d) 354, 256 NE(2d) 198 (1970) [reversing 11 OMisc 151, 40 OO(2d) 460].

4. Violation of this statute justified permanent disbarment: Toledo Bar Assn. v. Bartlett, 39 OS(2d) 100, 68 OO(2d) 59, 313 NE(2d) 834 (1974).

5. A fiduciary acting as a trustee may not loan money to himself; further any loaning of money to the wife of such trustee under a proper showing may be voidable but it is not necessarily void: *In re Chambers*, 30 OLA 420 [appeal dismissed 136 OS 202, 16 OO 535, 24 NE(2d) 601].

6. An executor who is the beneficiary of an option to purchase real estate of the testator must, in order to purchase and obtain clear title to such property, not only exercise his option to purchase such property, but also make application to and obtain the approval of the probate court for such sale. The probate court abuses its discretion in approving any such sale, where it determines that the purchase price was not full and fair: *Walters v. Wannemacher*, 6 OApp(2d) 226, 35 OO(2d) 385, 217 NE(2d) 695.

7. Under this section, which permits a fiduciary to make an advancement to the estate when such advancement either has been expressly authorized by the trust instrument or approved by the probate court, and under the provisions of a will authorizing the executors and trustees to borrow funds necessary to pay taxes, the corporate trustee has authority to loan money to the estate for the purpose of paying federal estate tax: *Kirkbride v. Hickok*, 41 OO 265, 89 NE(2d) 91 (PC).

8. In the absence of specific authority in the will or by the court to the contrary, a widow who is appointed executrix of her deceased husband's estate is either a legal or equitable assignee of the testator's note and the collateral securing the same, and as such assignee, she may be reimbursed for an advancement out of her own funds to pay the note only to the value of the security: *In re Outhwaite*, 42 OO 445 (App) [affirming 42 OO 442 (PC)].

9. This section prohibits an advancement by an executrix out of her own funds unless it has been expressly authorized by the will or has been approved by the probate court. This requirement is met when the probate court approves the final account: *In re Outhwaite*, 42 OO 445 (App) [affirming 42 OO 442 (PC)].

10. This section which provides in part that no corporate fiduciary shall be permitted to deal with the estate, notwithstanding any power in the instrument creating the trust to the contrary, is not applicable to the trustee of an inter vivos trust: *Central Nat. Bank v. Brewer*, 37 OO(2d) 323, 8 OMisc 409, 220 NE(2d) 846 (CP).

§ 2109.45 Affidavit before private sale confirmed. (GC § 10506-51)

Before the probate court confirms a sale by an executor, administrator, guardian, assignee, or trustee made under an order allowing such officer to make a private sale, such court shall require such officer to file an affidavit that such private sale was made after diligent endeavor to obtain the best price for the property and that the sale reported is the highest price he could get for such property.

HISTORY: GC § 10506-51; 114 v 320 (375). Eff 10-1-53. Analogous to former GC § 11213.

Forms

- 1 A&H Probate FORM 2109.45a et seq
- 1 A&H Probate FORM 2127.32a et seq; Report of private sale.

Research Aids

Affidavit by fiduciary required before private sale confirmed:

- O-Jur2d: Fiduciaries § 116; Trusts § 180;
- Executors and Administrators § 390
- Am-Jur2d: Trusts §§ 452, 453

[MORTGAGE OF REAL ESTATE]

§ 2109.46 Mortgage by fiduciary. (GC §§ 10506-59, 10506-60, 10506-62)

When it appears to be for the best interests of the trust, a fiduciary other than an executor or administrator may, with the approval of the probate court, borrow money and mortgage real estate belonging to the trust, whether such real estate was acquired by purchase or by descent and distribution.

The fiduciary proposing so to borrow money must file in the probate court which appointed him a petition describing all of the real estate in the trust and stating the nature and amount of the encumbrances thereon, the date such encumbrances became or will become due, and the rate of interest thereon. The petition shall also contain a statement of the personal property in the trust, the income from such personal property, and the income from the real estate in such trust. Such petition if filed by a guardian shall state the names, ages, and residences of the ward and next of kin known to be resident in the state, including the spouse of such ward and persons holding liens on such real estate, all of whom must be made defendants and be notified of the pendency and prayer of the petition in such manner as the court directs. In addition such petition shall contain a statement of the nature of the imbecility or insanity, if any, of such ward, whether temporary or confirmed and its duration. Except as provided in this section, the defendants and notice thereto shall be the same as though the real estate proposed to be mortgaged were being sold by the fiduciary. The petition shall set forth the purpose of the loan, the amount required therefor, and such other facts as may be pertinent to the question whether such money should be borrowed and shall contain a prayer that the fiduciary be authorized to mortgage so much of the ward's lands as may be necessary to secure such loan.

Upon the filing of such petition, the proceedings as to pleadings and proof shall be the same as on petition to sell real estate belonging to the trust.

HISTORY: GC §§ 10506-59, 10506-60, 10506-62; 114 v 320 (377). Eff 10-1-53. GC § 10506-59 analogous to former GC § 10969; GC § 10506-60 analogous to former GC § 10970; GC § 10506-62 analogous to former GC § 10972.

Comparative Legislation

- Mortgage of estate by fiduciary:
- Cal.—Probate Code, § 830

Ill.—Rev Stat, ch 3, § 20-4
 Ind.—Burns' Stat, § 29-1-15-11
 Mich.—MCLA, § 709.44
 N.Y.—SCPA, § 1904
 Pa.—Purdon's Stat, Tit. 20, § 7308
 Fla.—FSA, § 733.613

Forms

1 A&H Probate FORM 2109.46a et seq

Outlines of Procedure

Mortgage of real estate. Leyshon No. 84; A&H No. 62

Research Aids

Mortgage by fiduciary:
 O-Jur2d: Fiduciaries § 117
 Am-Jur2d: Trusts §§ 483-487

ALR

Construction and application of provision of will expressly giving trustee power to mortgage realty. 115 ALR 1417.

Propriety during life estate in unproductive property of authorizing mortgage binding upon remainderman to raise funds to pay taxes, repairs, or other charges against property, and powers of trustee in that respect. 116 ALR 1420.

Surchargeability of trustee in respect of mortgage investment as affected by matters relating to value of property. 117 ALR 871.

§ 2109.47 Mortgage by a guardian. (GC § 10506-61)

Before the probate court makes an order authorizing a guardian to mortgage real estate for the purpose of borrowing money to make repairs or improvements, such court shall appoint three disinterested persons whose duty it shall be to investigate fully the necessity for and the advisability of making such repairs or improvements and their probable cost and report this to the court under oath.

HISTORY: GC § 10506-61; 114 v 320 (377). Eff 10-1-53. Analogous to former GC § 10971.

Forms

1 A&H Probate FORM 2109.47a et seq

Research Aids

Mortgages by a guardian:
 O-Jur2d: Fiduciaries § 117

§ 2109.48 Amount of loan. (GC §§ 10506-63, 10506-64)

If on the final hearing of a fiduciary's petition to borrow money and mortgage real estate belonging to the trust it appears to be for the best interests of the trust that the prayer of the petition be granted, the probate court shall fix the amount necessary to be borrowed, direct what lands shall be encumbered by mortgage to secure such amount, and issue an order to such fiduciary directing him to ascertain and report to the court the rate of interest and the length of time for which he can borrow such amount.

If such report and the terms proposed are satisfactory to the court, they may be accepted and confirmed and the fiduciary ordered, as fiduciary, to execute a note for such amount and a mortgage on the lands so designated, which shall be a valid lien thereon. The fiduciary in no way shall be personally liable for the payment of any part of the sum borrowed, but such mortgaged lands alone shall be bound therefor. Such court shall direct the distribution of the fund and the fiduciary shall report to the court, for its approval, the execution of such notes and mortgage and his distribution of the fund.

HISTORY: GC §§ 10506-63, 10506-64; 114 v 320 (377, 378). Eff 10-1-53. GC § 10506-63 analogous to former GC § 10973; GC § 10506-64 analogous to former GC § 10974.

Forms

1 A&H Probate FORM 2109.48a et seq

Research Aids

Final hearing, report and order:
 O-Jur2d: Fiduciaries § 118

[INVESTIGATION OF TRUST]

§ 2109.49 Investigation of trust.

The probate judge, when he deems it necessary or upon the written application of any party interested in the trust estate, may appoint suitable persons to investigate the administration of the trust and report to the court. The expense thereof shall be taxed as costs against the party asking for such examination or [against] the trust fund, as the court may decree. This section shall not apply to a corporate trustee which is subject to section 1107.16 of the Revised Code.

HISTORY: GC § 10506-50; 114 v 320 (374); 129 v 582 (737), § 1 (Eff 1-10-61); 129 v 1817 (1820), § 1. Eff 11-8-61.

Research Aids

Investigation of trust:
 O-Jur2d: Fiduciaries § 163

Law Review

See explanatory article in 4 OBar 305.

[CONCEALED OR EMBEZZLED ASSETS]

§ 2109.50 Proceedings when assets concealed or embezzled.

Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, com-

pel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint. Where necessary such citation, attachment or warrant may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered. The officer to whom such process is delivered shall be liable for negligence in its service or return in like manner as sheriffs are liable for negligence in not serving or returning a capias issued upon an indictment. Before issuing an extra-county citation, attachment or warrant, the probate judge may require the complainant to post security with the probate court in such amount and in such form as the probate judge shall find acceptable in order to cover the costs of the proceeding under this section, including in such costs a reasonable allowance for the travelling expenses of the person or persons against whom an extra-county citation, attachment or warrant is to be issued. Such security may be in the form of a bond, the amount, terms, conditions and sureties of which shall be subject to the approval of the probate judge.

The probate court may initiate proceedings on its own motion.

The probate court shall forthwith proceed to hear and determine the matter.

The examinations, including questions and answers, shall be reduced to writing, signed by the party examined, and filed in the probate court.

If required by either party, the probate court shall swear such witnesses as may be offered by either party touching the matter of such complaint and cause the examination of every such witness, including questions and answers, to be reduced to writing, signed by the witness, and filed in the probate court.

All costs of such proceedings, including the reasonable travelling expenses of a person against whom an extra-county citation, attachment or warrant is issued, shall be assessed against and paid by the party making the complaint, except as provided by section 2109.52 of the Revised Code.

HISTORY: GC §§ 10506-67, 10506-68, 10506-70, 10506-71, 10506-72; 114 v 320 (379); 128 v 76 (77), § 1. Eff 11-9-59.

GC § 10506-67 analogous to former GC §§ 10673, 10989-6; GC § 10506-68 analogous to former GC § 10674; GC § 10506-70 analogous to former GC § 10676; GC § 10506-71 analogous to former GC § 10677; GC § 10506-72 analogous to former GC § 10989-6.

Cross-References to Related Sections

See RC §§ 2109.51, 2109.52 which refer to this section.

See RC § 2109.56 which refers to RC § 2109.50 et seq.

Comparative Legislation

Concealed or embezzled assets:

Ill.—Rev Stat, ch 3, §16-1
Ind.—Burns' Stat, § 29-1-10-6
Ky.—KRS, § 395.270
Mich.—MCLA, § 707.5
N.Y.—SCPA, § 2103
Fla.—FSA, § 733.309
Examination of witnesses:
Ind.—Burns' Stat, § 29-1-10-6
Mich.—MCLA, § 707.6
N.Y.—SCPA, § 2104

Forms

1 A&H Probate FORM 2109.50a et seq
1 A&H Probate FORM 2109.51a et seq: Failure to appear or answer.

1 A&H Probate FORM 2109.52a et seq. Verdict.

Outline of Procedure

Concealed or embezzled assets. Leyshon No. 59; A&H No. 28.

Research Aids

Concealment and embezzlement—generally:

OJur2d: Fiduciaries § 85 et seq; Trusts § 242

Costs:

O-Jur2d: Fiduciaries § 106

Am-Jur2d: Executors and Administrators § 769

Evidence and witnesses:

O-Jur2d: Fiduciaries §§ 101, 102

Jurisdiction:

O-Jur2d: Fiduciaries § 94

Pleadings, notice and hearing:

O-Jur2d: Fiduciaries § 95 et seq

Time when proceeding may be brought:

O-Jur2d: Fiduciaries § 92

Where proceeding lies—requisites:

O-Jur2d: Fiduciaries § 88 et seq

ALR

Personal representative's right to allowance, out of property involved, for attorneys' fees or other expenses incurred in unsuccessful efforts to claim property for the estate. 126 ALR 1349.

Law Reviews

Jurisdiction of probate court to determine title to allegedly concealed assets under GC §§ 10501-53, 10506-67, and 10506-77 (RC §§ 2101.24, 2109.50 and 2109.56): (Case note.) 18 OO 535.

Sale of real estate, construction of wills, and inheritance taxes discussed. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 8) 121.

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1. The purpose of GC §§ 10506-67 to 10506-77 (RC §§ 2109.50 to 2109.56), relating to proceedings to discover concealed or embezzled assets of an estate, is not to furnish a substitute for a civil action to recover judgment for money owing to an administrator or executor but rather to provide a speedy and effective method for discovering assets belonging to the estate and to secure possession of them for the purpose of administration: *Goodrich v. Anderson*, 136 OS 509, 17 OO 152, 26 NE(2d) 1016, discussed in 14 OBar 371.

2. Where the defendant is found not guilty of concealing or embezzling assets of the estate of the decedent, the court may not proceed to determine other issues, but has no alternative except to dismiss the complaint: *Goodrich v. Anderson*, 136 OS 509, 17 OO 152, 26 NE(2d) 1016, discussed in 14 OBar 371.

3. A judgment rendered by a probate court in a proceeding properly brought under GC § 10506-67 (RC § 2109.50), in which proceeding it was charged that the fiduciary of a trust estate had concealed assets of such estate, was appealable to the common pleas court on questions of law and fact under GC § 10501-56 (114 v 320, 336 [RC § 2101.42]): *Sheets v. Hodes*, 142 OS 559, 27 OO 498, 53 NE(2d) 804 [affirming 39 OLA 492].

4. Under the broad authority conferred on the probate court in matters relating to the administration of estates and in the control of fiduciaries, including plenary power to dispose of any matter properly before it, a proceeding in such court based on GC § 10506-67 (RC § 2109.50) does not abate with the death of a fiduciary charged with the concealment of assets of an estate and may be revived in the name of his executor: *Sheets v. Hodes*, 142 OS 559, 27 OO 498, 53 NE(2d) 804 [affirming 39 OLA 492].

5. The provisions of GC §§ 10506-70 and 10506-71 (RC § 2109.50) requiring that the questions and answers of the party examined and of the witnesses called to testify in a proceeding instituted under GC § 10506-67 (RC § 2109.50), shall be reduced to writing and signed by those who have testified, are directory: *Sheets v. Hodes*, 142 OS 559, 27 OO 498, 53 NE(2d) 804 [affirming 39 OLA 492].

6. General Code §§ 10506-67 and 10506-73 (RC §§ 2109.50 and 2109.52) provide a summary means, inquisitorial in nature, to recover specific property or the proceeds or value thereof belonging to a trust estate, title to which was in a decedent at his death or in a ward when his guardian was appointed; or to recover property, belonging to a trust estate, concealed, taken or disposed of after the appointment of the fiduciary: *In re Black*, 145 OS 405, 31 OO 31, 62 NE(2d) 90 [affirming 75 App 294].

7. A complaint filed under GC § 10506-67 (RC § 2109.50) involves a charge of wrongful or criminal conduct on the part of the person accused: *In re Black*, 145 OS 405, 31 OO 31, 62 NE(2d) 90 [affirming 75 App 294].

8. A court may, in the exercise of its jurisdiction, compel an attorney appearing before it to pay over or account for moneys or to deliver papers which he has received in his official capacity and wrongfully withholds from his client; but such attorney must be given an opportunity to answer and defend, and if the attorney in good faith claims title to the funds or papers in question, the client is not entitled to a summary order against him: *In re Butler*, 137 OS 115, 17 OO 440, 28 NE(2d) 196.

10. Resort may not be had to GC § 10506-67 (RC § 2109.50) et seq to collect a debt, obtain an accounting or adjudicate rights under a contract: *In re Black*, 145 OS 405, 31 OO 31, 62 NE(2d) 90 [affirming 75 App 294].

12. A summary proceeding under GC § 10506-67 (RC § 2109.50) et seq, was instituted to recover proceeds of "pay roll" checks, payable to the decedent and signed and indorsed by him, cashed by an employee who distributed the proceeds thereof partly in payment of wages to decedent's employees and partly to the decedent. Such transactions occurred each week for a period of over five years prior to the death of the decedent. The employee claimed to have paid to the decedent all such cash remaining after the payment of wages, whereas the administrator claimed a lesser sum was paid to the decedent. The relief sought by the administrator was in fact an adjustment of the accounts of the parties, was a judgment for the balance claimed to be due, with the statutory penalty, and is not within the purview of GC § 10506-67 (RC § 2109.50) et seq: *In re Leiby*, 157 OS 374, 47 OO 265, 105 NE(2d) 583.

12.1 No relief for a probate court estate, upon a complaint to the probate court pursuant to GC § 10506-67 (RC § 2109.50), can be given except with respect to property of such estate: *In re Sexton*, 163 OS 124, 56 OO 178, 126 NE(2d) 129.

12.2 Such suspected person is the court's witness, and neither the complainant nor any other person interested in the trust estate and opposed to the claims of the suspected person is bound by the suspected person's testimony: *In re Fife*, 164 OS 449, 58 OO 293, 132 NE(2d) 185.

12.3 In a proceeding to discover concealed assets, where the complaint is that the suspected person is in possession of certificates of corporate stock belonging to decedent's estate and it is shown that such certificates were issued to the decedent during his lifetime and stood in his name on the books of the corporation at the time of his death, a prima facie case is made for the inclusion of such certificates as assets of the estate. Such prima facie case, however, may be rebutted and overcome by clear and convincing evidence that such certificates were assigned and delivered by way of gift to the suspected person by the decedent during his lifetime: *In re Fife*, 164 OS 449, 58 OO 293, 132 NE(2d) 185.

12.4 Such suspected person is in reality the witness of the court, and the character and extent of his examination rest largely in the court's discretion, and, where it is apparent from the record that such discretion has not been abused, there is no basis for reversal in this respect by a reviewing court: *In re Fife*, 164 OS 449, 58 OO 293, 132 NE(2d) 185.

12.5 In such a proceeding it is the court which cites the person suspected of having concealed or embezzled assets to appear before it to be examined on oath touching the subject matter of the complaint, and it is the court which is in control of the examination, notwithstanding such examination may be delegated to and conducted by attorneys: *In re Fife*, 164 OS 449, 58 OO 293, 132 NE(2d) 185.

13. A petition and complaint comes within the provisions of this section (recodification act of 1953), where it alleges facts showing that the person filing it is a person interested in the estate of a decedent, and where it contains the further allegations that moneys deposited in a bank during the lifetime of the decedent in the joint names of the decedent and another with right of survivorship were so deposited for convenience only and in reality were the sole property of the decedent and belong in his estate, and that such other unauthorizedly withdrew the moneys from the account during the lifetime of the decedent and deposited the same in an account in such other's name where such moneys remain: *Fec-teau v. Cleveland Trust Co.*, 171 OS 121, 12 OO(2d) 139, 167 NE(2d) 890.

14. A complaint filed in the probate court under the provisions of GC § 10506-67 (RC § 2109.50) is quasi criminal in character, but the laws governing civil proceedings in the probate court are applicable to such a proceeding: *In re Howard*, 79 App 203, 34 OO 537, 72 NE(2d) 502 [modifying 33 OO 510, 68 NE(2d) 820].

15. The filing of exceptions to an executor's account, the executor alleging that the executor has failed to charge himself with all the assets of the estate, is not the proper procedure to obtain a determination as to the validity of a gift and transfer of possession during the lifetime of the decedent: *In re Trent*, 98 App 238, 57 OO 266, 128 NE(2d) 839.

16. In an action for a declaratory judgment brought by a person in possession of personal property claimed by the executor of decedent's estate and which the party in possession claims by virtue of a gift *inter vivos*, a probate court has jurisdiction to determine the title to such personal property: *Renee v. Sanders*, 102 App 21, 2 OO(2d) 7, 131 NE(2d) 346.

17. If an executor, administrator, or other interested party discovers that an asset was not included in the inventory or supplemental inventory of a decedent, and that the asset may belong to the estate, such party may bring an action in declaratory judgment under RC § 2721.05, or use the special proceedings of RC § 2109.50 to determine whether such asset belongs in the estate of the decedent: *Eger v. Eger*, 39 OApp(2d) 14, 68 OO(2d) 150, 314 NE(2d) 394 (1974).

18. General Code § 11495 (RC § 2317.03) prohibiting a party to an action from testifying in certain instances, has no application to proceedings had upon a citation made upon complaint of an executor under GC § 10506-67 (RC § 2109.50), relative to discovery of concealed or embezzled assets, and does not prohibit the party so cited from testifying as to transactions with the executor's decedent: *Robertson v. Polter*, 58 App 204, 12 OO 107, 16 NE(2d) 485.

19. This statute was enacted in 1932, and by its terms changed the existing law so as to include guardians of incompetent persons as well as executors and administrators. It was also changed so as to permit the probate court to institute such proceedings on its own motion: *In re Sanderson*, 64 App 177, 17 OO 562, 28 NE(2d) 565.

20. In a special proceeding under GC § 10506-67 (RC § 2109.50) et seq to discover assets of an estate, a defense that the articles in question were given to the defendant by the decedent is good if proved: *In re Raymond*, 66 App 428, 20 OO 385, 34 NE(2d) 821.

21. In the trial of such matter, evidence that the decedent was insolvent at the time of the alleged gift should be rejected: *In re Raymond*, 66 App 428, 20 OO 385, 34 NE(2d) 821.

22. In an action by an executrix to recover personal property held by another upon a claim of a valid gift

by the decedent, brought pursuant to GC § 10506-67 (RC § 2109.50), authorizing the probate court upon complaint made to it by a person interested in a trust estate to cite any person suspected of "having concealed" or of possessing "effects of such estate," to appear before it for examination under oath, it is error for the court to exclude testimony of witnesses as to statements made by the decedent to the effect that the property in question was placed in the hands of the one claiming title thereto for safe-keeping only, and contradicting such person's testimony that a valid gift was intended: *In re Evans*, 71 App 127, 25 OO 499, 41 NE(2d) 410.

23. General Code § 10506-67 (RC § 2109.50) gives the probate court power to issue a citation to any person to appear before it when complaint is made that such person is concealing assets properly included in an estate in process of administration before it: *In re Chance*, 88 App 416, 45 OO 201, 100 NE(2d) 92.

24. Neither such section nor any other provision of law gives such court power to issue extracounty process in the service of such citation: *In re Chance*, 88 App 416, 45 OO 201, 100 NE(2d) 92.

25. A proceeding by the administrator of a decedent's estate for the recovery of concealed or embezzled assets, instituted under GC § 10506-67 (RC § 2109.50), is not a civil action and such proceeding does not require the invocation of the provisions of GC § 11252 (RC § 2307.16), so as to necessitate the appointment of a guardian ad litem for a minor defendant: *Hiple v. Skolmutch*, 88 App 529, 45 OO 281, 100 NE(2d) 642.

25.1 A proceeding under this section to recover concealed or embezzled assets of an estate is inquisitorial, the witnesses testifying therein are the court's, and the rule of evidence against impeachment of a party's own witness does not apply: *Jones v. Neu*, 106 App 161, 6 OO(2d) 428, 150 NE(2d) 858.

25.2 A probate court has no jurisdiction, in a proceeding for the discovery of concealed or embezzled assets brought under the provisions of this section, to determine the right to possession of stock certificates, where the right to the possession of such certificates depends upon the interpretation, application and validity of various contracts: *Smith v. Simpson*, 111 App 36, 13 OO(2d) 388, 170 NE(2d) 433.

25.3 The title of the executor of a ward's estate relates back only to the moment of such ward's decease, and such executor cannot be a person interested in the trust estate of the guardianship existing only theretofore. Such executor's right to make complaint, or cause of action, concerning concealment of assets is not as successor to or transferee of the guardian's right to make complaint, or cause of action, but is separate from and independent thereof (the executor's right is as respects assets of his decedent's estate, that of the guardian is as respects assets of the ward): *Kelly v. Smith*, 7 OApp(2d) 142, 36 OO(2d) 293, 219 NE(2d) 231.

25.4 A probate court has jurisdiction to inquire into an incompetent's contractual affairs entered into prior to the appointment of a guardian where such person's mental capacity at the time of such dealings is questioned by the guardian: *Grannen v. Ey*, 44 OApp(2d) 55, 73 OO(2d) 52, 335 NE(2d) 735 (1974).

25.5 An agreement entered into by a person subsequently declared incompetent may be declared void when the benefiting party was aware of the person's deteriorating mental condition and took advantage of such to gain control of his property: *Grannen v. Ey*, 44 OApp(2d) 55, 73 OO(2d) 52, 335 NE(2d) 735 (1974).

25.6 If upon the trial of a statutory proceeding for concealment of assets, the evidence discloses that the subject matter of the complaint is not within the contemplation of the provisions of the statute, such as, for example, an effort to collect a debt, obtain an accounting or adjudicate rights arising under a contract, the complainant may not resort to the summary provisions of the statute but is relegated to a civil action with appropriate pleadings to define the issues: *Stone v. Woods*, 11 OApp 277, 11 OO(2d) 302, 167 NE(2d) 122.

25.7 General Code § 11495 (RC § 2317.03), prohibiting a party to an action from testifying in certain instances, has no application to proceedings had upon a citation made upon the complaint of an executor under GC § 10506-67 (RC § 2109.50), relative to the discovery of concealed or embezzled assets and does not prohibit the party so cited from testifying as to transactions with the executor's decedent: *In re Jones*, 68 OLA 282, 122 NE(2d) 111 (App).

25.8 Where after a hearing and a finding of not guilty on a complaint against an executor for concealing assets, which assets were the proceeds of a certain bank account which had been withdrawn on October 8th, by means of a deposit slip allegedly signed on that day by decedent, in which hearing it appeared that decedent died on October 8th, it is discovered that decedent had died on October 7th, the trial court committed an abuse of discretion in refusing to grant a rehearing on such complaint on the grounds of newly discovered evidence: *In re Warga*, 69 OLA 1, 113 NE(2d) 39 (App).

25.9 In an action for the concealment of assets belonging to the estate of an incompetent a statement signed by the incompetent that such assets were obtained from her by duress is admissible in evidence: *In re Rost*, 72 OLA 261 (App).

26. A party is guilty of concealing assets from an administrator where bonds which were left with said party for "safe-keeping" by the deceased prior to death were not turned over to the administrator, even though there was no fraudulent or criminal intent: *State ex rel Sneider v. Packer*, 4 OO 347 (PC).

27. Where plaintiff exercised the jurisdiction of the probate court under GC § 10506-67 (RC § 2109.50) and proceeded to final judgment, the dismissal of his action without prejudice after an appeal had been perfected to the common pleas court left the judgment announced by the probate court in full force and effect: *Jones v. Whaley*, 10 OO 87 (CP).

32. In a proceeding against an administrator or executor, under favor of GC § 10506-67 (RC § 2109.50), to discover concealed or embezzled assets of estate, the complaint is the only pleading required; proof is not limited to the items particularized in the complaint: *Hendrickson v. Hendrickson*, 17 OLA 39.

33. Under the provisions of GC § 10506-67 (RC § 2109.50) and cognate sections, a legatee, heir or other person interested in an estate is authorized to bring action against a person suspected of having concealed, embezzled, or conveyed away or of being or having been in possession of any moneys, goods, chattels, things in action or effects of such estate; but said section does not authorize the bringing of any action by any of the persons mentioned for property transferred by the decedent prior to his death whether such transfer was procured through coercion, duress, undue influence or other unlawful restraint: *McMahon v. Jones*, 17 OLA 488.

34. The common pleas court has no jurisdiction under GC § 10506-67 (RC § 2109.50) to hear and determine an action by an executor of a cestui que

trust's estate to recover from the trustee of her deceased's father's trust estate money and other personality in his possession alleged to belong to the deceased cestui's estate, where the evidence shows no wrongdoing on the part of the trustee: *Gregg v. Kent*, 27 OLA 628.

35. Where adult children, without the knowledge or consent of grandchildren, agreed to settle and divide an estate out of court, and one of the adults who took the lead therein assumed the responsibility of paying the grandchildren their respective amounts as they became of age, but failed to do so, an administrator appointed on the application of such grandchildren may bring an action under GC § 10506-67 (RC § 2109.50) to recover concealed or conveyed-away moneys belonging to the estate, in fraud of the rights of the administrator and others interested in the estate, against the adult who failed to pay the grandchildren, without joining the other heirs: *In re Christian*, 33 OLA 367.

36. In a proceeding in a probate court upon a complaint filed under GC § 10506-67 (RC § 2109.50) et seq, charging the administrator of a decedent's estate with having fraudulently concealed, embezzled or conveyed away certain assets of the estate, evidence that in the disposition of the articles in question he acted with the consent of one whom he believed, under the advice of counsel, to be the sole beneficiary of the estate, that such articles were of comparatively little value, and the absence of evidence of concealment or other circumstances indicative of a fraudulent intent, justifies a finding of "not guilty": *In re Johnson*, 38 OLA 372, 50 NE(2d) 273 (App).

38. Where personal property of a decedent is in the possession of the executrix in her fiduciary capacity and her conduct consists of conversations with beneficiaries in a manner calculated to obtain consent to the division of such property outside the estate and contrary to the express provisions of the will and of a failure to list such property in the original inventory, it being subsequently reported in a supplemental inventory in consequence of a demand by complainants, the conduct of the executrix does not justify a finding of guilty under the provisions of GC § 10506-67 (RC § 2109.50) on the theory that she wrongfully withholds assets which are lawfully in her possession: *In re Meyer*, 53 OLA 97, 82 NE(2d) 856 (PC).

39. By virtue of GC §§ 10506-67 and 10506-73 (RC §§ 2109.50 and 2109.52) a probate court upon complaint duly made may cite a person suspected of having concealed, embezzled or conveyed away, or of having been in possession of any estate property, to appear before said court and be examined. Said court may also determine title to such property and in its discretion order its return: *In re Brooks*, 56 OLA 15 (App).

40. The proceedings provided for by GC §§ 10506-67 to 10506-77 (RC §§ 2109.50 to 2109.56) are purely statutory, and an appeal from the court of appeals does not lie, since the appellate court has jurisdiction on appeal only in chancery cases: *Holbrook v. Frey*, 58 OLA 481 (App).

40.1 Where affiant, being trustee, in his affidavit charged a tenant upon the farm of which affiant is trustee, with being in contempt of court on grounds relating to the mismanagement of the farm by the tenant, there are no facts alleged in the affidavit which would support a proceeding under the provisions of GC § 10506-67 (RC § 2109.50): *In re Schroder*, 62 OLA 239, 107 NE(2d) 143 (App).

41. Revised Code §§ 2109.50 and 2109.52 relate to "money, chattels or choses in action" concealed,

embezzled or conveyed away from the estate and authorize in such case a judgment in favor of the fiduciary, or, if he be guilty, in favor of the state, and an action brought thereunder in an estate where the final account has been filed and approved, on the grounds of an alleged fraudulent withholding of complainant's distributive share of such estate by the administrator thereof and her mother, will be dismissed since no judgment can be rendered in favor of the complainant herself, and no judgment in favor of the estate so long as the order of settlement of the final account stands: *In re Reitler*, 73 OLA 328, 137 NE(2d) 791 (PC).

43. Where the evidence reveals that defendant entered into a contract with her daughter with incident of joint and survivorship terms relative to a savings account and prior to the daughter's death withdrew the funds from such account, which fact defendant openly and notoriously admitted at all times under claim of right of contract, an action for the concealment of assets brought under authority of GC § 10506-67 (RC § 2109.50), will not lie and the complaint will upon motion be dismissed: *In re Stoltz*, 75 OLA 583, 143 NE(2d) 192 (PC).

45. Revised Code § 2317.03, prohibiting a party to an action from testifying in certain instances, has no application to proceedings had and upon a complaint filed under RC § 2109.50, relating to concealed assets, and does not prohibit the party so cited from testifying as to transactions with the decedent: *In re Brandt*, 30 OO(2d) 615, 1 OMisc 37, 204 NE(2d) 270 (PC).

DECISIONS UNDER FORMER GC § 10673

INDEX

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Constitutionality

1. To the extent that this statute professes to authorize the court to render judgment for the value of the property where there is a controversy between the parties, it is unconstitutional. In such case, defendant has a right to a jury trial: *Howell v. Fry*, 19 OS 556.

Purpose

2. The purpose of this section, making provision for proceedings when property belonging to the estate of a decedent has been concealed or embezzled, is not to furnish a substitute either for criminal proceedings for embezzlement or for a civil action to recover judgment for money owing to the executor, but rather to provide a speedy and effective method for discovery of assets belonging to the estate and secure possession of them for the purpose of administration: *Leonard v. State ex rel Scott*, 3 App 313, 20 CC(NS) 340.

3. The proceeding under GC § 10673 (RC § 2109.50) is for judgment and penalty and not for the specific money concealed; and questions as to form and disposition of money by defendant are irrelevant, and he cannot be held for contempt for refusing to answer (GC § 10675 [see now RC § 2109.51]): *Lindquist v. Hayes*, 22 App 141, 153 NE 297.

4. In a proceeding under GC § 10673 (RC § 2109.50), defendant admitted the withdrawal and retention of the money, and all that is required is to

show by a preponderance of evidence that the money belonged to the decedent; it is not necessary to establish a fraudulent or criminal intent: *Lindquist v. Hayes*, 22 App 141, 153 NE 297.

5. In an action by an administrator alleging that defendant had appropriated property of decedent (GC § 10673 [RC § 2109.50]), GC § 10678 (RC § 2109.52) does not apply, proof of criminality is unnecessary, and evidence of withholding of property and of incapacity of decedent is admissible: *Losee v. Krieger*, 22 App 395, 153 NE 857.

Against whom asserted

6. The provisions of GC §§ 10673 to 10681 (RC §§ 2109.50 to 2109.55) do not authorize such proceedings against the executor or administrator of such estate: *Meinzer v. Bevington*, 42 OS 325.

7. Where a stepfather mingles the inheritance of his stepchildren with his own means innocently, under the impression that his promise to support the children was a valid consideration therefor, a complaint by the children for having concealed or embezzled their inheritance, made after they have attained their majority, will not lie: *Estate of Ledig*, 9 NP(NS) 169.

By whom asserted

8. All personal property of a deceased person vests in the administrator by relation from time of death, and he is empowered under this section to proceed against any person who is suspected of having in his possession personal property belonging to the decedent. A petition for injunction brought by one of the heirs of the estate against another heir for the purpose of preventing the withdrawal from the bank of certain funds alleged to belong to the decedent will therefore be dismissed, when it appears that an administrator has been appointed: *Sullivan v. Sullivan*, 12 OLR 224.

10. Right of action to set aside gifts of personal property by decedent passed only to personal representative who is real party in interest: *Skehan v. Larkin*, 41 App 85, 179 NE 425.

Procedure

11. Proceeding to recover concealed assets and for removal of administrator can be joined: *Harris v. Westervelt*, 15 CC 534, 8 CD 367.

12. In a proceeding under this section, to recover assets belonging to the estate, the burden of proof is upon the plaintiff to prove that defendant received the property and concealed it, embezzled it, or conveyed it away. Accordingly, it is error for the court to charge the jury that if they find that defendant received the property, the burden of proof is upon the defendant to show the return thereof: *Leonard v. State ex rel Scott*, 3 App 313, 20 CC(NS) 340.

13. In a proceeding under this section to recover property belonging to the estate of a decedent, which has been concealed or embezzled, the judgment, if any is rendered against the defendant, should be in favor of the executor and not in favor of the state: *Leonard v. State ex rel Scott*, 3 App 313, 20 CC(NS) 340.

14. In a proceeding under this section to recover property belonging to the estate of a decedent, which has been concealed or embezzled, it is error to treat the defendant as a party to a civil action, and therefore incompetent as a witness: *Leonard v. State ex rel Scott*, 3 App 313, 20 CC(NS) 340.

15. A defendant, against whom action in replevin has been brought by a person claiming to be the absolute owner and entitled to possession of goods that came into defendant's hands as administrator,

may, under GC § 11265 (RC § 2307.29), interplead executors of said estate, appointed under will probated after defendant had been appointed administrator: *Lorain County Sav. &c. Co. v. Haynes*, 26 App 552, 160 NE 516.

16. A complaint, filed in the probate court by an administrator of a decedent's estate under GC § 10673 (RC § 2109.50) asking that the defendant be required to answer under oath concerning the alleged concealment of certain property claimed to be a part of the estate, is a special proceeding and cannot, in reversing the case to the court of common pleas for hearing and determination, under authority of GC § 10674 (RC § 2109.50), be transmitted into a suit in equity to receive evidence or determine issues involving the mental incapacity of the decedent as pertaining to his intention regarding inter vivos gifts: *Halloran v. Merritt*, 48 App 135, 1 OO 85, 192 NE 542.

17. The proceedings provided for by GC §§ 10673 to 10684 (now GC § 10506-67 et seq [RC §§ 2109.50 et seq, 2113.25]) are purely statutory, and an appeal from the court of common pleas to the court of appeals does not lie, since the appellate court has jurisdiction on appeal only in chancery cases: *Stevens v. Reichelt*, 10 OLA 553.

18. Action by executrix to recover money which she claimed was the value of bonds which were the property of her decedent, and which she charged defendant had converted to his own use, was not an action under favor of GC § 10673 (now GC § 10506-67 [RC § 2109.50]), but merely one at common law for money as damages, and the court properly confined the testimony of defendant as a witness to matters that had occurred subsequent to the death of the testatrix: *Hodge v. Weed*, 12 OLA 591.

Statute of limitations

19. A suit for the recovery of the assets of a decedent's estate, under former GC § 10673 (RC § 2109.50) et seq, is a special proceeding and not barred in four years (GC § 11224 [RC § 2305.09]): *State ex rel Board of Education v. Steeley*, 21 App 396, 153 NE 285.

§ 2109.51 Imprisonment for disobeying citation.

If a person compelled under section 2109.50 of the Revised Code to appear for examination refuses to answer interrogatories propounded, the probate court shall commit such person to the county jail and such person shall remain in close custody until he submits to the court's order.

HISTORY: GC § 10506-69; 114 v 320 (379); 128 v 76 (77), § 1. Eff 11-9-59.

Analogous to former GC §§ 10675, 10989-4.

Forms

1 A&H Probate FORM 2109.51a et seq

1 A&H Probate FORM 2109.50a et seq: Complaint; citation to compel appearance.

Research Aids

Punishment for failure to appear and answer interrogatories:

O-Jur2d: Fiduciaries § 102; Contempt § 62

Am-Jur2d: Executors and Administrators § 720; Contempt §§ 104, 105

ALR

Punishment of civil contempt in other than divorce cases by striking pleading or entering default

judgment or dismissal against contemner. 14 ALR2d 580.

CASE NOTES AND OAG

1. In a summary proceeding to recover judgment of money of decedent claimed to be concealed, embezzled or conveyed away, questions as to form and disposition of money withdrawn from bank were immaterial and irrelevant; and hence defendant could not be held for contempt under former GC § 10675 (RC § 2109.51) for refusing to answer them: *Lindquist v. Hayes*, 22 App 141, 153 NE 297.

§ 2109.52 Judgment on the complaint.

When passing on a complaint made under section 2109.50 of the Revised Code, the probate court shall determine, by the verdict of a jury if either party requires it or without if not required, whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind. The probate court may issue a citation into any county in this state, which citation shall be served and returned as provided in section 2109.50, requiring any person to appear before it who claims any interest in the assets alleged to have been concealed, embezzled, conveyed, or held in possession and at such hearing may hear and determine questions of title relating to such assets. In all cases, except when the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the fiduciary or if there is no fiduciary in this state, the probate court shall render judgment in favor of the state, against the person found guilty, for the amount of the moneys or the value of the chattels or choses in action concealed, embezzled, conveyed away, or held in possession, together with ten per cent penalty and all costs of such proceedings or complaint; except that such judgment shall be reduced to the extent of the value of any thing specifically restored or returned in kind as provided in this section.

If the person found guilty is the fiduciary, the probate court shall forthwith render judgment in favor of the state against him for such amount or value, together with penalty and costs as provided in this section.

HISTORY: GC § 10506-73; 114 v 320 (379); 128 v 76 (78), § 1. Eff 11-9-59.

Analogous to former GC § 10678.

Cross-References to Related Sections

See RC §§ 2109.50, 2109.53 to 2109.55 which refer to this section.

Forms

1 A&H Probate FORM 2109.52a et seq.

Research Aids

Citation of interested persons:

O-Jur2d: Fiduciaries §§ 95, 96

Judgment on the complaint:

O-Jur2d: Fiduciaries § 103

Right to jury:

O-Jur2d: Fiduciaries § 97

ALR

Personal representative's right to allowance, out of property involved, for attorneys' fees or other expenses incurred in unsuccessful efforts to claim the property for the estate. 126 ALR 1349.

Law Reviews

Sale of real estate, construction of wills, and inheritance taxes discussed. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 8) 121.

CASE NOTES AND OAG

1. Under this section, the probate court may assess damages, or order return of the specific thing or things concealed or embezzled, and has authority to hear and determine questions of title relating to such assets: *Jones v. Whaley*, 10 OO 87 (CP).

2. Where the guardian of an incompetent filed in the probate court, on July 7, 1938, a complaint against A seeking to recover assets allegedly belonging to the guardianship estate, and A claimed to hold the assets by virtue of a trust created by the ward before the guardian was appointed, and the guardian claimed that his ward was incompetent to create the trust, the probate court, under the provisions of this section, being the amendment of a former analogous section (114 v 320, 379), and a part of the probate code, had jurisdiction to try the issue as to the title of said assets: *In re Sanderson*, 64 App 177, 17 OO 562, 28 NE(2d) 565.

3. The probate court is authorized under this section to hear and determine the "questions of title": *In re Evans*, 71 App 127, 25 OO 499, 41 NE(2d) 410.

4. In a hearing on a complaint under GC § 10506-67 (RC § 2109.50) the probate court is given jurisdiction to determine questions of title as provided by this section, and if the defendant is found guilty under the complaint the court has complete authority to render a money judgment: *In re Howard*, 79 App 203, 34 OO 537, 72 NE(2d) 502.

5. Under this section, the probate court has authority to determine the title of assets in dispute: *In re Sibert*, 46 OO 44, 101 NE(2d) 153 (App).

6. When the court finds that an executor has improperly distributed assets of an estate to himself as legatee, judgment may be rendered against him in favor of the estate for the amount distributed, together with ten per cent penalty and costs of the proceedings, as provided in this section: *In re Walden*, 34 OO(2d) 149, 214 NE(2d) 271 (PC).

7. In an action for recovery of concealed assets brought by an administrator in common pleas court under the provisions of GC § 10506-67 (RC § 2109.50) the common pleas court, by virtue of this section, has authority to hear and determine questions of title relating to such assets, and equitable jurisdiction wherever necessary to be invoked in order to grant full relief in any matter properly before the court: *Smith v. Ross*, 29 OLA 553.

DECISIONS UNDER FORMER GC § 10678

1. It has been held that former GC § 10678 (see now RC § 2109.52) is unconstitutional in so far as it professes to authorize a judgment without any provision for trial by jury, or a right of appeal in cases

where the defendant does not admit the truth of the complaints, for the court has no constitutional power to try such a case: *Howell v. Fry*, 19 OS 556.

2. Money which has been deposited voluntarily by decedent with defendant and which has not been used by defendant will not bear interest unless in the absence of a specific agreement, and a verdict which includes interest is excessive: *Leonard v. State ex rel Scott*, 3 App 313, 20 CC(NS) 340.

3. Under GC § 10678 (now GC § 10506-73 [RC § 2109.52]) the authority of the court and jury ends with a determination by the jury of the alleged guilt of the accused, and, if found guilty, with a determination of the amount of damages on account thereof for which judgment must be given with a penalty of ten per cent: *Wilson v. Wilson*, 12 OLA 704.

4. Where evidence fails to establish a cause of action for concealing or embezzling assets of decedent, but established a cause of action under code of civil procedure, court is not authorized to add ten per cent penalty to the amount found due: *Skehan v. Reed*, 14 OLA 96.

§ 2109.53 Judgment against fiduciary; removal. (GC § 10506-74)

If a judgment is rendered against a fiduciary under section 2109.52 of the Revised Code, he shall forthwith be removed by the probate court and that part of the trust not already administered shall be committed to some other person. A fiduciary so removed shall not receive compensation for acting as fiduciary and must be charged in his account with the amount of such judgment. Such fiduciary's property also shall be liable for the satisfaction of the judgment on execution issued thereon by his successor.

HISTORY: GC § 10506-74; 114 v 320 (380); 116 v 273 (276), § 1. Eff 10-1-53. Analogous to former GC § 10679.

Cross-References to Related Sections

Judgment of probate court may be made a lien, RC § 2329.04.

Research Aids

Removal and forfeiture of compensation for concealment of assets:

O-Jur2d: Fiduciaries §§ 105, 278, 325; Trusts § 61

Am-Jur2d: Executors and Administrators §§ 112, 501 et seq

ALR

Costs and other expenses incurred by fiduciary whose appointment was improper as chargeable against estate. 4 ALR2d 160.

Personal interest of executor or administrator, adverse to or conflicting with those of other persons interested in estate, as ground for revocation of letters or removal. 119 ALR 306.

CASE NOTES AND OAG

1. A judgment of "not guilty," rendered by a probate court in a proceeding on a complaint filed under this section, charging an administrator with the fraudulent concealment, embezzlement or giving away of assets of the estate, is entitled, on appeal, to all the weight which would be given a verdict of "not guilty" by a jury: *In re Johnson*, 38 OLA 372, 50 NE(2d) 273 (App).

§ 2109.54 Certificate of judgment; delivery to clerk of the court of common pleas. (GC § 10506-75)

The fiduciary in whose favor a judgment has been rendered by the probate court under section 2109.52 of the Revised Code shall forthwith deliver to the clerk of the court of common pleas a certificate of such judgment in accordance with section 2329.04 of the Revised Code, which certificate the probate judge shall make out and deliver to such fiduciary on demand. The clerk shall forthwith issue an execution of the court of common pleas for the amount of the judgment and the costs that have accrued or that may accrue thereon. Thenceforth proceedings on execution shall be the same as if the judgment had been rendered in such court of common pleas.

HISTORY: GC § 10506-75; 114 v 320 (380); 116 v 273 (276), § 1. Eff 10-1-53. Analogous to former GC § 10680.

Cross-References to Related Sections

See RC § 2109.55 which refers to this section.

Forms

1 A&H Probate FORM 2109.50a et seq: Concealed or embezzled assets.

Outline of Procedure

Concealed or embezzled assets. Leyshon No. 59; A&H No. 28.

Research Aids

Enforcement:

O-Jur2d: Fiduciaries § 105

§ 2109.55 Judgment in favor of state. (GC § 10506-76)

If a judgment is rendered in the name of the state under section 2109.52 of the Revised Code and there is no fiduciary within this state, the prosecuting attorney shall cause the certificate provided for in section 2109.54 of the Revised Code to be filed in the clerk's office and proceed thereon to execution as provided in such section. Such prosecuting attorney shall pay the money realized upon such execution to the county treasurer for the use of such trust, reserving such compensation to himself as the probate court allows.

HISTORY: GC § 10506-76; 114 v 320 (380); 116 v 273 (276), § 1. Eff 10-1-53. Analogous to former GC § 10681.

Research Aids

Execution:

O-Jur2d: Executions § 40

§ 2109.56 Conveyances. (GC § 10506-77)

All gifts, grants, or conveyances of land, tenements, hereditaments, rents, or chattels and all bonds, judgments, or executions made or obtained with intent to avoid the purpose of the proceedings set forth in sections 2109.50 to 2109.55, inclusive, of the Revised Code, or in contempla-

tion of any examination or complaint provided for by such sections shall be void.

HISTORY: GC § 10506-77; 114 v 320 (381). Eff 10-1-53. Analogous to former GC § 10682.

Research Aids

Conveyances void:

O-Jur2d: Fiduciaries § 107

Law Review

Jurisdiction of probate court to determine title to allegedly concealed assets under GC §§ 10501-53, 10506-67 (RC §§ 2101.24, 2109.50) and this section. (Case note.) 18 OO 535.

[FUNDS BELONGING TO UNKNOWN OR NONRESIDENT]

§ 2109.57 [Appointment of trustee of funds of unknown or nonresident.] (GC §§ 10506-78, 10506-81, 10506-82, 10506-83, 10506-79, 10506-80)

In any action or proceeding pending in a court of record, if it is made to appear to the court that any person entitled to all or a part of the proceeds of property sold in such action or proceeding is unknown or is a nonresident and not represented in such action or proceeding or that the person entitled cannot, at the time, definitely be ascertained, the probate court may appoint a trustee to whom the notes and mortgages for the unpaid part shall be made, delivered, and paid and to receive, hold, and manage such proceeds or part thereof. Such trustee shall collect the unpaid part of the proceeds of the property sold, by action or otherwise, and shall pay over such fund only on the order of the probate court appointing him.

Payment to such trustee shall be a bar to any claim thereafter made by any person and the persons or corporations paying such money in no case shall be required to see to the application of the money paid.

If a person entitled to any portion of the money held by such trustee fails for seven or more years after such trustee's appointment to make claim to the money and to present the proof necessary to entitle such person to such money, the prosecuting attorney of the county in which such trustee was appointed shall collect it, with the interest accrued thereon, from such trustee and pay it into such county's treasury, to be placed to the credit of the general fund.

When the probate court which appointed such trustee is satisfied that a person who appears and claims the moneys paid into the county treasury has a right to receive them, in whole or part, less the costs of collection by the prosecuting attorney, such court shall order the payment thereof to the person shown to be entitled to such moneys. Such person, on the judge's certificate, shall be given a warrant therefor by the county auditor.

HISTORY: GC §§ 10506-78, 10506-81, 10506-82, 10506-83, 10506-79, 10506-80; 114 v 320 (381). Eff 10-1-53. GC § 10506-78 analogous to former GC § 11022; GC § 10506-79 analogous to former GC § 11023; GC § 10506-80 analogous to former GC § 11024; GC § 10506-81 analogous to former GC § 11025; GC § 10506-82 analogous to former GC § 11026; GC § 10506-83 analogous to former GC § 11027.

Comparative Legislation

Disposition of unclaimed estates:
 Cal.—Probate Code, § 1062
 Ill.—Rev Stat, ch 3, § 24-20
 Ind.—Burns' Stat, § 29-1-17-12
 Ky.—KRS, § 393.040
 Mich.—MCLA, § 704.55
 N.Y.—SCPA, § 2222
 Pa.—Purdon's Stat, Tit. 20, § 2112
 Fla.—FSA, § 733.816

Forms

1 A&H Probate FORM 2107.57a et seq.
 1 A&H Probate FORM 2109.02a et seq: Fiduciaries; appointment, powers, duties.

Outline of Procedure

Funds belonging to unknown persons, trustee appointed. Leyshon No. 75; A&H No. 49.

Research Aids

Appointment of trustee of funds for absentee:
 O-Jur2d: Fiduciaries §§ 12, 25, 151

CASE NOTES AND OAG

1. Money paid to the county treasurer as property passing to the state by escheat is not unclaimed money within the meaning of the statutes vesting authority in the probate court to issue a certificate for the payment of unclaimed money, GC §§ 10506-80 and 10509-197 (RC §§ 2109.57 and 2113.67): In re Schoenberner, 36 OLA 509, 44 NE(2d) 286 (App).

2. Funds held by a county treasurer pursuant to RC §§ 5723.11, 2109.57 and 2113.64 must be disposed of pursuant to instructions contained therein and are not available for diversion to other uses: 1972 OAG No.72-122.

[INVENTORY]

§ 2109.58 Inventory by fiduciary. (GC §§ 10506-84, 10506-85)

Each fiduciary as to whom definite provision is not made in sections 2111.14 and 2115.02 of the Revised Code, shall within three months after his appointment make and file a full inventory verified by oath of the real and personal estate belonging to the trust, its value, and the value of the yearly rent of the real estate.

Except as provided by section 2115.16 of the Revised Code, exceptions to the inventory of a fiduciary may be filed at any time within six months after the return thereof by any person interested in the trust or in any of the property included in the inventory, but such time limit for the filing of exceptions shall not apply in case of fraud or concealment of assets. At the hearing the fiduciary and any witness may be examined under oath. The probate court shall enter its finding on the journal and tax the costs as may be equitable.

HISTORY: GC §§ 10506-84, 10506-85; 114 v 320 (382); 118 v 78 (79), § 1. Eff 10-1-53.

Cross-References to Related Sections

See RC §§ 2109.11, 2109.24 which refer to this section.

Forms

1 A&H Probate FORM 2109.58a et seq.

Outline of Procedure

Inventory, making, filing, and exceptions thereto. Leyshon No. 79, 80; A&H No. 53, 54.

Research Aids

Exceptions to inventory:
 O-Jur2d: Fiduciaries § 35
 Inventory:
 O-Jur2d: Fiduciaries § 34; Trusts § 189
 Am-Jur2d: Trusts § 515; Executors and Administrators § 209 et seq
 Removal for failure to file inventory:
 O-Jur2d: Fiduciaries § 323
 Am-Jur2d: Executors and Administrators § 111; Trusts § 130

CASE NOTES AND OAG

1. Under guardianship of a person incompetent from physical disability alone where the guardian is appointed with the consent of such incompetent, under GC § 10506-85 (RC § 2109.58), a brother is not an "interested person" who may file exceptions to an inventory or an account made or rendered by the guardian of such incompetent; but under guardianship of an imbecile the contrary is true, that is, a brother, or even a stranger, is an interested person who may file such exceptions: In re Faulder, 1 OO 63 (CP).

2. As an incident to a hearing upon exceptions to an inventory pursuant to this section, the Probate court has jurisdiction to determine the issue of a common-law marriage: In re Soeder, 7 OApp(2d) 271, 36 OO(2d) 404, 220 NE(2d) 547.

3. A beneficiary under a will, who is not the executor, can be properly excluded from a courtroom under a ruling ordering a separation of witnesses in a proceeding upon exceptions to an inventory brought pursuant to this section—a such beneficiary not being a party to such proceeding: In re Soeder, 7 OApp(2d) 271, 36 OO(2d) 404, 220 NE(2d) 547.

[PAYMENT OR DISTRIBUTION]

§ 2109.59 [Failure of fiduciary to make payment or distribution.] (GC §§ 10506-86, 10506-87, 10506-88, 10506-89)

If a fiduciary, upon demand, refuses or neglects to pay any creditor whose claim has been allowed by the fiduciary and not subsequently rejected or to pay any creditor or make distribution to any person interested in the estate whose claim or interest has been established by judgment, decree, or order of court, including an order of distribution, such creditor or other person may file a petition against the fiduciary in the probate court from which the fiduciary received his appointment to enforce such payment or distribution, briefly setting forth therein the amount and nature of his claim or interest. Such

petition shall not be filed against an executor or administrator until the expiration of the period prescribed in section 2117.30 of the Revised Code.

When such petition is filed, the probate court shall issue a citation to the fiduciary setting forth the filing of the petition and the nature of the claim of the petitioner and commanding such fiduciary to appear before the court on the return day thereof to answer and show cause why a judgment should not be rendered or order entered against him. Such citation shall be returnable not less than twenty nor more than forty days from its date and shall be served and returned by an officer as in the case of summons. Such citation may issue to any county in the state.

On the return of the citation the cause shall be for hearing, unless for good cause shown it is continued. The probate court may hear and determine all questions necessary to ascertain and fix the amount due from the fiduciary to the petitioner and render such judgment or make such order as may be proper. If necessary, such court may hear, determine, and settle the rights and claims of all parties interested in the subject matter of the petition. For such purpose the probate court may cause all parties in interest to be made parties to such petition by amended, supplemental, or crosspetition. The court shall cause notice to be served on all such parties in the manner provided in this section for service of the citation upon the fiduciary.

In any such proceeding the sureties on the bond of the fiduciary, if made parties thereto, may make any defense that the fiduciary could make and the court may render such judgment or make such order with respect to the sureties as may be proper.

HISTORY: GC §§ 10506-86, 10506-87, 10506-88, 10506-89; 119 v 394 (421, 422). EF 10-1-53. Analogous to former GC §§ 10509-199 to 10509-207.

Cross-References to Related Sections

See RC § 2109.60 which refers to this section.

Forms

1 A&H Probate FORM 2109.59a et seq.

Outlines of Procedure

Distribution or payment, proceedings to enforce. Leyshon No. 68; A&H No. 40.

Research Aids

Enforcement where fiduciary fails to make distribution:

O-Jur2d: Fiduciaries § 154 et seq

CASE NOTES AND OAG

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Year's allowance to widow, death of widow does not affect, 2
Enforcing payment, 1, 10 et seq
Jurisdiction, 11 et seq

1. If a fiduciary refuses to make payment to any creditor whose claim has been allowed by fiduciary and not subsequently rejected, or to make payment to any creditor or other interested person whose claim has been established, such creditor, under authority of GC § 10506-86 (RC § 2109.59), may file a petition to enforce payment, briefly setting forth the nature of his claim, only in the probate court from which the fiduciary received his appointment: *Wilder-muth v. Liggett*, 75 App 410, 31 OO 240, 62 NE (2d) 522.

2. A husband died in 1921, survived by a widow and child who were appointed coexecutors of his will. A year's allowance of six thousand dollars was set off to the widow, of which one thousand dollars was paid prior to her death in 1923. By statute, at the time of the husband's death the year's allowance was a preferred claim. An action was brought pursuant to GC § 10506-86 (RC § 2109.59) et seq, by the successor fiduciary of the widow's estate to recover the unpaid portion of the year's allowance with interest. Held: The widow's year's allowance constituted a debt against her husband's estate and a vested right which did not become divested by the widow's death or any other contingency occurring after the amount thereof was fixed and allowed: *Monger v. Jones*, 91 App 246, 48 OO 347, 108 NE(2d) 116.

3. A judgment creditor, during the administration of an estate in the probate court and before an order of distribution is made, may maintain an action in the nature of a creditor's bill in the common pleas court to reach an interest of the judgment debtor-legatee in funds or property in the hands of the executor of such estate: *Union Properties, Inc. v. Patterson*, 143 OS 192, 28 OO 111, 54 NE(2d) 668.

DECISIONS UNDER FORMER GC § 10509-199

Enforcing payment

10. The probate court is without jurisdiction to entertain an ex parte application by an heir, which application states only that the administratrix has made cash distribution out of the corpus of the estate to the other heirs, but not to the applicant, and praying the court for an order requiring the administratrix to make an immediate cash distribution to the applicant: *In re Turpen*, 26 OLA 584.

Jurisdiction

11. The common pleas court has no jurisdiction to hear and determine an action by a legatee against an executrix of an estate for converting a legacy to her own use, unless there has been a settlement of estate accounts, an order of distribution by the probate court and the expiration of thirty days, as provided in former GC §§ 10509-199 and 10509-206 (see now RC § 2109.59). Until such conditions have been met the probate court has exclusive jurisdiction to hear and determine such action, including any matters of fraud: *Neidecker v. Neidecker*, 63 App 416, 17 OO 135, 26 NE(2d) 929.

12. The probate court and common pleas court were given concurrent jurisdiction by former GC §§ 10509-199 and 10509-206 (114 v 320) (see now RC § 2109.59), to compel an administrator or executor to make distribution at the suit of a distributee. It was an essential element of such action that thirty days should have passed after the settlement of the administrator's or executor's account and an order of distribution made thereon before the action to compel distribution could be filed: *Heater v. Mitten-dorf*, 72 App 4, 26 OO 508, 50 NE(2d) 559.

13. The constitution and the legislature have conferred upon the probate court exclusive jurisdiction

in testamentary matters except in certain matters where the common pleas court of the county has concurrent original jurisdiction, as provided in GC § 10509-206 (RC § 2109.59), and if that exclusive jurisdiction is sought to be invaded by an order made to enjoin an officer of that court from performing his duties, which are exclusive within the jurisdiction of the probate court, then, of course, the court so issuing such order has exceeded its jurisdiction: *State ex rel Bridge v. Krehbiel*, 26 OLA 108.

§ 2109.60 Probate court may send case to the court of common pleas. (GC § 10506-90)

When a proceeding set forth in section 2109.59 of the Revised Code is pending in the probate court, such court, on motion of any party thereto, may reserve and send such cause to the court of common pleas which shall hear, settle, and determine all issues as provided in such section. In case of such reservation, the probate court shall prepare a transcript of the proceedings in the cause, so far as it has progressed, which, with the petition and other papers therein, forthwith shall be filed with the clerk of the court of common pleas.

HISTORY: GC § 10506-90; 119 v 394 (422), § 5. Eff 10-1-53. Analogous to former GC § 10509-205.

Comment

General Code § 10506-90 was similar to former GC § 10509-205. While the probate court may refer the proceedings to the court of common pleas, it should be noted that the court of common pleas does not have original jurisdiction. This being a disciplinary proceeding, the original jurisdiction was confined to the probate court, and consequently there is no provision comparable to former GC § 10509-206.

Forms

- 1 A&H Probate FORM 2109.60a et seq

Research Aids

Transfer to common pleas:
O-Jur2d: Fiduciaries § 158

[ACTION ON BOND]

§ 2109.61 Bond; parties to suit. (GC §§ 10506-91, 10506-92)

An action may be prosecuted on the bond of a fiduciary against any one or more of the obligors thereof by any person who has been injured by reason of the breach of any condition of the bond. Such action shall be prosecuted for the benefit of all persons who are interested in the estate and who have been similarly injured. Any such person or any obligor on the bond who is not already a party to the action may intervene therein or be made a party thereto by supplemental, amended, or crosspetition.

If a surety on the bond of a fiduciary is not made a party to an action or proceeding against such fiduciary, the fact that a judgment was rendered or an order was entered against the fiduciary shall constitute only prima-facie evidence of the justice and validity of the claim in an action subsequently brought against the sureties on the bond of the fiduciary.

HISTORY: GC §§ 10506-91, 10506-92; 119 v 394 (422), § 5. Eff 10-1-53.

Research Aids

Generally:
O-Jur2d: Fiduciaries § 224 et seq
Am-Jur2d: Executors and Administrators § 781 et seq; Trusts § 564

ALR

Liability of executor or administrator, or his bond, for loss caused to estate by act of his agent or attorney. 28 ALR3d 1191.

CHAPTER 2111: GUARDIANS

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- 2111.33 Petition to improve real estate.
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- 2111.37 Guardian for nonresident.
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- 2111.45 [Marriage of ward.]
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- 2111.48 Certain acts validated.

§ 2111.01 Definitions.

As used in Chapters 2101. to 2131., of the Revised Code:

(A) "Guardian," other than a guardian under sections 5905.01 to 5905.19, of the Revised Code, means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor, or the division of mental retardation and developmental disabilities, or an agency under contract with the division for the provision of protective service under sections 5119.85 to 5119.89, of the Revised Code, appointed by the probate court to have the care and management of the person of an incompetent.

(B) "Ward" means any person for whom a guardian as defined in this section is acting.

(C) "Resident guardian" means a guardian appointed by a probate court to have the care and management of property in Ohio belonging to a nonresident ward.

(D) "Incompetent" means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

HISTORY: GC § 10507-1; 114 v 320 (382); 129 v 1448 (Eff 10-25-61); 133 v H 688 (Eff 11-21-69); 134 v H 290 (Eff 3-23-72); 136 v H 244. Eff 8-26-76.

Cross-References to Related Sections

Gifts to minors, RC § 1339.31 et seq.

Guardian pursuant to appointment by probate court, RC § 5119.85(B).

See RC § 2111.03 which refers to RC § 2111.01 et seq.

See RC § 2131.02 which refers to this chapter.

Research Aids

Definitions:

Guardian:

O-Jur2d: Guardian and Ward § 2

Am-Jur2d: Guardian and Ward § 1

Incompetent:

O-Jur2d: Guardian and Ward § 17; Insane and other Incompetent Persons §§ 2-6.

Am-Jur2d: Incompetent Persons §§ 1-7

Resident guardian:

O-Jur2d: Guardian and Ward § 19

Ward:

O-Jur2d: Guardian and Ward § 2

Am-Jur2d: Guardian and Ward § 1

ALR

Guardian's position as joint tenant of or successor to property in ward's estate as raising conflict of interest. 69 ALR3d 1198.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without approval by court. 63 ALR3d 780.

Law Reviews

See explanatory article in 4 OBar 339.

Adequacy of mental examination in guardianship proceedings. (Case note.) 25 OSLJ 307.

Civil incompetency in Ohio: determination and effect. Fred A. Dewey. 34 CinLRev 419.

CASE NOTES AND OAG

1. For history of this section, see *State ex rel Connor v. Lamneck*, 133 OS 257, 10 OO 342, 13 NE(2d) 127.

2. The general rule that a party is deemed to have waived the disqualification of a juror unless he is able to show upon hearing that with the exercise of reasonable diligence he could not have objected to the seating of such juror at his impaneling thereof, applies to a juror who is an incompetent person under this section, and by reason of advanced age and mental and physical disability and infirmity is incapable of caring for his person and estate: *Cottman v. Federman Co.*, 71 App 89, 25 OO 435, 47 NE(2d) 1009.

3. A person adjudged incompetent because of mental infirmity brought about by advanced age is "insane" within the meaning of that term as defined by this section: *In re Jacobs*, 73 App 286, 28 OO 449, 43 NE(2d) 879.

4. This statute treats incompetency resulting from drunkenness in the same way that it treats incapacity resulting from mental disability: *Murphy v. Murphy*, 85 App 392, 40 OO 254, 87 NE(2d) 102.

5. The terms "insane and lunatic" as used in this section include every species of insanity or mental derangement: *Jacobs v. Porter*, 36 OLA 282, 43 NE(2d) 879 (App).

7. In view of the provision of GC § 10507-61 (RC § 2111.47) relating to the effect of the termination of a guardianship of an imbecile, it is apparent that the legislature in defining the word "imbecile" as it did in this section, did not intend that it should mean "a condition of permanent and hopeless incapacity": *Potts v. First-Cent. Trust Co.*, 37 OLA 382 (App).

9. A member of the state teachers retirement system who has the requisite age and years of service to qualify for superannuation retirement is not disqualified for such form of retirement merely by reason of his mental incompetency, and the guardian of the estate of the member may apply for the retirement allowance which is payable throughout the life of the member: 1956 OAG No.6553.

10. A guardian merely by virtue of his office is without authority to select a superannuation retirement payment option for his ward under RC § 3307.50, which would provide a lesser allowance of equivalent actuarial value to the ward for his lifetime and payments after the ward's death to a beneficiary designated by the guardian. Before the state teachers retirement board honors the selection of such an option, it should require adequate proof that a probate court has ordered or authorized the guardian to select such option: 1956 OAG No.6553.

§ 2111.02 Appointment of a guardian.

When found necessary, the probate court on its own motion or an application by any interested party shall appoint a guardian of the person, the estate, or both, of a minor, or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement therein and, except in the case of a minor, has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian.

If a person is incompetent due to physical disability, the consent of the incompetent must first be obtained before the appointment of a guardian for him, and such person may select a guardian who shall be appointed if a suitable person.

The guardian of an incompetent, by virtue of such appointment shall be the guardian of the minor children of his ward, unless the court appoints some other person as their guardian.

When the primary purpose of the appointment of a guardian is, or was, the collection, disbursement, or administration of moneys awarded by the veterans administration to the ward, or assets derived therefrom, no court costs shall be charged in the proceeding for the appointment or in any subsequent proceedings made in pursuance of the appointment, unless the value of the estate, including the moneys then due under the veterans administration award, exceeds one thousand five hundred dollars.

HISTORY: GC § 10507-2; 114 v 320 (383); 123 v 665, § 1; 128 v 76 (79), § 1 (Eff 11-9-59); 129 v 1448 (1450), § 1. Eff 10-25-61.

Analogous to former GC §§ 10915, 10916, 10989, 10989-1, 11011.

Cross-References to Related Sections

Improvement of real estate by guardian, RC § 2111.33 et seq.

Mortgaging real estate to improve, RC § 2109.46 et seq.

Comparative Legislation

Guardian appointed:

Cal.—Probate Code, § 1440

Ill.—Rev Stat, ch 3, § 11-3

Ind.—Burns' Stat, § 29-1-18-1

Ky.—KRS, § 387.010

Mich.—MCLA, § 703.1

N.Y.—SCPA, § 1703

Pa.—Purdon's Stat, Tit. 20, §§ 5111, 5511

Fla.—FSA, § 744.331

Text Discussion

1 Anderson Fam.L. § 31.7.

Forms

1 A&H Probate FORM 2111.02a et seq.

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

1 A&H Probate FORM 2109.26a et seq: Death, incapacity or disqualification of fiduciary.

1 A&H Probate FORM 2111.03a et seq: Application for appointment.

1 Anderson Fam.L. No. 127.

Outline of Procedure

Appointment of guardian. Leyshon No. 42; A&H Nos. 13.

Research Aids

Appointment of guardians generally:

O-Jur2d: Guardian and Ward § 16 et seq.

Am-Jur2d: Guardian and Ward § 24 et seq.

Appointment procedure:

O-Jur2d: Guardian and Ward §§ 40 et seq.

Am-Jur2d: Guardian and Ward §§ 27 et seq.

Jurisdiction to appoint guardian:

O-Jur2d: Guardian and Ward §§ 37-39

Am-Jur2d: Guardian and Ward §§ 24-26

ALR

Priority and preference in appointment of conservator or guardian for an incompetent. 21 ALR2d 880; 65 ALR3d 991.

Power of guardian or committee to compromise liquidated contract claim or money judgment, and of courts to authorize or approve such compromise. 155 ALR 196.

Guardian's right to elect on behalf of incompetent person in regard to option under insurance policy. 112 ALR 1063.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court. 130 ALR 113.

Revocation of a tentative or revocable trust created by one who has since become incompetent. 138 ALR 1383.

Consideration and weight of religious affiliations in appointment or removal of guardian for minor child. 22 ALR2d 696.

Who is minor's next of kin for guardianship purposes. 63 ALR3d 813.

Law Reviews

Ohio annotations to Restatement of Conflict of Laws, §§ 145, 149, 150. Prof. Fletcher R. Andrews of Western Reserve University. 9 CinLRev 77.

Adequacy of mental examination in guardianship proceedings. (Case note.) 25 OSLJ 307.

The disguised oppression of involuntary guardianship: have the elderly freedom to spend? 73 YaleLJ 676.

Appointment of guardians for the mentally incompetent. 1964 DukeLJ 341.

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1. For history of this section, see *State ex rel Connor v. Lamneck*, 133 OS 257, 10 OO 340, 13 NE(2d) 127.

1.1 Where there is not existing award of custody of an orphaned minor resident of Ohio by a foreign court, the probate court of the county of such residence has jurisdiction, under this section, to appoint a guardian of the minor, irrespective of the fact that the domicile of such minor may be in another state: *Fore v. Toth*, 168 OS 363, 7 OO(2d) 127, 155 NE(2d) 194 [79 OLA 15, 151 NE(2d) 777].

2. The spirit and purpose of the provision of this section, "that if the incompetency" of an incompetent "be due to physical disability or infirmity the consent of the incompetent" to the appointment of a guardian "must first be obtained," require that "the consent" should be in writing or made in open court by the proposed ward who is mentally competent:

In *re Irvine*, 72 App 405, 27 OO 332, 52 NE(2d) 536.

2.1 The probate court is a court of limited jurisdiction; its power to appoint a guardian and powers of the guardian to act under the authority of the court are fixed by statute: *Zuber v. Zuber*, 93 App. 195, 50 OO 496, 112 NE(2d) 688.

2.2 The practical effect of paragraph two of this section, regarding consent of the ward, is to place in the hands of the ward the power to select a guardian, because at any time before the appointment the applicant can withdraw the consent. In *re Luft*, 91 App 409, 45 OO 333, 97 NE(2d) 561.

2.3 Once a probate court properly appoints a guardian for a minor, exclusive, continuing jurisdiction upon matters of custody remain in that court, even though the minor has his domicile in some other county or state: *Weigel v. Grossnickle*, 100 App 106, 60 OO 66, 135 NE(2d) 894.

2.4 Where a testator devised certain real estate to his wife, and subsequently a guardian was appointed for the testator on the ground of physical incompetency, to which the testator gave written consent, a sale of the real estate by such guardian, under authority of the probate court, will result in an ademption: *Roderick v. Fisher*, 97 App 95, 54 OO 264, 122 NE(2d) 475.

2.5 The appointment of a guardian for an alleged incompetent can be made, under the provisions of this section, only upon the basis of mental disability or infirmity when the incompetent does not consent but in fact opposes the appointment: *Jacobs v. Porter*, 36 OLA 282, 43 NE(2d) 879 (App).

2.6 In the absence of abuse of discretion, the appointment of a guardian for an incompetent will not be set aside by an appellate court: In *re Harris*, 73 OLA 97, 136 NE(2d) 328.

2.7 In a hearing for the removal of a guardian on the grounds that such guardian was appointed without notice to or the consent of the ward evidence presented to the presiding judge at the time of the original appointment, contrary to the facts found by the court in its journal entry, is inadmissible: In *re Gerstenek*, 76 OLA 280, 139 NE(2d) 64 (App).

2.8 The question of consent, as required by the statute, to the appointment of a guardian is an issue of fact to be established by the evidence and not one affecting the court's jurisdiction: In *re Gerstenek*, 76 OLA 280, 139 NE(2d) 64 (App).

2.9 Where the notice served upon the ward in a guardianship proceeding stated "for the appointment of himself or some other suitable person as guardian," and during the course of the trial the original applicant withdrew and another, whose application for appointment was also before the court, was substituted in his place, and entry of withdrawal as to the original applicant was not a dismissal of the proceedings but merely a withdrawal as to the applicant personally: In *re Gerstenek*, 76 OLA 280, 139 NE(2d) 64 (App).

3. The appointment of a guardian of an incompetent person by reason of physical disability alone, with his written consent or request as provided by this section is not an abridgment of the personal and property rights of such incompetent and is not in violation of Article I, § 1, of the Constitution: In *re Faulder*, 1 OO 63 (CP).

4. The probate court has the right to examine personally a person charged with being incompetent, and a right to appoint competent persons to examine such person: In *re Joyce*, 19 OO 506 (PC).

5. The probate court exceeded its authority in ordering an examination of a person charged with being incompetent to be made by doctors selected by the applicant: In *re Joyce*, 19 OO 506 (PC).

5.1 General Code § 10507-1 (RC § 2111.01) et seq provide for the appointment by the probate court, when necessary, of a guardian of the person, or of the estate of a minor, or of both, who will have the care and management of the person or the estate of such minor, or both: *Chertoff v. Commissioners*, 35 OO 339, 160 F(2d) 691.

5.2 The appointment by the probate court of a guardian of an incompetent's person and estate will not interfere with the jurisdiction of the court of common pleas in a pending divorce action over the "assets of the marriage": *In re Stephens*, 30 OO(2d) 325, 202 NE(2d) 458 (PC).

5.3 There is no legal distinction between a guardian for a mentally incompetent person and a person incompetent by reason of physical disability or infirmity, except that specified in this section, which requires that a person for whom a guardian is to be appointed for reason of physical disability or infirmity must consent to the appointment of a guardian: *In re Tillman*, 73 OLA 534, 137 NE(2d) 172 (PC). [See also 100 App 291, 60 OO 254, 136 NE(2d) 291.]

5.4 When one, due to physical disability, has voluntarily consented to the appointment of a guardian under the statutes providing for such appointment and the court has acted upon the matter and made the appointment, the ward cannot terminate the guardianship by merely withdrawing her consent: *In re Barr*, 80 OLA 488, 156 NE(2d) 357 (PC).

5.6 An attorney who was requested by the superintendent of a county home to take appropriate steps to secure a guardian for an inmate who was in need of such protection and who thereafter filed an application for the appointment of himself or some suitable person, is an interested party within the meaning of this section, even though he did not personally know or had never seen his prospective ward and the allegations of mental incapacity in the application did not constitute a fraud upon the court: *In re Tittington*, 82 OLA 563, 162 NE(2d) 628 (PC).

6. A guardian may be appointed in Ohio, even though the minor has his domicile in some other county or state, under this section: *Langan v. Kesinger*, 23 OLA 392.

7. Where a consideration of all the evidence shows that the consent to the appointment of a guardian was not voluntarily and freely given in accordance with the requirements of GC § 10507-2 (RC § 2111.02), then the appointment is contrary to law and the application to dismiss the guardian will be sustained: *In re Luft*, 62 OLA 157, 107 NE(2d) 259 (App).

8. This section cited and discussed in 1950 OAG No.1533.

11. The term "court costs" as used in this section, refers to those charges or fees, fixed by statute, for services rendered by officers of the court in the progress of the cause or judicial proceeding and, specifically, includes fees of a sheriff for service on the necessary parties in a proceeding for the appointment of a guardian and any subsequent proceedings, but does not include charges or publication costs made by a newspaper incident to the publication of notice of the appointment of a guardian: 1956 OAG No.6592.

12. Court costs paid by mistake in a guardianship proceeding, by reason of this section, are not refundable by the probate court where such costs have become a part of the general fund of the county as provided in RC § 325.27: 1956 OAG No.6592.

13. The executive secretary of the Lucas County child welfare board may be appointed legal guardian of a minor when said minor's funds, originally deposited

under the provisions of RC § 2111.05, have increased to over one thousand dollars: 1968 OAG No. 68-013.

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Scope and construction

1. The steps necessary for the appointment of a guardian are proceedings in rem, and not inter partes, or adversary in character; and the order of appointment made in the exercise of such jurisdiction binds the ward, and the ward's presence is not necessary, unless, by reason of his right to choose his guardian or for other cause, the statute so requires: *Shroyer v. Richmond*, 16 OS 455.

2. A minor, himself, cannot change his domicile, and as the residence of a minor is determined by the domicile of a parent or some one in loco parentis, the word "resident," as used in this section means domicile: *In re Murray*, 8 CC(NS) 498, 18 CD 652 [affirming 4 NP(NS) 233, 16 OD 612].

3. Where the father, who is the last surviving parent of a minor, dies while domiciled with the father's parents, and the minor continues to live with the grandfather for a time, the minor is a resident of the county in which the grandfather is domiciled, within the meaning of this section: *In re Murray*, 8 CC(NS) 498, 18 CD 652 [affirming 4 NP (NS) 233, 16 OD 612].

4. Under Ohio law the rules governing testamentary trusts and trustees are the same as those governing guardians and administration of estates: *Boals v. Clingan*, 6 NP(NS) 609, 16 OD 267.

5. The phrase "resident in such county" in this section is practically the same as "domicile"; hence, the domicile of a minor so long as both parents are living is that of the father, that of the surviving parent if one die, or if the grandparents stand in loco parentis, that of the grandparents: *In re Clayton*, 61 Bull 355.

Jurisdiction

6. To give the court jurisdiction over a minor, so as to authorize the appointment of a guardian for him, such minor must at the time of the appointment have an actual or constructive residence within the county; but the guardian derives his power from the appointment and giving bond, and letters of guardianship, need not, in fact, issue: *Maxson v. Sawyer*, 12 O 195, 25 Bull 250.

7. Probate court has exclusive jurisdiction: *Shroyer v. Richmond*, 16 OS 455; *Newton v. Hammond*, 38 OS 430; see also *State v. Beatty*, 52 OS 656, 44 NE 1139.

8. Where a husband and wife are divorced and the court of common pleas granting the divorce also awards the custody and control of the children of the marriage, such children become the wards of that

court, and the jurisdiction of the court over their custody and control is a continuing jurisdiction, and no other court can acquire jurisdiction over such children: *In re Crist*, 89 OS 33, 105 NE 71 [approving and following *Hoffman v. Hoffman*, 15 OS 427, and *Rogers v. Rogers*, 51 OS 1].

9. While a court of insolvency has continuing jurisdiction over a minor child, an order purporting to be made by another court appointing another guardian is void; and the guardian thus appointed cannot bring an action on behalf of the minor: *Addams v. State ex rel Hubbell*, 104 OS 475, 135 NE 667.

10. Any order of a court concerning the guardianship of a minor child is subject to be modified from time to time, as in the judgment of the court the best interests of the child may require: *Addams v. State ex rel Hubbell*, 104 OS 475, 135 NE 667.

11. During the continuing jurisdiction over minor children, other courts, whether inferior or superior, having concurrent jurisdiction of the custody of minor children, are by long and well-settled practice of this state denied the exercise of such jurisdiction: *Addams v. State ex rel Hubbell*, 104 OS 475, 135 NE 667.

12. Where a minor five years old leaves his grandfather's home where said minor is domiciled, with permission and consent, to live with his aunt in another county, the probate court of the latter county is without jurisdiction to appoint a guardian, while the grandfather has not changed domicile: *In re Murray*, 8 CC(NS) 498, 18 CD 652 [affirming 4 NP (NS) 233, 16 OD 612].

14. The probate court under this section has exclusive original jurisdiction to appoint and remove guardians, etc., and the orders of that court in such proceedings are not subject to collateral attack: *Allen v. Lewis*, 12 OD(NP) 81 [citing *Shroyer v. Richmond*, 16 OS 455; *Heckman v. Adams*, 50 OS 305].

15. Where a guardian has been appointed for a minor whose parents are living, and who are suitable to have custody of the minor, but not notified of the application and it further appears that the minor is about to be removed from the county, the common pleas court has jurisdiction by habeas corpus to require such minor to be returned to the custody and control of its parents: *Fisher v. Madden*, 12 OD (NP) 83.

16. Where a father before his death gave his child to the maternal grandparents in another state who kept him continuously until long after the father's death, the domicile of the child becomes that of the grandparents and a probate court in Ohio has no jurisdiction to appoint a guardian for such child: *In re Clayton*, 61 Bull 355.

For whom guardian may be appointed

17. To authorize the appointment of a guardian for a minor, the latter must, at the time of appointment, have an actual or constructive residence within the county: *Lessee of Maxom v. Sawyer*, 12 O 195.

18. Where the ward was both an infant and of unsound mind at the time a guardian was appointed and the record is silent as to the grounds for the appointment, but the guardian continued to act as such after the ward became of age, and was still recognized by the courts as guardian, the presumption is that the appointment covered both grounds: *King v. Bell*, 36 OS 460.

19. The right to society and possession of minor child may be taken from the parent for misuse, or something that will justify a court of chancery in interfering, and for the protection of the child; but first there must have been an adjudication: *Boescher v. Boescher*, 7 NP 418, 5 OD 184.

20. Appointment of guardian over a person, not of sufficient mentality to care for his property, is within the sound discretion of probate court; and an appointment will be affirmed when manifestly not against the weight of evidence: *In re Wilson*, 23 App 390, 155 NE 654.

Guardian of person

21. Relatives of agreed religious faith, other things being equal, should be appointed under antenuptial agreement as to religion, unless children's happiness will be risked by the change: *In re Minors of Luck*, 7 NP 49, 10 OD 1.

22. A court has no right to appoint a guardian for the person of a child who has a parent, without proof and finding, on notice to the parent, of the parent's unfitness. The right to the child is a property right and cannot be taken away without due process of law: *Boescher v. Boescher*, 7 NP 418, 5 OD 184.

23. Where one of the parents survives, a trust company may not act as guardian of the children: *Meyer v. Karp*, 26 NP(NS) 192.

24. Probate court has no authority to appoint a guardian of the person of a minor who is without estate, and where the record discloses affirmatively that the minor is without estate the appointment is void: *In re Baier*, 8 NP 107, 11 OD 47.

Order appointing guardian

25. An order of court appointing a guardian, made in the exercise of such jurisdiction cannot be collaterally impeached; and when the record shows nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it: *Shroyer v. Richmond*, 16 OS 455.

Notice

26. In an application for the appointment of a guardian for a child who has one or more parents living, notice must be given to the parents of such child: *In re Gerbig*, 11 NP(NS) 529, 57 Bull 77.

27. It is not necessary to notify a minor of the application for guardianship; but the parents of the infant if living, unless they themselves are the applicants, should be notified: *Fisher v. Madden*, 12 OD(NP) 83.

DECISIONS UNDER FORMER GC § 10989

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Construction

1. This section, making physical disability or infirmity a ground for the appointment of a guardian of the property of a person mentally competent, but physically incompetent, is invalid: *Schafer v. Haller*, 108 OS 322, 140 NE 517, 30 ALR 1378.

2. Legal residence means continuous residence for twelve months: *In re Canady*, 4 NP 403, 7 OD 285.

Jurisdiction

3. Under existing legislation the probate courts of

this state have power to appoint guardians for deaf and dumb persons of full age, whom they find to be incapable of managing their affairs, without submitting the question of incapacity to a jury of any kind: *Shroyer v. Richmond*, 16 OS 455.

4. The idiot must have resided within the county continuously for a period of at least twelve months, or come into the county with his father or some one having legal control over him, with the intention of making this his residence, before a guardian can be appointed for him by the probate court: *In re Canady*, 4 NP 403, 7 OD 285.

5. If a guardian of the estate of an insane person is appointed, and the insane person changes his domicile to another county, the former court has no jurisdiction over an application for a guardian for his person: *In re Greer*, 24 NP(NS) 46.

6. Before the probate court can appoint guardians for imbeciles the judge must be satisfied that the subject is an imbecile and a resident of this county: *In re Shelleig*, 8 NP 399, 11 OD 81.

Idiot, imbecile and lunatic

7. Mere fact that an aged woman shows infirmities of age, or peculiar conduct, is not sufficient to authorize the appointment of a guardian: *In re Emswiler*, 8 NP 132, 11 OD 10.

8. One who for some years has been wasting his property, making disadvantageous contracts, spending large sums of money in which he had only a life estate, for property which was not worth, when the money was invested, half the sum expended for it, is an imbecile within the meaning of the statute: *In re Emswiler*, 8 NP 132, 11 OD 10.

9. A person may be an imbecile, though able to govern himself so as not to need a guardian for his person. Therefore, when a person has become so infirm mentally that he cannot manage his affairs with sufficient capacity to preserve his property, a guardian may be appointed: *In re Emswiler*, 8 NP 132, 11 OD 10.

Appointment

10. Appointment may be made either for person or estate: *Heckman v. Adams*, 50 OS 305, 34 NE 155.

11. A conveyance by an incompetent, made on the day that entry of the appointment of a guardian is made on the docket, to one who knows that such proceedings are pending, will be set aside: *Goss v. Fiorni*, 108 OS 115, 140 NE 324 [affirming judgment of court of appeals, which on appeal reached similar conclusion as *Fiorni v. Goss*, 23 NP(NS) 303].

12. From a decision of the probate court, refusing to appoint a guardian for a person alleged to be incompetent by reason of advanced age, an appeal lies to the common pleas court: *Romell v. Romell*, 18 App 31.

13. The fact that a person who has been committed to a state hospital for the insane has been discharged therefrom, does not operate as a vacation of an order of the probate court which appointed a guardian for such person, which appointment cannot be attacked collaterally by reason of such discharge, and such insane person cannot bring an action in his own name: *Reno v. Love*, 26 CD 296, 60 Bull 497 (Ed) [affirmed, without opinion, 88 OS 623].

14. Appointment of guardian is conclusive evidence of ward's incapacity to make or ratify a contract, pending the guardianship; as to ward's capacity to marry, to make a will or commit a crime, it is only prima facie evidence of incompetency: *Jordan v. Dickson*, 10 DecRep 147, 19 Bull 64 [for later opinion, see 10 DecRep 332, 20 Bull 360].

15. What must appear to justify appointment: *In*

re Tempest, 21 Bull 301; *France v. Frantz*, 4 NP 278, 6 OD 555.

Notice

16. Before the amendment of 1889, a guardian for an insane wife could be appointed at any time without notice to the husband: *Heckman v. Adams*, 50 OS 305, 34 NE 155.

17. Before the amendment no notice was required on application for appointment of guardian for imbecile: *In re Dickson*, 10 DecRep 6, 18 Bull 37.

18. In hearing of application for appointment of guardian, failure to give notice to the alleged imbecile can be complained of only in a direct proceeding to set aside the appointment in probate court or reverse it on error: *Jordan v. Dickson*, 10 DecRep 332, 20 Bull 360 [for former opinion, see 10 DecRep 147, 19 Bull 64].

DECISIONS UNDER FORMER GC § 11011

1. The fact that no provision is made for a trial by jury does not render a statute for the appointment of a guardian invalid. Art. I, § 5 of the Ohio constitution does not apply: *Hagany v. Cohnen*, 29 OS 82.

2. Such guardianship is not conclusive evidence of want of capacity to form a valid marriage: *McCleary v. Barcalow*, 6 CC 481, 3 CD 548.

4. Guardianship on the ground of intemperance does not raise the same presumption of testamentary incapacity as would be the case if the guardianship rested upon the ground of insanity or imbecility: *Fagan v. Welsh*, 19 CC(NS) 177, 32 CD 409.

5. The probate court has no jurisdiction to find one an intemperate and appoint a guardian for him under this section, where the application for the appointment of a guardian alleges imbecility and is made under former GC § 10989 (see now RC § 2111.02): *Urban v. Urban*, 21 CC(NS) 458, 33 CD 387.

§ 2111.03 Application for appointment as guardian.

A person applying for appointment as guardian shall file in the office of the probate court an application verified by affidavit containing a statement of the whole estate of the ward, its probable value, the probable annual rents of the ward's real estate, and also the following:

(A) The application of the guardian of a minor shall contain:

- (1) Name, age, and residence of the minor;
- (2) Name and residence of each parent;
- (3) Name, degree of kinship, age, and address of next of kin if no parent is living or if the parent is absent, under disability, or for other reason cannot be notified;

(4) Name and residence of person having custody of minor.

(B) The application of the guardian of an incompetent shall contain:

- (1) Name, age, and residence of person for whom such appointment is sought;
- (2) Facts upon which the application is based;
- (3) Name, degree of kinship, age, and address of next of kin.

The court shall, of its own motion, proceed as provided in sections 2111.01 to 2111.48, inclu-

sive, of the Revised Code, upon suggestion by the industrial commission that any person who has made application for or been awarded compensation or death benefits as an employee or the dependent of a killed employee is a minor, or incompetent. In such event no application need be filed and the commission shall furnish the court with the name and residence of such person and the name, degree of kinship, age, and address of the father, mother, or next of kin so far as is known to the commission.

HISTORY: GC § 10507-3; 114 v 320 (383); 115 v 424, § 1; 129 v 1448 (1451), § 1. Eff 10-25-61.

Analogous to former GC § 10920.

Cross-References to Related Sections

Additional bond before sale of real estate, RC § 2127.27.

Administrator or executor ineligible, when, RC § 2111.09.

Comparative Legislation

Application for appointment:

Cal.—Probate Code, § 1440

Ill.—Rev Stat, ch 3, § 11-5

Ind.—Burns' Stat, § 29-1-18-11

Ky.—KRS, § 387.025

Mich.—MCLA, § 703.2

N.Y.—SCPA, § 1704

Pa.—Purdon's Stat, Tit. 20, § 5511

Fla.—FSA, § 744.334

Forms

1 A&H Probate FORM 2111.03a et seq.

1 A&H Probate FORM 2111.02a et seq: Appointment of guardian.

1 Anderson Fam.L. No. 127.

Outline of Procedure

Appointment of guardian. Leyshon No. 42; A&H No. 13

Research Aids

Application for appointment:

O-Jur2d: Guardian and Ward §§ 41, 42

Am-Jur2d: Guardian and Ward § 46

CASE NOTES AND OAG

1. A proceeding of this kind is not an ordinary civil proceeding in which there is a party plaintiff and a party defendant, and in which a judgment is to be asked against any person. No pleadings are provided for except that the statute provides that an application for the appointment of a guardian shall contain allegations of certain facts. In re Joyce, 19 OO 506, 32 OLA 553.

2. Two applications attached together as one instrument, and containing all necessary information, were properly held to meet statutory requirement: In re Kollmeyer, 64 OLA 578, 113 NE(2d) 122.

3. An application for appointment as guardian for an incompetent, which is filed pursuant to RC §§ 2111.02 and 2111.03 raises a matter for determination by the probate court, i.e., the question as to whether the person for whom a guardian is sought is incompetent: In re Hill, 29 OO(2d) 60, 196 NE(2d) 816 (PC).

4. Where the probate court appoints a guardian for an incompetent, either on its own motion or pursuant to an application made in accordance with this section there is no statutory requirement for a

hearing on every other application which may have been filed pursuant to this section: In re Hill, 29 OO(2d) 60, 196 NE(2d) 816 (PC).

§ 2111.04 Notice of appointment.

No guardian of the person, the estate, or both shall be appointed until at least three days after the probate court has caused written notice, setting forth the time and place of the hearing, to be served upon the following persons:

(A) In the appointment of the guardian of a minor, notice shall be served:

(1) Upon the minor, if over the age of fourteen years, by personal service;

(2) Upon each parent of the minor whose name and address are known or can with reasonable diligence be ascertained, provided the parent is free from disability other than minority;

(3) Upon the next of kin of the minor known to reside in the county in which application is made, if there is no living parent, the name and address of the parent cannot be ascertained, or the parent is under disability other than minority;

(4) Upon the person having the custody of the minor.

(B) In the appointment of the guardian of an incompetent, notice shall be served:

(1) Upon the person for whom appointment is sought by personal service;

(2) Upon the next of kin of the person for whom appointment is sought known to reside in the county in which application is made.

Notice may not be waived by the person for whom the appointment is sought.

From the service of notice until the hearing, no sale, gift, conveyance, or encumbrance of the property of the incompetent shall be valid as to all persons having notice of the proceeding.

HISTORY: GC § 10507-4; 114 v 320 (384); 121 v 557 (569); 127 v 36 (Eff 9-4-57); 129 v 1448 (Eff 10-25-61); 136 v S 145. Eff 1-1-76.

Comment

The provision for notice in case of minors was new in the 1931 amendment to GC § 10507-4, as the former statutes contained no requirement of notice. General Code § 10507-4 was based upon the fundamental plan of the three former statutes which are here consolidated, viz., former GC § 10989, as to idiots, imbeciles, lunatics and incompetents; former GC § 10989-1, as to confined persons; and former GC § 11012, as to habitual drunkards.

Forms

1 A&H Probate FORM 2111.04a et seq.

1 A&H Probate FORM 2111.37a et seq: Resident guardian for nonresident.

1 Anderson Fam.L. Nos. 128, 129

Research Aids

Notice of appointment:

O-Jur2d: Guardian and Ward §§ 45-49.

Am-Jur2d: Guardian and Ward §§ 37-44

ALR

Construction and application of statute prescribing that notice of petition or hearing for appointment of guardian be of such nature or be given to such persons as court deems reasonable or proper. 109 ALR 338.

Law Reviews

Ohio annotations to Restatement of Conflict of Laws, § 109. Prof. Fletcher R. Andrews of Western Reserve Univ. 12 CinLRev 410.

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

CASE NOTES AND OAG

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1. For history of this section, see *State ex rel Connor v. Lamneck*, 133 OS 257, 10 OO 342, 13 NE(2d) 127.

2. Former GC § 11012 (see now RC § 2111.04), with reference to the appointment of guardians of habitual drunkards, did not prohibit the drunkard from buying necessities after service of notice: *Brockway v. Jewell*, 52 OS 187, 139 NE 470.

3. Statutory provisions are made for the appointment by the probate court of guardians of the estates of minors, but before this can be done, notice to the parents of the filing of the application and the time of hearing thereon must be given: *In re Moyer*, 68 App 319, 22 OO 483, 40 NE(2d) 695.

4. The provision of this section, that from the service of notice of a hearing for appointment of a guardian for an incompetent person until the hearing, no gift of property of the incompetent shall be valid as to persons having notice of such proceeding, is inapplicable where the evidence does not disclose that the named person received notice of the proceeding prior to delivery of the key: *In re Stevenson*, 79 App 315, 35 OO 78, 69 NE(2d) 426.

4.1 In a proceeding for an adjudication of incompetency, statutory requirements must be strictly adhered to, and, in the matter of service of process, compliance therewith is mandatory before the court acquires jurisdiction: *In re Koenigshoff*, 99 App 39, 58 OO 114, 119 NE(2d) 652.

4.2 The filing of a motion to vacate an adjudication of incompetency does not constitute an entry of appearance relating back to the time of notice of the original adjudication such as could, in effect, give the court jurisdiction over the person of the alleged incompetent even though he was not personally served: *In re Koenigshoff*, 99 App 39, 58 OO 114, 119 NE(2d) 652.

4.4 A daughter is a next of kin to a parent; and, under this section that written notice shall be served upon the next of kin before a guardian of the person, the estate, or both shall be appointed, a next of kin is an interested person: *In re Tillman*, 100 App

291, 60 OO 254, 136 NE(2d) 291.

4.5 In a proceeding for the appointment of a resident guardian for a nonresident confined person, compliance with this section, with respect to notice to such confined person is requisite before the court acquires jurisdiction, and a judgment, without notice to such person as required by such section, finding such person confined in a hospital as a mentally ill person and appointing a resident guardian of the Ohio estate of such person, is void for lack of due process. Whether substituted service be sufficient compliance with the statute, not decided: *In re Reynolds*, 103 App 102, 3 OO(2d) 175, 144 NE(2d) 501.

4.6 A judgment of the probate court appointing a guardian for a minor is a nullity and may be directly attacked in any court in any proceeding, where the provision of this section, having to do with notice, was not complied with and the hearing mentioned therein was set prior to the passing of the required three days: *Horn v. Childers*, 116 App 175, 22 OO(2d) 34, 187 NE(2d) 402.

4.7 The phrase, "known to reside in the county," as used in this section has reference to the knowledge had by those whose duty it is to give the notice in the first place—either the person applying for appointment as guardian or the court: *In re Kelley*, 1 OApp(2d) 137, 30 OO(2d) 159, 204 NE(2d) 96.

4.8 It will be presumed that a probate court, in the exercise of its constitutional jurisdiction as a court of general jurisdiction in the appointment and removal of guardians, in rendering a judgment terminating a guardianship, found all facts necessary for it to do so, including those facts having to do with service of notice and next of kin. Such presumption may be rebutted and overcome only by recitals in the record affirmatively showing a lack of jurisdiction: *In re Kelley*, 1 OApp(2d) 137, 30 OO(2d) 159, 204 NE(2d) 96.

4.9 The payment of a debt is not a sale, gift, conveyance or incumbrance prohibited by this section: *Beach v. Baker*, 79 OLA 136, 151 NE(2d) 677 (App).

6. This section, providing for notice in guardianship proceedings, requires notice only upon the next of kin of the person for whom appointment is sought known to reside in the county in which application is made and next of kin residing outside the county are not entitled to notice: *In re Titington*, 82 OLA 563, 162 NE(2d) 628 (PC).

6.1 The only notice which a person who is charged with being incompetent is entitled to under this section is simply a notice that an application has been filed for the appointment of a guardian, and this notice must be served upon him personally at least three days before the date of the hearing: *In re Joyce*, 19 OO 506 (PC).

6.2 Revised Code § 2111.04 provides that no sale, gift, conveyance, or encumbrance of the property of an [alleged] incompetent shall be valid as to any party having notice of the incompetency proceeding. Knowledge on the part of either party to a contract of sale will void the contract: *Arledge v. Arledge*, 72 OO(2d) 152 (CP) (1974).

6.3 A deed conveying land from a father to his daughter, which was executed after they had received notice of a hearing on an application to have the grantor adjudged an incompetent and for the appointment of a guardian, is void under this section, and a recitation in the deed that it was in confirmation of a warranty deed previously signed by the grantor and left in escrow does not avoid the application of the statute: *Willis v. Peffers*, 29 OLA 299.

7. "Heirs at law" designated in probate court under

GC § 10503-12 (RC § 2105.15) are not, during the lifetime of the person who designated them, "next of kin" entitled to written notice of the time and place of hearing of an application for appointment of a guardian for such person under this section, subsec. (B)2: Jones v. Jones, 30 OLA 499.

8. Under former GC § 10989 (see now RC §§ 2111.01, 2111.02 and 2111.04) it was held that on the hearing of the application for the appointment of a guardian of an alleged imbecile, failure to give notice to the alleged imbecile can be complained of only in a direct proceeding to set aside the appointment in the probate court or reverse it on error: Jordan v. Dickson, 10 DecRep 332, 20 Bull 360 [for former opinion, see 10 DecRep 147, 19 Bull 64].

§ 2111.05 [Estates not more than three thousand dollars.]

When the whole estate of a ward, or of several wards jointly, under the same guardianship, does not exceed three thousand dollars in value, the guardian may apply to the probate court for an order to terminate the guardianship. Upon proof that it would be for the best interest of the ward to terminate the guardianship, the court may order the guardianship terminated, and direct the guardian, if the ward is a minor, to deposit the assets of the guardianship in a depository authorized to receive fiduciary funds, payable to the ward when he attains majority, or the court may authorize the delivery of the assets to the natural guardian of the minor, to the person by whom the minor is maintained, to the executive secretary of children services in the county, or to the minor himself.

If the ward is an incompetent, and the court orders the guardianship terminated, the court may authorize the deposit of the assets of the guardianship in a depository authorized to receive fiduciary funds in the name of a suitable person to be designated by the court, or if the assets do not consist of money, the court may authorize delivery to a suitable person to be designated by the court. The person receiving the assets shall hold and dispose of them in the manner the court directs.

If the court refuses to grant the application to terminate the guardianship, or if no such application is presented to the court, the guardian shall only be required to render account upon the termination of his guardianship, upon order of the probate court made upon its own motion, or upon the order of the court made on the motion of a person interested in the wards or their property, for good cause shown, and set forth upon the journal of the court.

If the estate is three thousand dollars or less and the ward is a minor, the court may, without the appointment of a guardian by the court, or the giving of bond, authorize the deposit in a depository authorized to receive fiduciary funds, payable to the guardian when appointed, or to the ward when he attains majority, or the court may authorize delivery to the natural guardian of the

minor, to the person by whom the minor is maintained, to the executive secretary who is responsible for the administration of children services in the county, to the division of mental retardation or to the administrator of an agency under contract with the division for the provision of protective service under sections 5119.85 to 5119.89 of the Revised Code, or to the minor himself.

If the whole estate of a person over eighteen years of age, who has been adjudged mentally ill or mentally retarded, does not exceed three thousand dollars in value, the court may, without the appointment of a guardian by the court or the giving of bond, authorize the deposit of the estate in a depository authorized to receive fiduciary funds in the name of a suitable person to be designated by the court, or if the assets do not consist of money, the court may authorize delivery to a suitable person to be designated by the court. The person receiving the assets shall hold and dispose of them in the manner the court directs.

HISTORY: GC § 10507-5; 114 v 320 (384); 119 v 394; 121 v 538 (550); 126 v 71; 127 v 378 (Eff 8-30-57); 129 v 1448 (Eff 10-25-61); 130 v 614 (Eff 1-23-63); 134 v H 290 (Eff 3-23-72); 135 v S 1 (Eff 1-1-74); 136 v S 145. Eff 1-1-76.

See former GC § 10933.

Cross-References to Related Sections

County children services board or county department of welfare appointed in lieu of guardian, RC § 5153.18.

Award of workmen's compensation to guardian of minor workman, RC § 4123.89.

Forms

1 A&H Probate FORM 2111.05a et seq.

Research Aids

Estates less than three thousand dollars:
O-Jur2d: Guardian and Ward § 20

Law Reviews

See explanatory article 4 OBar 339.

Procedure of probate court. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 7) 109.

It can't be done. Article by William R. Kinney. 19 OBar (No. 13) 225.

CASE NOTES AND OAG

1. Probate court has no authority to appoint a guardian of the person of a minor who is without estate; and where the record discloses affirmatively that the minor was without estate, the appointment was void, and parents are entitled to a writ of habeas corpus to obtain custody of such child: In re Baier, 8 NP 107, 11 OD 47.

2. A child welfare board when its executive secretary has been duly designated by the probate court under this section and RC § 5153.18, as trustee of funds of one of its wards, is not empowered to make disposition of said funds except as authorized or approved by the probate court who has jurisdiction in the matter: 1958 OAG No.1990.

3. Pursuant to this section and RC § 5153.18, the executive secretary of a county welfare board, acting as trustee of an estate of a ward which is less than one thousand dollars, may use those assets for medical and dental care of such child subject to the

approval of the probate court: 1959 OAG No.826.

4. Pursuant to this section and RC § 5153.18, the executive secretary of a county welfare board, acting as the trustee of a minor's estate of less than one thousand dollars, may administer those assets without being appointed guardian of such minor: 1959 OAG No.826.

5. The executive secretary of the Lucas County child welfare board may be appointed legal guardian of a minor when said minor's funds, originally deposited under the provisions of RC § 2111.05, have increased to over one thousand dollars: 1968 OAG 68-036.

§ 2111.06 Guardian of the person.

If the powers of the person appointed as guardian of a minor or incompetent are not limited by the order of appointment, such person shall be guardian both of the person and estate of the ward. In every instance the court shall appoint the same person as guardian of the person and estate of any such ward, unless in the opinion of the court the interests of the ward will be promoted by the appointment of different persons as guardians of the person and of the estate.

A guardian of the person of a minor shall be appointed as to a minor having neither father nor mother, or whose parents are unsuitable persons to have the custody and tuition of such minor, or whose interests, in the opinion of the court, will be promoted thereby. A guardian of the person shall have the custody and provide for the maintenance of the ward, and if the ward is a minor, such guardian shall also provide for the education of such ward.

HISTORY: GC § 10507-6; 114 v 320 (385); 129 v 1448 (1453), § 1. Eff 10-25-61.

Analogous to former GC § 10916.

Comment

General Code § 10507-6 was similar to former GC § 10916 relative to the appointment of guardians of minors. It also expressly provided that a guardian may be appointed of the person even though there is no estate. It was held under the former section that the probate court had no authority to appoint a guardian of the person of a minor who had no estate, and where the record disclosed affirmatively that the minor had no estate the appointment was void: *In re Baier*, 8 NP 107, 11 OD 47.

Forms

1 A&H Probate FORM 2111.06a et seq.

1 A&H Probate FORM 2111.13a et seq: Expenditures by guardians.

Research Aids

Guardian of the person:

O-Jur2d: Guardian and Ward § 91 et seq.

Same person as guardian of person and estate:

O-Jur2d: Guardian and Ward §§ 26, 59

Am-Jur2d: Guardian and Ward § 61 et seq.

Law Reviews

Ohio annotations to Restatement of Conflict of Laws, § 145. Prof. Fletcher R. Andrews of Western Reserve University. 9 CinLRev 77.

CASE NOTES AND OAG

1. This section authorizes appointment of guardian of estate of lunatic without appointment of guardian of person: *Heckman v. Adams*, 50 OS 305, 34 NE 155.

2. Relatives of agreed religious faith, other things being equal, should be appointed under antenuptial agreement as to religion, unless children's happiness will be risked by the change: *In re Minors of Luck*, 7 NP 49, 10 OD 1.

3. A court has no right to appoint a guardian for the person of a child who has a parent, without proof and finding, on notice to the parent, of the parent's unfitness. The right to the child is a property right and cannot be taken away without due process of law: *Boescher v. Boescher*, 7 NP 418, 5 OD 184.

4. In the absence of a showing that a parent is not a fit person, or has, by abandonment, forfeited his natural right to the care, custody, and control of his minor child, no other person may be appointed guardian of the person of the minor child: *In re DiSalvo*, 40 OO(2d) 523, 11 OMisc 259, 227 NE (2d) 441 (PC).

§ 2111.07 Powers of guardian of person and estate. (GC § 10507-7)

Each person appointed guardian of the person and estate of a minor shall have the custody and tuition of his ward and the management of such ward's estate during minority, unless such guardian is removed or discharged from such trust or the guardianship terminates from any of the causes specified in Chapters 2101. to 2131., inclusive, of the Revised Code.

HISTORY: GC § 10507-7; 114 v 320 (385). Eff 10-1-53. Analogous to former GC § 10928.

Cross-References to Related Sections

Custodian of gift to minor shall have powers of guardian appointed under this section, RC § 1339.34.

Comparative Legislation

Guardian of person—minor:

Cal.—Probate Code, § 1403

Ill.—Rev Stat, ch 3, § 11-5

Ind.—Burns' Stat, § 29-1-18-5

Ky.—KRS, § 387.060

Mich.—MCLA, § 703.3

N.Y.—SCPA, § 1718

Pa.—Purdon's Stat, Tit. 20, §§ 5141, 5521

Fla.—FSA, § 744.302

Research Aids

O-Jur2d: Guardian and Ward § 91

Am-Jur2d: Guardian and Ward § 65 et seq

CASE NOTES AND OAG

1. Under RC §§ 2111.07, 2111.13 and 2111.14 a guardian may make expenditures for the ward's support, maintenance and education: *Faber v. United States*, 53 OO(2d) 246, 26 OMisc 277, 309 FSupp 818.

§ 2111.08 Parents are natural guardians. (GC § 10507-8)

The wife and husband are the joint natural

guardians of their minor children and are equally charged with their care, nurture, welfare, and education and the care and management of their estates. The wife and husband have equal powers, rights, and duties and neither parent has any right paramount to the right of the other concerning the custody of the minor, the control of the services or the earnings of such minor, or any other matter affecting the minor; provided that if either parent, to the exclusion of the other, is maintaining and supporting the child, such parent shall have the paramount right to control the services and earnings of the child. Neither parent shall forcibly take a child from the guardianship of the parent entitled to its custody.

In case the wife and husband live apart, the court may award the guardianship of a minor to either parent, and the state where the parent having the lawful custody of the minor resides has jurisdiction to determine questions concerning the minor's guardianship.

HISTORY: GC § 10507-8; 114 v 320 (385). EFF 10-1-53. See former GC § 10928.

Comparative Legislation

Parents as guardians:

- Cal.—Probate Code, § 1407
- Ill.—Rev Stat, ch 3, § 11-7
- Ind.—Burns' Stat, § 29-1-18-5
- Ky.—KRS, § 387.030
- Mich.—MCLA, § 703.6
- N.Y.—SCPA, § 1705
- Pa.—Purdon's Stat, Tit. 20, § 5112
- Fla.—FSA, § 744.301

Research Aids

Custody and control of child:

- O-Jur2d: Parent and Child § 14 et seq
- Am-Jur2d: Parent and Child § 25 et seq

Jurisdiction where husband and wife live apart:

- O-Jur2d: Guardian and Ward § 37

Natural guardian:

- O-Jur2d: Infants § 6; Parent and Child §§ 8, 29
- Am-Jur2d: Parent and Child §§ 8, 14 et seq

Obligation as between parents:

- O-Jur2d: Parent and Child § 32
- Am-Jur2d: Parent and Child § 61 et seq

Possession and control of property of child:

- O-Jur2d: Parent and Child § 28
- Am-Jur2d: Parent and Child §§ 48, 49

Services and earnings of child:

- O-Jur2d: Parent and Child § 24 et seq
- Am-Jur2d: Parent and Child §§ 46, 47

Support and education of child:

- O-Jur2d: Guardian and Ward § 93; Infants § 6; Parent and Child § 29 et seq
- Am-Jur2d: Parent and Child § 50 et seq

ALR

Child's right of action against third person who causes parent to desert, or otherwise neglect his parental duty. 12 ALR2d 1178.

Adoption as affecting duty of support or assistance otherwise owed by natural parent to child. 114 ALR 494.

Child's ownership of or right to income of property as affecting parent's duty to support, or as grounds for reimbursing parent for expenditures in that regard. 121 ALR 176.

Maintenance of suit by child, independently of statute, against parent for support. 13 ALR2d 1142.

Law Reviews

Ohio annotations to Restatement of Conflict of Laws, §§ 146, 149. Prof. Fletcher R. Andrews of Western Reserve University, 9 CinLRev 77.

Divorce, liability of husband to support child awarded to wife. (Case note.) 7 OSLJ 446.

Beneficiaries' rights in life insurance policies. Address by Virgil D. Parish. 25 OBar (No. 29) 513.

CASE NOTES AND OAG

1. This section makes parents the natural guardians of their minor children and equally charges them with their care, etc., and "the care and management of their estates": In re Moyer, 68 App 319, 22 OO 483, 40 NE(2d) 695.

2. In a controversy as to the custody of the child, the paramount object which governs the court is the benefit to the child, and all rights must yield to that consideration. But when all else is equal, and no present reason exists for departure from the rule, the right of the father to the custody of his minor child is superior to that of any other person: Ex parte Coons, 11 CD 208.

3. In the exercise of its continuing jurisdiction, the court is not bound by the custody provisions of a separation agreement incorporated into a divorce decree: Bastian v. Bastian, 81 OLA 408, 13 OO(2d) 267, 160 NE(2d) 133.

4. There is a presumption that the best interests of a bastard child require it to be in its mother's custody, and the burden is upon the person disputing such mother's right to custody to prove that such child should not be in its mother's custody: In re Gary, 112 App 331, 14 OO(2d) 431, 167 NE(2d) 509.

5. A parent has a right to the custody of his child against all other persons unless and until it is shown that the parent has relinquished this right by contract, forfeited it by abandonment, or lost it because of his unfitness or inability to provide a suitable home for the child: Baker v. Rose, 57 OO(2d) 57, 28 OMisc 200, 270 NE(2d) 678 (1970).

§ 2111.09 Eligibility as administrator or executor.

Unless expressly appointed or designated to act both as guardian and executor by a last will in writing, no person who is or has been an administrator or executor of a last will shall, prior to the approval of his final account as such executor or administrator, be appointed a guardian of the person and estate or of the estate only of a ward who is interested in the estate administered upon or entitled to an interest under such will, except that a surviving spouse may be executor or administrator of the deceased spouse's estate and also guardian of the person and estate or of the estate only of a minor child of such surviving spouse, whether or not such minor child is interested in the estate of the deceased spouse. But an executor or an administrator may be appointed a guardian of the person only of a ward.

HISTORY: GC § 10507-9; 114 v 320 (386); 127 v 36 (39).
§ 1. Eff 9-4-57.

Analogous to former GC § 10917.

Comment

Such an appointment is regarded as void in a collateral proceeding: *Scobey v. Gano*, 35 OS 550. Compare *Easton v. Wittekind*, 27 NP(NS) 525, wherein it is held that the proceedings of a guardian to sell the minor's real estate, which are carried on in good faith and confirmed, are not a nullity because the guardian was also executor of the estate contrary to former GC § 10917.

It was formerly the law that a married woman could not be a guardian. Later, this was a subject of considerable controversy, but now the law is settled that a married woman occupies the same status as a single woman, and therefore there is no legal impediment to her appointment.

Research Aids

Executor or administrator as guardian:
O-Jur2d: Guardian and Ward § 23

Law Reviews

Recent amendments affecting probate practice.
Richard F. Sater. 18 OSLJ 464.

CASE NOTES AND OAG

1. The proceedings of the guardian of a minor, to sell the minor's real estate, which are carried on in good faith and confirmed by probate court, are not a mere nullity notwithstanding the guardian held office illegally by reason of the fact that he was also executor of an estate in which the minor was interested, contrary to the provisions of GC § 10917: *Easton v. Wittekind*, 27 NP(NS) 525.

2. Under GC § 10917, in effect prior to January 1, 1932, no person who at the time was or had been an administratrix or executrix of a last will prior to the approval of her final account as such executrix or administratrix might be appointed a guardian of the estate of a minor who was interested in the estate administered upon or entitled to an interest under and by virtue of such will: *In re Zimmerman*, 141 OS 207, 25 OO 326, 47 NE(2d) 782.

§ 2111.10 Corporation as guardian. (GC § 10507-10)

Any appointment of a corporation as guardian shall apply to the estate only and not to the person.

HISTORY: GC § 10507-10; 114 v 320 (386). Eff 10-1-53.
See former GC § 710-160.

Research Aids

Corporation as guardian:
O-Jur2d: Guardian and Ward § 24
Am-Jur2d: Guardian and Ward § 36

§ 2111.11 Spouse may be appointed guardian. (GC § 10507-11)

When a guardian is appointed for a person having a spouse, the court may appoint such spouse as the guardian, if it is made to appear to the satisfaction of the court that such spouse

is competent to discharge the duties of such appointment.

HISTORY: GC § 10507-11; 114 v 320 (386). Eff 10-1-53.
Analogous to former GC § 10990.

Research Aids

Spouse of incompetent preferred:
O-Jur2d: Guardian and Ward § 28
Am-Jur2d: Guardian and Ward § 29

§ 2111.12 Guardian of minor. (GC §§ 10507-12, 10507-13, 10507-14)

A minor over the age of fourteen years may select a guardian who shall be appointed if a suitable person. If such minor fails to select a suitable person, an appointment may be made without reference to his wishes. The minor shall not select one person to be the guardian of his estate only and another to be the guardian of the person only, unless the court which appoints is of the opinion that the interests of such minor will thereby be promoted.

A surviving parent by last will in writing may appoint a guardian for any of his children, whether born at the time of making the will or afterward, to continue during the minority of the child or for a less time.

When the father or mother of a minor names a person as guardian of the estate of such minor in a will, the person named shall have preference in appointment over the person selected by such minor. A person named in such will as guardian of the person of such minor shall have no preference in appointment over the person selected by such minor, but in such event the probate court may appoint the person named in the will, the person selected by the minor, or some other person.

Whenever a testamentary guardian is appointed, his duties, powers, and liabilities in all other respects shall be governed by the law regulating guardians not appointed by will.

HISTORY: GC §§ 10507-12, 10507-13, 10507-14; 114 v 320 (386); 121 v 557 (570). Eff 10-1-53. GC § 10507-12 analogous to former GC § 10918; GC § 10507-13 analogous to former GC § 10930; GC § 10507-14 analogous to former GC § 10931.

Cross-References to Related Sections

See RC § 2109.21 which refers to this section.

Comparative Legislation

Guardian by will:
Cal.—Probate Code, § 1402
Ky.—KRS, § 387.040
Mich.—MCLA, § 703.10
N.Y.—SCPA, § 1710
Pa.—Purdon's Stat, Tit. 20, § 2519
Fla.—FSA, § 744.302

Forms

1 A&H Probate FORM 2111.12a et seq.

Research Aids

Infant's right of selection:
O-Jur2d: Guardian and Ward §§ 26, 35

- Am-Jur2d: Guardian and Ward § 30
 Preference in appointment of testamentary guardian:
 O-Jur2d: Guardian and Ward § 34
 Am-Jur2d: Guardian and Ward § 15
 Testamentary guardianship:
 O-Jur2d: Guardian and Ward § 7
 Am-Jur2d: Guardian and Ward § 11 et seq

ALR

- Guardian de facto or de son tort of minor. 25 ALR2d 752.
 Infant's right to select own guardian. 85 ALR2d 921.
 Power and discretion of court where will appointed guardian of minor. 67 ALR2d 803.

Law Reviews

- See explanatory article in 4 OBar 339.
 Ohio annotations to Restatement of Conflict of Laws, § 149. Prof. Fletcher R. Andrews of Western Reserve University. 9 CinLRev 77.

CASE NOTES AND OAG

Right of minor to choose guardian

1. A minor may select one guardian for its estate and another for its person if the interest of such minor will be promoted by such choice: *Fisher v. Madden*, 12 OD(NP) 83.

Appointment of guardian

7. Mother divorced and awarded custody of child, cannot appoint a guardian by her will: *In re Coons*, 20 CC 47, 11 CD 208.
 8. A testamentary guardian of a minor, named by will, pursuant to the provisions of this section, is without authority to act as such guardian until he has been appointed guardian by the probate court having jurisdiction to make such appointment: *Henicle v. Flack*, 3 App 444, 23 CC(NS) 447.

Testamentary guardian to have preference

17. A decree of divorce which gives the custody of a minor child to one of the parents does not clothe that parent with authority to appoint a testamentary guardian for the child, and as between the testamentary guardian and the surviving parent, the court will consider only the best interests of the child in choosing its guardian: *In re Gerbig*, 11 NP(NS) 529, 57 Bull 77.

§ 2111.13 Duties of guardian of person. (GC § 10507-16)

When a guardian is appointed to have the custody and maintenance of a ward and to have charge of the education of such ward, if such ward is a minor, his duties are:

- (A) To protect and control the person of his ward;
 (B) To provide suitable maintenance for his ward when necessary, which must be paid out of the estate of such ward upon the order of the guardian of the person of such ward;
 (C) To provide such maintenance and education for such ward as the amount of his estate justifies when the ward is a minor and has no father or mother, or has a father or mother who

fails to maintain or educate him, which shall be paid out of such ward's estate upon the order of the guardian of the person of such ward;

(D) To obey all the orders and judgments of the probate court touching the guardianship.

No part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the court.

HISTORY: GC § 10507-16; 114 v 320 (387). Eff 10-1-53. Analogous to former GC § 10935.

Forms

- 1 A&H Probate FORM 2111.13a et seq.

Research Aids

Duty to obey orders of probate court:

- O-Jur2d: Guardian and Ward § 88
 Am-Jur2d: Guardian and Ward § 72

Maintenance and education of ward:

- O-Jur2d: Guardian and Ward §§ 93, 98
 Am-Jur2d: Guardian and Ward § 70

Protection and control of ward's person:

- O-Jur2d: Guardian and Ward § 92
 Am-Jur2d: Guardian and Ward §§ 68, 69

Right to expend principal:

- O-Jur2d: Guardian and Ward §§ 94, 100
 Am-Jur2d: Guardian and Ward §§ 71, 72

ALR

Power of guardian or committee to compromise liquidated contract claim or money judgment, and of courts to authorize or approve such a compromise. 155 ALR 196.

Right of court or guardian to use funds of incompetent for benefit of others than incompetent. 160 ALR 1435.

Liability of guardian, or his surety, as affected by agreement by which he limits his control over funds or investments. 102 ALR 1108.

Purchase from corporation of which he is an officer or stockholder by guardian of incompetent as voidable or as ground for surcharging his account. 105 ALR 449.

Remedy for conservation of property of alleged incompetent prior to his adjudication as such. 107 ALR 1392.

Guardian's right to elect on behalf of incompetent person in regard to option under insurance policy. 112 ALR 1063.

Liability of guardian of incompetent for loss of funds as affected by failure to obtain order of court authorizing investment, in absence of mandatory statute. 116 ALR 437.

Right of guardian or committee of incompetent to incur obligations so as to bind incompetent or his estate, or to make expenditures, without prior approval by court. 130 ALR 113.

Revocation of a tentative or revocable trust created by one who has since become incompetent. 138 ALR 1383.

Enlistment or consent to enlistment in military service as emancipation of minor. 137 ALR 1490.

Law Reviews

Ohio annotations to Restatement of Conflict of Laws, § 149. Prof. Fletcher R. Andrews of Western Reserve University. 9 CinLRev 77.

Divorce action by guardian on behalf of insane ward. (Case note.) 2 OO 221.

CASE NOTES AND OAG

1. When the estate of the child is sufficient for its support and exceeds that of the parent, the child should be maintained out of its own estate. This statute does not fix the rule that the parent is bound to support the ward absolutely, no matter what the relative size of their respective estates may be: *Wing v. Hibbert*, 20 CC 404, 11 CD 192 [on appeal from 7 NP 124, 8 OD 65].

3. While this section provides that "no part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the court," the statute does not require that the order of the court for payment be made prior to the rendition of the services, and the court may consider the matter when it is brought before it on exceptions to an accounting, the question then being whether or not the payments made were reasonable under the circumstances: *In re Tillman*, 73 OLA 534 (PC).

4. Where there was no order for the payment of a claim made and approved by the court in a guardianship proceeding, it could not be maintained against the administration of the ward's estate and if that part of services represented by nursing was not included within the coverage of the statute, it could not be separated from the other items claimed. The court went on to say that the word "maintenance" used in this section includes all necessary and requisite service conducive to the physical, moral or mental well-being of the ward, including nursing: *In re Burns*, 52 OLA 134, 79 NE(2d) 234 [affirming *In re Burns*, 79 NE(2d) 711].

5. This section does not require that the court's order for payment be made prior to rendition of the service; an order made subsequent thereto would be a compliance therewith: *In re Burns*, 52 OLA 134, 79 NE(2d) 234 [affirming *In re Burns*, 79 NE(2d) 711].

6. Under RC §§ 2111.07, 2111.13 and 2111.14 a guardian may make expenditures for the ward's support, maintenance and education: *Faber v. United States*, 309 FSupp 818, 53 OO(2d) 246, 26 OMisc 277.

7. It is the duty of the guardian of a minor, when necessary, to provide for the maintenance and education of his ward, and the cost thereof may be paid from the estate of the minor to the extent his estate justifies, but no part of the estate may be used for these purposes unless approved by the court: 1932 OAG No. 4864.

8. In the event the probate court has appointed a guardian for an applicant for an old age pension, and if by virtue of GC § 1359-6 (repealed, 124 v 471 [475]) the division requires as a condition precedent to the granting of a pension a transfer of his real estate, the probate judge has authority to authorize the guardian to transfer real estate in trust to the division: 1935 OAG No.4338.

§ 2111.14 Duties of guardian of estate.

In addition to his other duties, every guardian appointed to take care of the estate of a ward shall have the following duties:

(A) To make and file a full inventory verified by oath, within three months after his appointment, of the real and personal estate of his ward with its value and the value of the yearly rent of the real estate, provided that if the guardian fails to file such inventory for thirty days after he has been notified of the expiration of the time by the probate judge, such judge

shall remove him and appoint a successor;

(B) To manage the estate for the best interest of his ward;

(C) To pay all just debts due from such ward out of the estate in his hands, collect all debts due to the ward, compound doubtful debts, and appear for and defend, or cause to be defended, all suits against his ward;

(D) To obey all orders and judgments of the courts touching the guardianship;

(E) To bring suit for his ward when such suit is for the best interests of such ward;

(F) To settle and adjust, when necessary or desirable, the assets which he may receive in kind from an executor or administrator to the greatest advantage of his ward. Before such settlement and adjustment is valid and binding, it must be approved by the probate court and such approval entered on its journal. Such guardian must also have the approval of the court to hold the assets as received from the executor or administrator or to hold what may be received in the settlement and adjustment of such assets.

No guardian appointed to take care of the estate of a ward may open a safety deposit box held in the name of the ward, until the contents of the box have been audited by an employee of the county auditor in the presence of the guardian and a verified report of the audit has been filed by the county auditor with the probate court which shall then issue a release to the guardian permitting the guardian to have access to the safety deposit box of the ward.

HISTORY: GC § 10507-15; 114 v 320 (387); 133 v S 42. EF 9-15-69.

Analogous to former GC §§ 10933, 10991, 11011.

Cross-References to Related Sections

Education of ward, duties, RC § 3321.38.

Investments, RC § 2109.37 et seq.

Listing ward's property for taxation, RC § 5711.05.

See RC §§ 2109.12, 2109.24, 2109.58, 2127.22 which refer to this section.

Comparative Legislation

Duties:

Cal.—Probate Code, § 1500

Ill.—Rev Stat, ch 3, § 11-13

Ind.—Burns' Stat, § 29-1-18-28

Ky.—KRS, § 387.060

Mich.—MCLA, § 703.17

N.Y.—SCPA, § 1718

Pa.—Purdon's Stat, Tit. 20, §§ 5141, 5521

Fla.—FSA, § 744.361

Forms

1 A&H Probate FORM 2111.14a et seq.

1 A&H Probate FORM 2111.13a et seq: Expenditures by guardians.

Outline of Procedure

Inventory, making, filing, and exceptions thereto. Leyshon No. 79; A&H No. 53

Research Aids**Collection of assets:****O-Jur2d:** Guardian and Ward §§ 139-141**Am-Jur2d:** Guardian and Ward § 76**Duty to bring lawsuits for ward:****O-Jur2d:** Guardian and Ward §§ 109, 194 et seq**Am-Jur2d:** Guardian and Ward § 154**Duty to file inventory:****O-Jur2d:** Fiduciaries §§ 34, 323; Guardian and Ward § 178**Duty to manage the estate:****O-Jur2d:** Guardian and Ward § 105**Am-Jur2d:** Guardian and Ward § 78**Duty to obey court orders touching guardianship:****O-Jur2d:** Guardian and Ward § 88**Duty to pay and collect all debts and appear and defend lawsuits:****O-Jur2d:** Guardian and Ward §§ 109, 138, 200, 201**Am-Jur2d:** Guardian and Ward §§ 79; 156-159**ALR**

Appearance by guardian ad litem without service of summons. 164 ALR 529.

Power of guardian, committee, or trustee of incompetent, after latter's death, to pay debts. 60 ALR2d 963.

CASE NOTES AND OAC

1. Under RC §§ 2111.07, 2111.13 and 2111.14 a guardian may make expenditures for the ward's support, maintenance and education: *Faber v. United States*, 309 FSupp 818, 53 OO(2d) 246, 26 OMisc 277.

1.1 A guardian is liable to account to his ward for any part of the ward's estate lost or wasted through the failure of the guardian to exercise reasonable diligence and that care which a reasonable man would have used in the conduct of his own affairs: *In re Zimmerman*, 141 OS 207, 25 OO 326, 47 NE(2d) 782.

1.2 Where a person, now deceased, created during her lifetime a joint and survivorship bank account for the benefit of the survivor, and the trial court finds that the deceased intended to create a joint and survivorship account, and the evidence and the record support that finding, the fact that the decedent, after she had created the account, was declared to be an incompetent and a guardian was properly appointed for her, does not, as a matter of law, terminate the joint and survivorship nature of the account: *Miller v. Yocum*, 21 OS(2d) 162, 50 OO(2d) 372, 256 NE(2d) 208 (1970) [affirming 18 OApp(2d) 52, 47 OO(2d) 37].

2. Where reasonable grounds for contest of a will exist, it is "for the best interests of the ward," within the meaning of this section, for the guardian to contest any will under which the ward receives substantially less than he would receive as an heir-at-law, had there been no will: *In re Kowalke*, 80 App 515, 36 OO 305, 76 NE(2d) 899.

3. An action instituted by a duly appointed guardian of an incompetent, in which personal rights of the guardian are asserted against the incompetent antagonistic to his interests, should be suspended until a successor guardian has been appointed by the court making the original appointment and made a party to the action instituted by the original guardian: *Murphy v. Murphy*, 85 App 392, 40 OO 254, 87 NE (2d) 102.

4. Where a husband has entered into contracts of insurance in which his wife is named beneficiary, in which contracts he has reserved the right to change the beneficiary provisions, and, after agreeing with the insurance company upon a plan for the payment of the proceeds of the policies in the event of his

death, is thereafter adjudged incompetent and his wife is appointed guardian of his person and estate, she as guardian is without power or right to petition the court appointing her for authority to change the beneficiary provisions or method of distribution of the proceeds of the policies to a plan which she considers more favorable to her, which changes will not take effect until after the death of the ward, and the court is without jurisdiction or authority to direct the insurance company to change the terms of the policies as prayed for by the guardian: *Zuber v. Zuber*, 93 App 195, 50 OO 496, 112 NE(2d) 688.

5. This section and GC § 10507-26 (RC § 2111.23) are in pari materia, and are the only sections which control defenses made by ward under the disability of incompetency: *Hasty v. Weller*, 19 OO 304 (PC).

6. Under this section, a guardian has the duty to manage the estate for the best interests of his ward, and where it appears to the probate court that it would be to the best interests of the ward to elect to purchase the mansion house under RC § 2113.38, such court has the inherent power to permit and direct the guardian to make the election to purchase the mansion house at the appraised value: *Dorfmeier v. Dorfmeier*, 69 OLA 15, 123 NE(2d) 681 (PC).

7. It was the duty of a guardian to pursue his ward's workmen's compensation claim: *In re Moore*, 79 OLA 112, 154 NE(2d) 675.

DECISIONS UNDER FORMER GC § 10933**INDEX**

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Scope

1. The language of this section is very comprehensive, and includes whatever may be part of an estate, whether derived from personality or realty. Liability of substituted surety for previous sale of real estate by guardian, see *Tuttle v. Northrup*, 44 OS 178, 1 NE 581.

Jurisdiction

2. Jurisdiction of the probate court under this section is exclusive: *Newton v. Hammond*, 38 OS 430; see also *State v. Beatty*, 52 OS 656, 44 NE 1139.

3. If the probate court could compel an accounting without notice, still the jurisdiction would at some time become lost, and when this is so, an action in equity might be maintained on the bond without

that accounting: *Gilbert v. Gilbert*, 13 CC 29, 7 CD 58.

4. It is the duty of the probate court, either with or without complaint being first made, to enforce the performance of the duties required by this section, and all other requirements relating to the duties of guardians, to preserve the estate of minors: *In re Strickland*, 7 NP 233, 1 OD 702.

5. The probate court has authority to pass upon all questions of investment and reinvestment: *Guthrie v. Cincinnati Gas &c. Co.*, 2 NP(NS) 117, 15 OD 23.

6. The exclusive jurisdiction of the probate court extends to matters omitted from the account, as well as those included in it: *State v. Beatty*, 33 Bull 109.

Management

7. Guardian having control over estate of insane ward need not have authority to dictate what her residence should be (former GC § 10991 [see now RC § 2111.14]): *Bishop v. Bishop*, 40 App 493, 179 NE 142.

8. Where a guardian for the purpose of paying for improvements to land, in the possession of or claimed by his ward, gave a lien on the accruing rents, it was held that if the guardian had power to encumber the land, the ward could not overreach the lien by purchasing a paramount and better title than he had when the lien was created; for the contract of the guardian, made within the extent of his power, binds the ward the same as if it were his own: *Este v. Strong*, 2 O 401.

9. Guardian may answer for ward: *Ewing v. Higby*, 7 O (pt1) 198; *Ewing v. Hollister*, 7 O (pt2) 138.

10. Where the trustees act within the scope of their authority, and exercise such prudence, care and diligence as men of ordinary prudence, care and diligence in like matters of their own, they should not be held accountable for losses happening from their management of the trust funds: *Miller v. Proctor*, 20 OS 442.

11. Guardian is charged with the duty of listing ward's estate for taxation, and payment, as well as the general management of such estate. He is not responsible for an abuse of such power: *Campbell v. Park*, 32 OS 544.

12. Where an action is prosecuted by A, guardian for B, on an instrument payable to "A, guardian of B," the fact that the ward becomes of age, pending the suit, affords no grounds to abate it: *Gard v. Neff*, 39 OS 607.

13. Summons on the ward cannot be waived by the guardian. The minor may prosecute error for such defect, upon arriving at majority: *Roberts v. Roberts*, 61 OS 96, 55 NE 411.

14. Consent of a guardian, if authorized by a statute, is probably not warranted in a proceeding commenced by himself in his own interest, and where his position is adverse to his ward: *Ream v. Wolls*, 61 OS 131, 55 NE 176.

15. It is the duty of a guardian for a lunatic to appear and defend, or cause to be defended, all suits against his ward, citing this statute: *Stuard v. Porter*, 79 OS 1, 85 NE 1062.

16. The provision of former GC § 10933 (see now RC § 2111.14), to the effect that the guardian may appear for his ward, does not authorize him to enter into a contract to bind his ward's estate for services rendered in litigation: *Payne v. Rech*, 6 App 327, 27 OCA 60, 28 CD 258.

17. A qualified guardian may be substituted for a disqualified one as a party to a suit: *Weiland v.*

Muntz, 2 CC(NS) 71, 15 CD 185.

18. A letter from the probate judge of the county in which the guardian was appointed, stating she has moved to another state with her wards, and has been reappointed in that state, and that a transfer of the Ohio securities belonging to the wards having become necessary, the sale of the securities to the party to whom the letter is addressed is thereby ratified, merely carries the information that the entire management of the estate of the wards has been transferred to the courts of such other state, and is without significance in so far as the question of authority for the sale and transfer of the securities may be concerned: *Merchants &c. Sav. Bank v. Schirk*, 5 CC (NS) 569, 17 CD 125.

19. The right to draw upon the principal of the ward's estate, if the income proves inadequate for the needs of the ward, see *In re Hough*, 2 NP 382, 1 OD 699.

20. Where a fund is given to a guardian, the principal to be divided among the wards when they become of age, and in the meantime the interest and income from such principal to be paid to a third person, the guardian will hold the principal as guardian for his wards, and the interest thereon as trustee for such third person: *In re Kaufman's Estate*, 7 NP 552, 5 OD 407.

21. It is the duty of a guardian to keep real estate belonging to his ward in reasonable repair, and where the property is occupied by the guardian, he is chargeable with a fair rental therefor, and he may deduct from the rental the cost of reasonable and necessary repairs made by him upon the property during his tenancy: *In re Connell*, 12 NP(NS) 311, 56 Bull 142.

23. Where upon a guardian's sale of ward's property, the purchaser fails to make payments as the terms of the sale require, necessitating a resale, the guardian or the administrator of the estate may sue for the difference in price realized at the second sale and the costs of such sale: *Clawson v. Beatty*, 36 Bull 214 [supreme court, without report].

Accounts

24. A guardian may, in his account filed for settlement in the probate court, charge all proper debts due from his ward, although accruing prior to guardianship; for he cannot bring an action against himself or his ward while the relationship continues. The probate court has no discretion to refuse or settle them, though he should disallow items which are improper charges: *Davis v. Ford*, 7 O (pt2) 104.

25. When a guardian closes his account with his ward by filing a final account in the probate court, an amount being due his ward, for which he induces her to sign a receipt as for money paid, he agreeing to be responsible to her for the amount, with interest, an action may be maintained upon such agreement by the ward, and the sum actually due recovered from the guardian without in any way opening or reviewing the accounts which had been settled in the probate court: *Lindsay v. Lindsay*, 28 OS 157.

26. No limitation of time exists which will bar the issuing of a citation requiring a guardian to file an account of his trust (*Phillips v. State ex rel Harter*, 5 OS 122, disapproved and overruled: *McClelland v. State ex rel Clark*, 101 OS 42, 127 NE 409 [affirming *State ex rel Clark v. McClelland*, 30 OCA 522]).

27. Action to reopen account of guardian within two years after ward becomes of age is authorized by statute: *Read v. Marty*, 6 OLA 199.

28. Where a former ward, many years after he be-

came of age, asks for an accounting by his former guardian, some legal notice must be given the guardian before the accounting may be had, and where upon an action on the bond the surety alone depends, the surety cannot be met with the objection that there had been an accounting in the probate court without notice to the former guardian or surety, and almost twenty years after the bond had been given: *Gilbert v. Gilbert*, 13 CC 29, 7 CD 58.

29. Approval by the probate court on exceptions by guardian to the allowance and payment by a former guardian of a claim against the ward in favor of an estate in which he was executor, is conclusive against the present guardian suing such executor to get back the money, although the court believes such claim was unfounded: *Lynch v. Cogswell*, 18 CC 641, 7 CD 12.

30. The administrator of a deceased guardian should file the account of the deceased guardian and turn over the money in his hands to the newly appointed guardian, immediately after his appointment: *In re Estate of Bruckmann*, 1 NP(NS) 7, 48 Bull 637.

31. A long delay in filing exceptions to his guardian's account, there being no excuse for such delay, is laches, especially where the filing is delayed until after the death of the guardian, thus depriving the sureties of their main witness: *In re Streit*, 12 OD (NP) 158.

32. Money which the guardian had no right to receive, being paid him by an executor under an order of court without jurisdiction, and belonging in fact to other persons, must be accounted for as assets by him and his sureties, and they are estopped to set up the illegality or the title of others: *In re Cloud*, 20 Bull 455.

Payment on discharge

33. Mere delay of a ward, on his arriving of age, to compel his guardian to settle his accounts in the probate court, does not discharge the sureties, notwithstanding the guardian may, in the meantime, have become insolvent: *Newton v. Hammond*, 38 OS 430; see also *State v. Beatty*, 52 OS 656, 44 NE 1139.

34. The duty of guardian to pay over funds to ward arises expressly by reason of this section, without any order of distribution: *Lamkin v. Robinson*, 10 NP(NS) 1, 21 OD 13 [appealed, 15 CC(NS) 126, 24 CD 91, which was affirmed, without opinion, 88 OS 603, and *Stevens v. Robinson*, 88 OS 603; for a later opinion, see *Lamkin v. Robinson*, 16 App 440, 32 OCA 401, 35 CD 767; motion to certify record overruled, 20 OLR 367].

35. Receipt by ward, on coming of age, to the guardian for the balance due, filed in court, but not seen by or influencing the sureties, is no defense for them if it was without consideration or payment: *Meier v. Herancourt*, 8 Bull 29.

Claims against ward

36. A guardian cannot sustain an action against his ward, while the relation of guardian and ward subsists, for advances made to his ward, as evidenced by a balance due to him on settlement with the court: *Davis v. Ford*, 7 O (pt2) 104.

37. Action to recover any balance that may be due him from his late ward must be brought in the proper court after such balance is declared in probate court, and after the relation between them ceases to subsist: *Davis v. Ford*, 7 O (pt2) 104.

39. The rule which permits a widowed mother, without means or income other than that resulting

from her own labor, to charge the estate of her child for support and education, is applicable to one who, by her own exertions, supported a stepson until he was sixteen years of age: *Peters v. Scoble*, 7 CC (NS) 417, 18 CD 541; see *Spink v. Spink*, 7 CC(NS) 89, 18 CD 94.

40. A demurrer will lie against a count in an action for recovery from a ward, or money advanced by her guardian, if there is no averment of an express promise to pay: *Fourth Nat. Bank v. Hopple*, 8 NP 473, 11 OD 483 [affirmed, *Hopple v. Fourth Nat. Bank*, *Hosea*, 428; for a later opinion in same case, see *Fourth Nat. Bank v. Hopple*, 8 NP 473, 11 OD 483].

41. Where a guardian surrendered possession of his ward's estate by operation of law, and without opportunity to make himself whole, an equitable action may be maintained in his favor against the ward's general estate for indemnification: *Fourth Nat. Bank v. Hopple*, 8 NP 473, 11 OD 483 [affirmed, *Hopple v. Fourth Nat. Bank*, *Hosea*, 428; for a later opinion in same case, see *Fourth Nat. Bank v. Hopple*, 8 NP 473, 11 OD 483].

42. A parent cannot, in the absence of disparity between the means of the minor and the parent, and where he is earning sufficient to support himself and child, reimburse himself out of the minor's estate: *In re Gould's Estate*, 2 OD(NP) 398.

Payment of debts

43. Where one as guardian, employed counsel to bring suit against a railroad for wrongful death, a suit for fees against the guardian in his representative capacity cannot be maintained: *Hurd v. Wheeling & Co. R. Co.*, 4 NP 404, 6 OD 545.

44. The cost of repairs of property of a ward should be made from the income of the ward's estate, or if the income is insufficient, from the principal, leave so to do having been first obtained from the probate court: *In re Connell*, 12 NP(NS) 311, 56 Bull 142.

Investments

45. A guardian is bound to employ money of an infant so as to make interest if practicable, and he is chargeable with interest if he fails to do so: *Armstrong v. Miller*, 6 O 118.

47. One who buys notes bearing on their face the marks of a trust fund, is put upon inquiry: *Strong v. Strauss*, 40 OS 87.

48. Where a guardian has had the opportunity to show, by his own oath or otherwise, his inability to invest, and does not, inability to invest will not be presumed to excuse him from interest: *Armstrong v. Miller*, W 562.

50. A guardian holding purchase money, notes and a mortgage received on sale of the vendor's land, sold them before maturity by representing that the proceeds were to be used to pay debts of the ward, but he appropriated part of the proceeds. Held: As to such part, the buyers could not recover on foreclosure: *McFarland v. Harper*, 33 Bull 87.

Settlements and compromises

51. Where a guardian appointed in Pennsylvania, received the assets of the ward, and then removed with his ward to Ohio, and died without settlement with his ward, it was held the ward could maintain an action against the personal representative of the guardian's estate: *Pedan v. Robb*, 8 O 227.

52. Guardians must make final account in the probate court when their wards arrive at full age: *Newton v. Hammond*, 38 OS 430; see also *State v. Beatty*,

52 OS 656, 44 NE 1148.

53. Sureties are concluded by settlement in probate court, and will not be heard, in absence of fraud and collusion, to question its correctness or demand a rehearing of the accounts: *Braiden v. Mercer*, 44 OS 339, 7 NE 155; see also *Gardner v. Ashbrook*, 53 OS 678, 44 NE 1136.

54. A ward's written settlement with his guardian, made six years after his becoming of age, in which he states that the guardian's account is correct and satisfactory in all respects, and asks the court to confirm same, concludes the ward, in the absence of fraud, in obtaining the settlement: *In re Streit*, 12 OD(NP) 158.

Expiration of trust

55. The trust of a guardian expires, within the meaning of clause four of the above section [former GC § 10933], at the date of his removal, by the probate court, for cause: *Gorman v. Taylor*, 43 OS 86, 1 NE 227; see also *State v. Beatty*, 52 OS 656, 44 NE 1139.

Appeal

56. The issue of fraud in obtaining judgment is triable to the court, and not to a jury, and from the judgment rendered either party may appeal to the circuit court: *Gantz v. Gease*, 82 OS 34, 91 NE 872.

57. An order of the probate court striking exceptions to the account of a guardian from the files, is a final order, and the time to appeal therefrom cannot be prolonged by a later motion to set aside such order: *In re Streit*, 12 OD(NP) 158.

§ 2111.15 Duties of guardian of person and estate. (GC § 10507-17)

When a person is appointed to have custody of the person and to take charge of the estate of a ward, such person shall have all the duties required of a guardian of the estate and of a guardian of the person.

HISTORY: GC § 10507-17; 114 v 320 (388). **EFF** 10-1-53. See former GC § 10934.

Research Aids

Guardian of person and estate:

O-Jur2d: Guardian and Ward § 87

§ 2111.16 Certain vouchers disallowed as credits.

Unless previously authorized by the court, no voucher shall be received from or allowed as a credit in the settlement of a guardian's account which is signed or purports to be signed by his ward.

HISTORY: GC § 10507-29; RS § 6304; 114 v 320 (390); 127 v 36 (39), § 1. **EFF** 9-4-57.

See former GC § 10992.

Forms

1 A&H Probate FORM 2111.13a et seq: Expenditures by guardians.

1 A&H Probate FORM 2109.23a et seq: Allowance of compensation.

Research Aids

Vouchers as credits:

O-Jur2d: Fiduciaries § 271

Law Review

Recent amendments affecting probate practice. Richard F. Sater. 18 OSLJ 464.

CASE NOTES AND OAG

1. For a discussion of the change made in RS § 6304 by the codifying commission, see *In re Connell*, 12 NP(NS) 311, 56 Bull 142.

2. Under former GC § 10992 (see now RC § 2111.16) it was held that a receipt or voucher signed by a minor can be received in settlement of his guardian's accounts, but it is otherwise as to a lunatic or idiot by reason of this section: *Millen v. Young*, 18 CC 571, 8 CD 391.

§ 2111.17 Suits by guardians.

A guardian may sue in his own name, describing himself as guardian of the ward for whom he sues. When his guardianship ceases, actions or proceedings then pending shall not abate, if the right survives. His successor as guardian, the executor or administrator of the ward, or the ward himself, if the guardianship has terminated other than by the ward's death, shall be made party to the suit or other proceeding as the case requires, in the same manner as executor or administrator is made a party to a similar suit or proceeding where the plaintiff dies during its pendency.

HISTORY: GC § 10507-18; 114 v 320 (388). **EFF** 10-1-53. Analogous to former GC § 10993.

Research Aids

Effect of termination of guardianship on pending suit:

O-Jur2d: Abatement, Survival and Revival §§ 45, 64
Suit by guardians;

O-Jur2d: Guardian and Ward § 203

Am-Jur2d: Guardian and Ward §§ 149-152

ALR

Right to bring action before removal of disability where statute permits bringing of suit within specified time after removal. 109 ALR 955.

§ 2111.18 Claim for injury to ward or damage to property; settlement.

When personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property is caused to a ward by wrongful act, neglect, or default which would entitle the ward to maintain an action and recover damages therefor, the guardian of the estate of the ward may adjust and settle the claim with the advice, approval, and consent of the probate court. In the settlement, if the ward is a minor, the parent or parents may waive all claim for damages on account of loss of service of the minor, and such claim may be included in the settlement; provided, that when it is proposed that the claim

involved be settled for three thousand dollars or less, the court may, upon application by any person whom the court may authorize to receive and receipt for the settlement, authorize the settlement without the appointment of a guardian and authorize the delivery of the moneys to the natural guardian of the minor, to the person by whom the minor is maintained, or to the minor himself. The court may authorize the minor or person receiving the moneys to execute a complete release on account thereof. The payment shall be a complete and final discharge of any such claim.

HISTORY: GC § 10507-19; 114 v 320 (388); 115 v 198; 125 v 903 (972); 127 v 380 (Eff 9-4-57); 136 v H 1137, Eff 7-14-76.

See former GC § 10933.

Comparative Legislation

Settle claims:

- Cal.—Probate Code, § 1501
- Ill.—Rev Stat, ch 3, § 11-13
- Ind.—Burns' Stat, § 29-1-18-38
- Ky.—KRS, § 387.130
- Mich.—MCLA, § 703.18
- N.Y.—SCPA, § 1813
- Pa.—Purdon's Stat, Tit. 20, § 5144
- Fla.—FSA, § 744.387

Text Discussion

- 1 Anderson Fam. L. § 6.25

Forms

- 1 A&H Probate FORM 2111.18a et seq.
- 1 A&H Probate FORM 2111.18.1 et seq: Settlement of claim without appointment of guardian.
- 1 Anderson Fam. L. Nos. 33-37

Research Aids

Compromise and settlement of claims:

- O-Jur2d: Guardian and Ward § 110; Parent and Child § 26; Infants § 55
- Am-Jur2d: Guardian and Ward § 107

Law Review

- Attorney's liens. Arthur F. Lustig. 7 ClevMarLRev 502.

CASE NOTES AND OAG

1. In the absence of a showing of prejudicial error in the proceedings or of fraud or collusion on the part of those involved, a settlement of an injured minor's claim for damages by his guardian in conformity with the provisions of GC § 10507-19 (now RC § 2111.18), is valid and binding on the minor and may not be set aside: In re Kelley, 172 OS 177, 15 OO(2d) 327, 174 NE(2d) 244 [affirming 113 App 180, 15 OO(2d) 431, 168 NE(2d) 587].

2. It was not necessary for the probate court to appoint a guardian or guardian ad litem where the action was properly brought by the injured party's father and next friend: In re Noie, 87 OLA 276, 179 NE(2d) 536 (App).

3. The issue whether a release of a negligence claim executed in the probate court is void may be determined by a common pleas court in an action therein to recover for personal injury damages caused by such negligence: Carpenter v. Pontius, 119 App 383, 28 OO(2d) 12, 200 NE(2d) 682.

When personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property is caused to a minor, who claims to be emancipated, by wrongful act, neglect, or default which would entitle such minor to maintain an action and recover damages therefor, such minor, who claims to be emancipated, may file an application in the probate court in the county where he then resides, praying for a finding by such court that such minor is in fact emancipated, and authorizing, approving, and consenting to the settlement of such claim by such minor without the appointment of a guardian. Upon hearing on such application, after five days["] written notice of the time and place of such hearing has been given to each of the living parents of such minor, whose name and address is known, provided such parent is free from disability other than minority, or, if there is no living parent, after such notice to the next of kin of such minor known to reside in the county, the court may find such minor to be emancipated and may authorize, approve, and consent to the settlement of such claim by such minor without the appointment of a guardian and may authorize such minor to receive and receipt for such settlement and, upon such minor executing and delivering a full and complete release for such injuries and damages, may authorize the delivery and payment of such moneys to such minor, to a trustee or guardian of the estate of such minor appointed by the court for the benefit of such minor, or to a depository authorized to receive fiduciary funds to hold said moneys payable to the ward when he attains majority, or for the benefit of said minor as the court may direct.

Upon the finding of the probate court that such minor was, at the time of such injury and damage, an emancipated minor, and provided such notice has been given to each living parent, whose name and address is known, then such release executed by such emancipated minor shall be a full and complete discharge and release of any claim which either or both of such parents might have by reason of such personal injury, or damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible property of such minor.

HISTORY: 129 v 205, § 1. Eff 10-2-61.

Text Discussion

- 1 Anderson Fam. L. § 6.25.

Forms

- 1 A&H Probate FORM 2111.18.1a et seq.
- 1 Anderson Fam. L. Nos. 38-40.

Outline of Procedure

Damage claims—settlement of, by emancipated minor. Leyshon No. 62-1; A&H No. 32

[§ 2111.18.1] § 2111.181 Settlement of claim of emancipated minor.

Research Aids

Settlement of claim of emancipated minor:
O-Jur2d: Parent and Child § 26

ALR

Appearance of parent and next friend or guardian ad litem, as affecting right to recover consequential damages to himself on account of injury to child: 116 ALR 1087.
Power of guardian or committee to compromise liquidated contract or money judgment, and of courts to authorize or approve such a compromise. 155 ALR 196.

O.S.B. Service Letter

The indemnifying release in settlement of minors' claims and the new Ohio statute for emancipated minors. S. Burns Weston and Robert H. Kennedy. Negligence Law Edition, July, 1963.

§ 2111.19 Completion of real estate contracts.

A guardian, whether appointed by a court in this state or elsewhere, may complete the contracts of his ward for the purchase or sale of real estate or any authorized contract relating to real estate entered into by a guardian who has died or been removed. Said guardian shall proceed in the manner provided by sections 2113.48 to 2113.50, inclusive, of the Revised Code.

HISTORY: GC § 10507-21; 114 v 320 (388); 129 v 257, § 1. Eff 10-5-61.

See former GC § 11003.

Forms

1 A&H Probate FORM 2111.19a et seq.

Research Aids

Completion of land contract:
O-Jur2d: Guardian and Ward § 127

§ 2111.20 Sale of personal estate. (GC § 10507-22)

The guardian of the person and estate, or of the estate only, may sell all or any part of the personal estate of the ward when such sale is for the interest of the ward.

HISTORY: GC § 10507-22; 114 v 320 (388). Eff 10-1-53. See former GC § 10945.

Comparative Legislation

Sale of estate of ward:
Cal.—Probate Code, § 1519
Ill.—Rev Stat, ch 3, § 20-3
Ind.—Burns' Stat, § 29-1-18-43
Ky.—KRS, § 387.140
Mich.—MCLA, § 709.3
N.Y.—SCPA, § 1713
Pa.—Purdon's Stat, Tit. 20, § 5155
Fla.—FSA, § 744.441

Forms

1 A&H Probate FORM 2111.20a et seq.

Research Aids

Sale of personalty:
O-Jur2d: Guardian and Ward §§ 153-155
Am-Jur2d: Guardian and Ward §§ 122-124

ALR

Sale without order of court. 108 ALR 936.
Right of court or guardian to use funds of incompetent for benefit of others than incompetent. 160 ALR 1435.

CASE NOTES AND OAG

1. A purchaser dealing fairly, takes good title to personal property belonging to the ward sold by a guardian, though the sale is made without order of the court and the guardian misappropriates the proceeds: Strong v. Hope, 4 Bull 1034.

2. Where one buys of a guardian notes bearing on their face the marks of a trust fund, he is put upon inquiry; and if he buys under circumstances fairly indicating that they were sold against the interests of the ward, he gets no title from the guardian who misappropriates the proceeds of the sale: Strong v. Strauss, 40 OS 87.

§ 2111.21 Sale, compromise, adjustment, or mortgage of dower. (GC § 10507-23)

The guardian of a ward who has or is claimed to have a right of dower, or a contingent right to it, in lands or tenements of which the spouse of such ward was or is seized as an estate of inheritance, where the dower has not been assigned, may sell, compromise, or adjust such dower or may release such contingent right of dower in the event the spouse of such ward desires to mortgage such property upon such terms as such guardian deems for the interest of such ward and upon such terms as the probate court of the county in which the guardian was appointed approves, or if such guardian was appointed in a foreign state, upon such terms as the probate court of the county wherein the land is situated approves. After such approval, the guardian may execute and deliver all the necessary deeds, mortgages, releases, and agreements for the sale, compromise, assignment, or mortgage of such dower or contingent right to dower. As a basis for computing the value of an inchoate dower right in any sale, compromise, or adjustment pursuant to this section, the value of the lands or tenements may be considered to be the sale price or, if there is no sale, the appraised value. Such sale, compromise, adjustment, or mortgage may be made upon application and entry in the pending proceedings.

HISTORY: GC § 10507-23; 114 v 320 (389); 122 v 495, § 1. Eff 10-1-53. See former GC § 10997.

Forms

1 A&H Probate FORM 2111.21a et seq.

Research Aids

Sale compromise or adjustment of dower:

O-Jur2d: Guardian and Ward § 129; Dower § 92

Law Review

It can't be done. Article by William R. Kinney. 19 OBar (No. 13) 225.

§ 2111.22 Release of ward's tax title by guardian. (GC § 10507-24)

When a ward has title to real estate by tax title only, the guardian, by deed of release and quitclaim, may convey such ward's interest or title to the person entitled to redeem such real estate, upon receiving from such person the amount paid for such tax title with the forfeiture and interest allowed by sections 319.52, 5719.17, and 5719.18 of the Revised Code. If the guardian tenders such deed to the person entitled to redeem such real estate and he refuses to accept and pay for it, he shall not recover costs in any proceeding thereafter instituted to redeem such real estate.

HISTORY: GC § 10507-24; 114 v 320 (389). **EFF** 10-1-53. Analogous to former GC § 10960.

Research Aids

Release of ward's tax title:

O-Jur2d: Guardian and Ward § 130; Taxation § 518

§ 2111.23 Guardian ad litem. (GC § 10507-26)

Whenever a ward, for whom a guardian of the estate or of the person and estate has been appointed, is interested in any suit or proceeding in the probate court, such guardian shall in all such suits or proceedings act as guardian ad litem for such ward, except as to suits or proceedings in which the guardian has an adverse interest. Whenever a minor or other person under legal disability, for whom no guardian of the estate or of the person and estate has been appointed, is interested in any suit or proceeding in such court, the court may appoint a guardian or a guardian ad litem. In a suit or proceeding in which the guardian has an adverse interest, the court shall appoint a guardian ad litem to represent such minor or other person under legal disability.

HISTORY: GC § 10507-26; 114 v 320 (389); 125 v 411 (413). **EFF** 10-16-53. See former GC § 10782.

Comment

This section reflects the idea of the committee of the Ohio state bar association who prepared the Probate Code, that the general guardian should be the guardian ad litem except when the general guardian is personally interested (1933 committee comment).

Cross-References to Related Sections

See RC § 2109.35 which refers to this section.

Comparative Legislation

Guardian ad litem:

Cal.—Probate Code, § 1607

Ill.—Rev Stat, ch 3, § 6-6

Ind.—Burns' Stat, § 29-1-18-1

Ky.—KRS, § 387.305

Mich.—MCLA, § 703.12

N.Y.—SCPA, § 403

Pa.—Purdon's Stat, Tit. 20, § 5521

Fla.—FSA, § 744.391

Forms

1 A&H Probate FORM 2111.23a et seq.

Research Aids

Guardian ad litem:

O-Jur2d: Guardian and Ward §§ 200, 201; Infants §§ 46-56; Insane and Other Incompetent Persons § 46

Am-Jur2d: Guardian and Ward § 157; Infants § 155 et seq.; Incompetent Persons § 115 et seq.

ALR

Appearance by guardian ad litem without service of summons. 164 ALR 529.

Law Review

Probate code amendments. Francis J. Eberly. 14 OSLJ 368.

See explanatory article in 4 OBar 339.

CASE NOTES AND OAG

See also Civil Rule 17(B), and case notes thereunder.

1. The gist of this section is that a guardian of the person and estate of a ward shall act as guardian ad litem for such ward in any proceeding in the probate court, except suits or proceedings in which the guardian is personally interested: *Plessinger v. Bireley*, 76 App 183, 31 OO 477, 62 NE(2d) 720.

1.1 Although it might be contended that the third sentence of this section which reads "In a suit or proceeding in which the guardian has an adverse interest, the court shall appoint a guardian ad litem to represent such minor or other person under legal disability," authorizes the probate court to appoint a guardian ad litem in any action pending in another court, the import of the section as a whole deals with proceedings in the probate court and should not be construed to apply or extend to actions in the common pleas court. In *re Reynolds*, 106 App 488, 7 OO(2d) 222, 155 NE(2d) 686.

1.2 The provisions of this section, providing for the appointment of a guardian or a guardian ad litem for a minor interested in a proceedings for whom no guardian of the estate or of the person and estate has been appointed, are directory and not mandatory, and the probate court may appoint a guardian for such minor when it is necessary to bring an action in the probate court, but it is not compelled to do so and in a proper case the action may be properly brought by the minor petitioner through her next friend: In *re Noie*, 87 OLA 276, 179 NE(2d) 536 (App).

5. Where the only interest which the guardian has in proceedings to sell the ward's real estate is the bringing of the action in an official capacity as guardian, the latter is not "personally interested" within the meaning of this term as used in this section: *Hasty v. Weller*, 19 OO 304 (PC).

6. Failure to appoint a guardian ad litem for a minor defendant renders the judgment erroneous as against the minor: *Smith v. Merkle*, 74 OLA 33 (PC).

7. In a suit or proceeding against a minor in which the guardian of such minor has an adverse interest,

the court must appoint a guardian ad litem to represent such minor: *Smith v. Merkle*, 74 OLA 33 (PC).

8. In all suits in which infants are parties defendant, it is the duty of the court to carefully safeguard the rights and interests of such infants and it is also the duty of a guardian ad litem to ascertain the legal and equitable rights of his ward and to bring those rights to the attention of the court for consideration and decision: *Smith v. Merkle*, 74 OLA 33 (PC).

DECISIONS UNDER FORMER GC § 10782

1. It is sufficient if infant heirs appear by their general guardian: *Ewing v. Hollister*, 7 O 138.

2. Under the act of 1824 the practice was general to serve the process upon the general guardian, or a guardian ad litem, or to permit an appearance without process, by either: *Sheldon's Lessee v. Newton*, 3 OS 496.

3. The law of 1824 did not prescribe the mode of making the heirs defendants, and such proceedings having, before the statute, been ex parte, the court might direct the mode, and an appearance and answer made by their guardian ad litem, appointed by the court in the case, was a reasonable and proper mode under that statute: *Biggs v. Bickel*, 12 OS 49.

5. A guardian cannot enter appearance for his ward unless authorized by statute. Summons on the ward cannot be waived by the guardian. The minor, on attaining majority, may prosecute error to the judgment for such defects: *Roberts v. Roberts*, 61 OS 96, 55 NE 411.

6. Consent of a guardian, if authorized by a statute, is probably not warranted in a proceeding commenced by himself and in his own interest, and where his position is adverse to his ward: *Ream v. Wolls*, 61 OS 131, 55 NE 176.

7. It is the duty of a guardian ad litem to ascertain the legal and equitable rights of his ward and to bring those rights to the attention of the court for consideration and decision: *Bennett v. Fleming*, 105 OS 352, 137 NE 900 [motion to vacate order remanding cause to common pleas court and to remand it to the court of appeals allowed, 20 OLR 611; judgment of court of appeals for defendant; motion to certify record overruled, 21 OLR 315].

8. Heirs who are idiots are made parties to the record by the filing of an answer and cross-petition by their guardian, wherein the allegations of the petition are admitted, service of summons waived, and the court is asked to grant the prayer of the petition: *Segal v. Eagle Bldg. Co.*, 11 CC(NS) 481, 21 CD 519.

§ 2111.24 Insolvency of ward. (GC § 10507-30)

If the probate court finds that the estate of a ward is insolvent or will probably be insolvent, such estate shall be settled by the guardian in like manner as for the settlement of the insolvent estate of a deceased person under section 2117.15 of the Revised Code.

HISTORY: GC § 10507-30; 114 v 320 (390). Eff 10-1-53. See former GC § 11008.

Cross-References to Related Sections

Settlement of insolvent estates of deceased persons, RC § 2117.15.

Research Aids

Insolvency:

O-Jur2d: Executors and Administrators § 342 et seq

Am-Jur2d: Executors and Administrators § 312 et seq.

CASE NOTES AND OAG

1. This section seems to preclude the idea that there could be any preference among creditors of the idiot, imbecile or lunatic, at least after the appointment of his guardian: *Heff v. Cox*, 5 NP 413, 5 OD 377.

[LEASE OF REAL ESTATE]

§ 2111.25 Lease for not more than three years. (GC § 10507-31)

A guardian, of the person and estate or of the estate only, without application to the probate court, may lease the possession or use of any real estate of his ward for a term not exceeding three years, provided such term does not extend beyond the minority, if the ward is a minor. If the lease extends beyond the death of the ward or beyond the removal of the disability of a ward other than a minor, such lease shall terminate on such death or removal of disability, unless confirmed by the ward or his legal representatives. In the event of such determination, the tenant shall have a lien on the premises for any sum expended by him in pursuance of the lease in making improvements for which compensation was not made in rent or otherwise.

HISTORY: GC § 10507-31; 114 v 320 (391). Eff 10-1-53. Analogous to former GC §§ 10961, 10998, 10999.

Cross-References to Related Sections

Improvement of real estate by guardian, RC § 2111.33 et seq.

Leasing for oil or gas purposes, RC § 2111.26 et seq.

Mortgaging to pay debts or improve real estate, RC § 2109.46 et seq.

Comparative Legislation

Lease of estate:

Cal.—Probate Code, § 1538.5

Ill.—Rev Stat, ch 3, § 19-2

Ind.—Burns' Stat, § 29-1-18-43

Ky.—KRS, § 387.140

Mich.—MCLA, § 709.5

N.Y.—SCPA, § 1715

Pa.—Purdon's Stat, Tit. 20, § 5522

Fla.—FSA, § 744.441

Research Aids

Lease for not more than three years:

O-Jur2d: Guardian and Ward §§ 146, 147

Am-Jur2d: Guardian and Ward § 113 et seq

ALR

Guardian's power to make lease for infant ward beyond minority or term of guardianship. 6 ALR3d 570.

Power to lease infant's land beyond minority or guardianship. 6 ALR2d 570.

CASE NOTES AND OAG

1. In a suit to establish the validity of a lease

executed by a guardian, the petition should show by what authority the guardian acted, and that the persons for whom he acted were disqualified by infancy, imbecility or otherwise: *Globe Soap Co. v. Louisville & N. R. Co.*, 6 CC(NS) 496, 17 CD 759.

2. A covenant by a guardian to renew a lease for a second term is in excess of the power granted by this section and is void: *Globe Soap Co. v. Louisville & N. R. Co.*, 6 CC(NS) 496, 17 CD 759.

§ 2111.26 Lease for term of years. (GC § 10507-32)

A guardian may lease the possession and use of the real estate of his ward or any part of it for a term of years, renewable or otherwise, by perpetual lease, with or without the privilege of purchase, or may lease upon such terms and for such time as the probate court approves any lands belonging to the ward containing coal, gypsum, petroleum oil, natural gas, gravel, stone, or any other mineral substance for the purpose of drilling, mining, or excavating for and removing any of such substances, or such guardian may modify or change in any respect any lease previously made.

Such lease, or modification or change in a lease previously made, may be made when the guardian of the person and estate or of the estate only applies to the court by which he was appointed and such court finds that the lease or modification or change is necessary for the support of the ward or of his family, for the payment of the just debts of the ward, for the ward's education, if a minor, to secure the improvement of the real estate of the ward and increase the rent, to pay any liens or claims against said real estate, or if such court finds that such real estate is suffering unavoidable waste, or that in any other respect it will be for the best interests of the ward or those persons for whom the ward is required by law to provide.

HISTORY: GC § 10507-32; 114 v 320 (391). Eff 10-1-53. Analogous to former GC §§ 10962, 10999, 10975, 10976, 10983.

Cross-References to Related Sections

See RC § 2111.28 which refers to this section.

Forms

1 A&H Probate FORM 2111.27a et seq: Lease, improvement of real estate by guardian.

Outline of Procedure

Lease of real estate by a guardian. Leyshon No. 83; A&H No. 60

Research Aids

Lease for term of years:

O-Jur2d: Guardian and Ward § 148

Am-Jur2d: Guardian and Ward § 113 et seq

CASE NOTES AND OAG

1. In order to bring the lease within the provisions of the statute the petition should contain averments showing requisite conditions and the authority of the court: *Globe Soap Co. v. Louisville & N. R. Co.*, 6 CC(NS) 496, 17 CD 759.

§ 2111.27 Petition. (GC § 10507-33)

A guardian's application for authority to lease real estate of a ward shall be by petition setting forth:

(A) The legal capacity of the petitioner;

(B) The name of the ward, the character of his disability, and if it is idiocy, imbecility, or lunacy, whether such disability is curable or not, temporary, or confirmed, and its duration;

(C) The number, names, ages, and residence of the family of the ward, including the spouse and those residents of the county who have the next estate of inheritance from such ward, all of whom, as well as the ward, must be made defendants;

(D) The indebtedness of the ward, the expense of supporting and maintaining him, the expense of educating him if he is a minor, and any other expense of the ward;

(E) The value of all the property and effects of the ward including the real estate proposed to be leased;

(F) The income of the ward and the net annual value to the ward of the real estate proposed to be leased;

(G) A description of the real estate proposed to be leased and the probable amount for which such real estate can be leased;

(H) A detailed statement of the improvements proposed to be made to the real estate sought to be leased;

(I) The reasons for the proposed lease and the terms, covenants, conditions, and stipulations thereof, including the time for which it is proposed the real estate should be leased;

(J) Such other facts necessary to apprise the court fully of the necessity or benefit to the ward or the estate of the proposed lease, or such other facts as may be required by the court;

(K) A prayer for the proper authority.

HISTORY: GC § 10507-33; 114 v 320 (391). Eff 10-1-53.

Cross-References to Related Sections

See RC §§ 2111.28, 2111.29 which refer to this section.

Forms

1 A&H Probate FORM 2111.27a et seq.

1 A&H Probate FORM 2111.30a et seq: Appraisers.

Outline of Procedure

Lease of real estate by a guardian. Leyshon No. 83; A&H No. 60

Research Aids

Petition to lease:

O-Jur2d: Guardian and Ward § 149

Am-Jur2d: Guardian and Ward § 113 et seq

§ 2111.28 Parties. (GC §§ 10507-34, 10507-35)

In an application for authority to lease real estate of a ward under sections 2111.26 and

2111.27 of the Revised Code, the guardian may act for two or more wards and two or more guardians of different wards may unite, when all the wards are jointly or in common interested in the real estate. When the same person is guardian of two or more wards owning lands in common, such wards may be joined as defendants in the same petition.

The ward's spouse shall be made a defendant to such petition, and if the proposed lease is for the purpose of mining or removing mineral or other substances, and if such spouse files an answer consenting to the lease, free and discharged of all right and expectancy of dower therein, such answer shall be a full release of such spouse's expectancy of dower when the lease is confirmed. Unless in such answer an allowance in lieu of dower is waived, the court shall allow, out of the proceeds of the lease, such sum in money as is the just and reasonable value of such expectancy of dower.

HISTORY: GC § 10507-34, 10507-35; 114 v 320 (392). **EFF** 10-1-53. GC § 10507-34 analogous to former GC §§ 10964, 10982; GC § 10507-35 analogous to former GC § 10996.

Forms

1 A&H Probate FORM 2111.27a et seq: Lease, improvement of real estate by guardian.

Research Aids

Parties:

O-Jur2d: Guardian and Ward § 150; Dower §§ 59, 93

Am-Jur2d: Guardian and Ward § 113 et seq

§ 2111.29 Parties and proceedings. (GC § 10507-36)

When a guardian files an application for authority to lease the real estate of a ward, the same rules shall apply as to parties and, upon filing of the petition described in section 2111.27 of the Revised Code, like proceedings shall be had as in an action to sell real estate belonging to the ward under sections 2127.01 to 2127.43, inclusive, of the Revised Code, including services of summons, notice, appraisal, pleading, rule days, and proof.

HISTORY: GC § 10507-36; 114 v 320 (392). **EFF** 10-1-53. Analogous to former GC §§ 10964, 10977, 10986, 11001.

Forms

1 A&H Probate FORM 2111.27a et seq: Lease, improvement of real estate by guardian.

1 A&H Probate FORM 2111.30a et seq: Appraisers.

Research Aids

Parties and proceedings:

O-Jur2d: Guardian and Ward §§ 149-151

Am-Jur2d: Guardian and Ward § 113 et seq

§ 2111.30 Duties of appraisers. (GC § 10507-37)

When a guardian applies for authority to lease the real estate of a ward, the duties of the

appraisers shall be the same as in proceedings to sell real estate belonging to the ward under sections 2127.22 and 2127.23 of the Revised Code, except that they shall appraise not only the value of the real estate but also the value of the annual rental upon the terms, covenants, conditions, and stipulations of the proposed lease. If said lease is for the mining or removal of mineral or other substances, the appraisers shall report in writing to the probate court their opinion as to the probability of the lands containing such substances, the probable quantity of such substances, and the terms upon which it would be advantageous to the ward to lease the lands for mining or removing such substances. In their report the appraisers shall state whether in their opinion, the proposed lease will be for the best interests of the ward, those whom he is required by law to support, or the estate. They may also suggest any change in the terms, covenants, and stipulations proposed in the petition. The report of the appraisers shall be returned on or before the day named in the order for the final hearing of the case. On the return of the appraisement, the guardian need not give an additional bond, but in case of sale under the terms of the lease, such guardian must give such bond before the confirmation of the sale.

HISTORY: GC § 10507-37; 114 v 320 (392); 125 v 903 (972). **EFF** 10-1-53. Analogous to former GC §§ 10964, 10978, 11001.

Cross-References to Related Sections

See RC § 2111.31 which refers to this section.

Forms

1 A&H Probate FORM 2111.30a et seq

1 A&H Probate FORM 2111.27a et seq: Lease, improvement of real estate by guardian.

Research Aids

Duties of appraisers:

O-Jur2d: Guardian and Ward § 151

§ 2111.31 Hearing and order. (GC §§ 10507-38, 10507-39, 10507-41)

If the report of the appraisers under section 2111.30 of the Revised Code is favorable to the lease and on the final hearing the court is of the opinion that it will be to the advantage of the ward, those whom he is required by law to support, or the estate to lease the real estate, the probate court shall make an order authorizing the lease to be made by public or private letting, as it deems best, on such terms, covenants, conditions, and stipulations, either in accordance with those set forth in the petition or otherwise, as it directs, provided such terms, covenants, conditions, and stipulations are not less favorable to the ward than those reported by the appraisers. The lease shall not take effect until such

lease and the security, if any, therein prescribed are approved and confirmed.

In the lease made in pursuance of such order it may be provided that the improvements shall be made by the tenant as part of the rent, or by the guardian, either out of the rent or other means of the ward as the court directs.

If the lease is for the mining or removal of mineral or other substances and the guardian is unable to lease the lands upon the terms ordered, he may report the fact to the court and such court may change the terms of leasing, but not below the customary royalty in the vicinity of such lands.

HISTORY: GC §§ 10507-38, 10507-39, 10507-41; 114 v 320 (393); 125 v 903 (972). **EFF** 10-1-53. GC § 10507-38 analogous to former GC §§ 10965, 10979, 10987, 11002; GC § 10507-39 analogous to former GC § 10966; GC § 10507-41 analogous to former GC § 10981.

Cross-References to Related Sections

See RC § 2111.32 which refers to this section.

Forms

1 A&H Probate FORM 2111.27a et seq: Lease, improvement of real estate by guardian.

Research Aids

Hearing and order:

O-Jur2d: Guardian and Ward § 152

Am-Jur2d: Guardian and Ward § 113 et seq

§ 2111.32 Royalty. (GC § 10507-40)

If the lease made pursuant to court order, under section 2111.31 of the Revised Code is for the mining or removal of mineral or other substances on a royalty basis, within six months after the receipt of the first royalty under such lease the guardian shall report to the probate court the amount thereof and the court shall then fix a bond which will cover such royalty. At any time the court deems the bond insufficient to secure the royalty, it may increase such bond or require a new one.

HISTORY: GC § 10507-40; 114 v 320 (393). **EFF** 10-1-53. Analogous to former GC § 10980.

Research Aids

Additional bond for royalty:

O-Jur2d: Guardian and Ward § 152

[IMPROVEMENT OF REAL ESTATE]

§ 2111.33 Petition to improve real estate.

A guardian may use the moneys and personal estate of his ward to improve his ward's real estate. Such guardian shall file in the probate court in which he was appointed a petition containing the following:

(A) A description of the premises to be improved;

(B) The amount of rent the premises yield at the time the petition is filed;

(C) In what manner it is proposed to make such improvement;

(D) The proposed expenditures for such improvement;

(E) What rent the premises will probably yield when so improved;

(F) A statement of the value of the ward's personal estate;

(G) Other facts which are pertinent to the question whether the improvement should be made;

(H) A prayer that such guardian be authorized to use so much of his ward's money and personal estate as is necessary to make such improvement;

(I) The character of the disability of the ward, and if it is incompetency, whether such disability is curable or not, temporary, or confirmed, and its duration;

(J) The names, ages, and residence of the family of the ward, including the spouse and those known to be residents of the county who have the next estate of inheritance from the ward. All such persons, as well as the ward, must be made defendants and notified of the pendency and prayer of the petition in such manner as the court directs.

If the property is so situated that, to the best interests of the ward's estate, it can be advantageously improved in connection with the improvement of property adjacent to it, the petition shall show this and have a prayer in accordance therewith.

HISTORY: GC § 10507-42; 114 v 320 (394); 125 v 903 (973); 129 v 1448 (1454), § 1. **EFF** 10-25-61.

Analogous to former GC § 11004.

Cross-References to Related Sections

See RC § 2111.34 which refers to this section.

Comparative Legislation

Improvements on real estate:

Cal.—Probate Code, § 1533

Ky.—KRS, § 387.150

Fla.—FSA, § 744.441

Forms

1 A&H Probate FORM 2111.33a et seq

1 A&H Probate FORM 2111.30a et seq: Appraisers.

Outline of Procedure

Improvement of real estate by a guardian. Leyshon No. 77; A&H No. 52

Research Aids

Improvements:

O-Jur2d: Guardian and Ward §§ 144, 145

Am-Jur2d: Guardian and Ward § 127

§ 2111.34 Proceedings. (GC § 10507-43)

Upon the filing of the petition described in section 2111.33 of the Revised Code, like proceedings shall be had as to pleadings and proof as on petition by a guardian to sell the real estate of a ward under sections 2127.01 to 2127.43,

inclusive, of the Revised Code. The probate court shall appoint three disinterested freeholders of the county as commissioners to examine the premises to be improved, to examine the surroundings, and to report to the court their opinion whether the improvement proposed will be advantageous to the estate of the ward.

HISTORY: GC § 10507-43; 114 v 320 (394). Eff 10-1-53. Analogous to former GC § 11005.

Forms

1 A&H Probate FORM 2111.33a et seq: Improvement of real estate.

Research Aids

Proceedings:

O-Jur2d: Guardian and Ward §§ 144, 145

§ 2111.35 Amount to be used for improvement. (GC § 10507-44)

On the final hearing of a guardian's proceeding to improve the real estate of his ward, if the prayer of the petition is granted, the probate court shall fix the amount of money and personal estate that may be used in making such improvement. Such court may authorize such guardian to unite with the owners of adjacent property, upon such equitable terms and conditions as the court approves, for the improvement of the premises of his ward and for the proper management and repair of the property when so improved.

HISTORY: GC § 10507-44; 114 v 320 (394). Eff 10-1-53. Analogous to former GC § 11006.

Cross-References to Related Sections

See RC § 2111.36 which refers to this section.

Forms

1 A&H Probate FORM 2111.33a et seq: Improvement of real estate.

Research Aids

Amount to be used for improvement:

O-Jur2d: Guardian and Ward §§ 144, 145

§ 2111.36 Guardian's report. (GC § 10507-45)

A guardian shall distinctly report under oath the amount of money and personal estate expended in making an improvement to his ward's real estate under section 2111.35 of the Revised Code to the probate court, within forty days after the improvement is completed. If the ward dies before the removal of the disability and there are heirs who inherit real estate only from him, the money expended shall descend and pass the same as his other personal estate and be a charge on the premises improved in favor of the heirs who inherit the personal estate.

HISTORY: GC § 10507-45; 114 v 320 (394). Eff 10-1-53. Analogous to former GC § 11007.

Forms

1 A&H Probate FORM 2111.30a et seq: Improvement of real estate.

Research Aids

Report:

O-Jur2d: Guardian and Ward § 145

[RESIDENT GUARDIAN OF NONRESIDENT WARD]

§ 2111.37 Guardian for nonresident. (GC §§ 10507-46, 10507-47)

When a nonresident minor, incompetent, habitual drunkard, idiot, imbecile, lunatic, or person confined in a state, charitable, or penal institution has real estate, chattels, rights, credits, or moneys in this state, the probate court of the county where such property or a part of it is situated may appoint a resident guardian of such ward to manage, collect, lease, and take care of his property. Such appointment may be made whether or not such ward has a guardian, trustee, or other conservator in the state of his residence, and if he has such guardian, trustee, or other conservator in the state of his residence, the control and authority of the resident guardian appointed in Ohio shall be superior as to all property of the ward in Ohio.

The first appointment of a resident guardian of a nonresident ward shall extend to all the property and effects of the ward in this state and exclude the jurisdiction of the probate court of any other county.

HISTORY: GC §§ 10507-46, 10507-47; 114 v 320 (395). Eff 10-1-53. GC § 10507-46 analogous to former GC § 11014; GC § 10507-47 analogous to former GC § 11015.

Comparative Legislation

Guardian of nonresident ward:

Cal.—Probate Code, § 1570

Ind.—Burns' Stat, § 29-1-18-39

Ky.—KRS, § 387.190

Mich.—MCLA, § 703.25

N.Y.—SCPA, § 1716

Pa.—Purdon's Stat, Tit. 20, §§ 5111, 5511

Fla.—FSA, § 744.307

Forms

1 A&H Probate FORM 2111.37a et seq.

1 A&H Probate FORM 2109.02a et seq: Fiduciary; appointment, duties.

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

1 A&H Probate FORM 2111.04a et seq: Notice of application.

Outline of Procedure

Appointment of guardian of nonresident ward. Leyshon No. 43; A&H No. 14

Research Aids

Resident guardian for nonresident ward:

O-Jur2d: Guardian and Ward §§ 19, 39, 84

ALR

Removal of child from state pending proceedings for custody as defeating jurisdiction to award custody. 171 ALR 1405.

CASE NOTES AND OAG

1. Where application has been made for trusteeship of a lunatic, adjudged insane in another state (former GC § 11014 [see now RC § 2111.37]), and also by the foreign guardian to possess the property of the lunatic in this state (former GC § 11009 [see now RC § 2111.42]), it is within the discretion of the probate court, in the interest of the lunatic, to grant the trusteeship and deny the application of foreign guardian: *George v. Cleveland Trust Co.*, 22 App 1, 153 NE 914.

§ 2111.38 Bond and duties. (GC § 10507-48, 10507-49, 10507-50)

The resident guardian of a nonresident ward shall give bond and be bound and controlled by all the statutes of Ohio as though he were a guardian of a ward resident in this state, and shall have all of the authority of a guardian of a resident ward including the authority to lease or sell real state belonging to the ward.

Unless removed by the probate court, a resident guardian of a nonresident minor shall hold his appointment until such minor dies or arrives at the age of majority, whether or not such minor is over fourteen years of age at the time of appointment. A resident guardian of any other nonresident ward shall hold his appointment until the death of the ward or until the court is satisfied that the necessity for the guardianship no longer exists.

All moneys due to such nonresident ward while such resident guardianship continues shall be paid over to his foreign guardian so far as necessary or proper for the ward's support and maintenance. If the ward dies, such moneys shall be paid to his ancillary administrator or other legal representative, provided that the court which appointed such resident guardian has satisfactory proof, as provided by section 2111.39 of the Revised Code, of the authority of such foreign guardian, administrator, or other legal representative to receive the moneys or estates of such nonresident ward, that the security given by such foreign guardian, administrator, or other legal representative is sufficient to protect such ward's interest or estate, and provided such court deems it best for him or his estate.

HISTORY: GC §§ 10507-48, 10507-49, 10507-50; 114 v 320 (395). Eff 10-1-53. GC § 10507-48 analogous to former GC § 11017; GC § 10507-49 analogous to former GC § 11018; GC § 10507-50 analogous to former GC § 11019.

Forms

1 A&H Probate FORM 2111.38a et seq

1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

Research Aids

Authority of resident guardian:

O-Jur2d: Guardian and Ward § 84

Bond of resident guardian:

O-Jur2d: Fiduciaries § 177 et seq

Disposition of monies on death of ward:

O-Jur2d: Guardian and Ward § 226

Payment of monies to foreign guardian:

O-Jur2d: Guardian and Ward § 132

Tenure of office:

O-Jur2d: Guardian and Ward § 72

Am-Jur2d: Guardian and Ward § 54 et seq

§ 2111.39 Foreign guardian may collect money. (GC § 10507-51)

When a foreign legal representative of a nonresident ward applies to have all or any of the moneys or property in the hands of the resident guardian of such ward paid or delivered to him, he must file his petition or motion in the probate court by which such resident guardian was appointed. Such resident guardian must be given thirty days' notice of the time of hearing thereon and such foreign representative must produce an exemplification under the seal of the office, if there be a seal, of the proper court of the state of his residence containing all the entries on record in relation to his appointment and qualification, authenticated as required by the act of congress in such cases. Upon the hearing thereof, the court shall make such order as it deems for the best interests of such nonresident ward or his estate.

HISTORY: GC § 10507-51; 114 v 320 (396). Eff 10-1-53. Analogous to former GC § 11020.

Cross-References to Related Sections

See RC § 2111.38 which refers to this section.

Forms

1 A&H Probate FORM 2111.39a et seq.

Outline of Procedure

Payment of money by resident guardian of nonresident ward. Leyshon No. 86; A&H No. 64

Research Aids

Procedure for collection:

O-Jur2d: Guardian and Ward § 133

§ 2111.40 When nonresident ward becomes a resident. (GC § 10507-52)

When a nonresident ward for whom a resident guardian was appointed has become a resident since the appointment and a guardian has been appointed for such ward, the probate court shall remove the resident guardian previously appointed and require an immediate settlement of his account.

HISTORY: GC § 10507-52; 114 v 320 (396). Eff 10-1-53. Analogous to former GC § 11037.

Research Aids

Settlement and accounting:

O-Jur2d: Guardian and Ward § 73; Fiduciaries § 258

Termination of guardianship when ward becomes a resident of state:

O-Jur2d: Guardian and Ward § 73; Fiduciaries § 328

[NONRESIDENT GUARDIAN OF NON-
RESIDENT WARD]

§ 2111.41 When ward removes from the state and has a foreign guardian.

When a ward for whom a guardian has been appointed in this state removes to another state or territory, and a guardian of the ward is there appointed, the guardian in this state may be removed and required to settle his account.

Such a removal shall not be made unless the guardian appointed in another state or territory applies to the probate court in this state that made the former appointment, and files an exemplification from the record of the court making the foreign appointment containing all the entries and proceedings relating to his appointment, his giving bond, with a copy thereof, and of the letters of guardianship, all authenticated as required by the act of congress. Before such an application is heard or action taken by the court, at least thirty days' written notice shall be served on the guardian appointed in this state specifying the object of the application, and the time it is to be heard.

No such removal shall be made in favor of a foreign guardian, unless at the time of the hearing the state or territory in which he was appointed has a similar provision as to wards removing from that state or territory. The court shall grant the application unless it makes an affirmative finding that the removal of the guardian appointed in this state would not be in the interest of the ward.

If on such a hearing the court removes the guardian, it shall make all suitable orders for discharging the guardian and shall deliver to the foreign guardian all moneys and other property in the hands of the resident guardian after his settlement.

HISTORY: GC §§ 10507-53 to 10507-56; 114 v 320 (396); 125 v 903 (974) (E# 10-153); 136 v S 145. E# 1-1-76.

GC §§ 10507-53 to 10507-56 analogous to former GC § § 10940 to 10943.

Forms

1 A&H Probate FORM 2111.41a et seq.

Outline of Procedure

Removal of guardian when guardian removes from state. Leyshon No. 101; A&H No. 81

Research Aids

Effect of ward's removal from state:

O-Jur2d: Guardian and Ward §§ 74-77; Fiduciaries § 328

Am-Jur2d: Guardian and Ward § 219

Settlement and accounting:

O-Jur2d: Fiduciaries § 258

Law Review

Ohio annotations to Restatement of Conflict of Laws, §§ 149, 150. Prof. Fletcher R. Andrews of Western Reserve University. 9 CinLRev 77.

CASE NOTES AND OAG

1. An insane person has power to change his domicile if a guardian of his person has not been ap-

pointed: In re Greer, 24 NP(NS) 46.

2. General Code §§ 10507-54 and 10507-56 (see now RC § 2111.41) must be complied with in order to receive or recover money belonging to a ward, from an executor or administrator, and remove the same to another state: Banning v. Gotshall, 62 OS 210, 56 NE 1030.

3. In hearing of application for trusteeship of lunatic adjudged insane in foreign state, and application of foreign guardian to possess property of lunatic, probate court has discretion, in view of former GC §§ 10942, 10944, 10991 and 11020 (see now RC §§ 2109.04, 2111.13, 2111.14, 2111.26, 2111.41, 2111.42 and 2111.48), in best interests of lunatic, to grant application for trusteeship and deny foreign guardian's application: George v. Cleveland Trust Co., 22 App 1, 153 NE 914.

4. Common pleas court is without authority to take jurisdiction and remove resident guardian, until proof, required by this section, has been made: Johnson v. Myers, 5 OLA 788.

5. An allegation in a petition that the laws of a foreign state contain same provisions, as to removal of guardian, as are contained in the Ohio statute is not sufficient, as proof, to comply with former GC § 10942 (see now RC § 2111.41): Johnson v. Myers, 5 OLA 788.

§ 2111.42 Foreign guardians may receive property.

In any case in which a guardian is appointed by a court of another state or territory or by a foreign country for a nonresident ward, and the ward is entitled to money or other property in the custody of an executor, administrator, or other person in this state, the foreign guardian may file an application in the probate court in which the executor or administrator was appointed, or in the court of the county in which the other person holding the property resides, asking authority to demand, receive, or recover by suit the money or other property, and remove it. With the application, the foreign guardian shall file a copy of his appointment and bond, and a copy of any entries and proceedings in the cause in which he was appointed concerning the property in this state, authenticated as required by the act of congress or by the law applicable to proceedings in the courts of the foreign country. Due notice of the filing and time of hearing on the application shall be given to the resident executor, administrator, or custodian. If the limitations upon which the ward is entitled to the money or other property do not conflict with the removal, and unless the court makes an affirmative finding that the removal would not be in the best interest of the ward, the court shall grant the application, and authorize the guardian to demand, receive, or recover by suit the money or other property, and remove it from this state.

HISTORY: GC § 10507-57; 114 v 320 (397); 119 v 394; 136 v S 145. E# 1-1-76.

See former GC §§ 10944, 11009.

Comment

This section has been made available to a guardian appointed in a foreign country, as well as in another state or territory.

The provisions relating to procedure have been clarified. The application may be filed in the probate court of the county in which the executor or administrator was appointed, or of the county in which the holder of the property resides. The application must be accompanied by copies of the guardian's appointment, his bond, and any entries or proceedings concerning the property. If the application is made by a guardian appointed in another state or territory, the copy must be authenticated as required by the act of congress. See U. S. Code, Title 28, § 687. If the application is made by a guardian appointed in a foreign country, the copy must be authenticated as required by the law applicable to proceedings in courts of such foreign country.

Forms

1 A&H Probate FORM 2111.42a et seq.

Outline of Procedure

Payment of money by resident guardian of a nonresident ward. Leyshon No. 86, A&H No. 64; Payment of money to foreign guardian of nonresident ward. Leyshon No. 86-1, A&H No. 65

Research Aids

Removal of property by foreign guardian:

O-Jur2d: Guardian and Ward § 134

Am-Jur2d: Guardian and Ward § 221

Law Reviews

Ohio annotations to Restatement of Conflict of Laws, § 150. Prof. Fletcher R. Andrews of Western Reserve University. 9 CinLR 77.

CASE NOTES AND OAG

1. The authority in former GC § 11009 (see now RC § 2111.42) for a foreign guardian of a lunatic to possess property of his ward in this state, is limited to similar power possessed by guardians appointed by the state courts under former GC § 10991 (see now RC §§ 2109.04, 2111.13, 2111.14, 2111.26 and 2111.48): *George v. Cleveland Trust Co.*, 22 App 1, 153 NE 914.

2. A foreign guardian is not entitled to receive or receipt for money due the ward from an executor until he complies with this section, by filing an exemplification of the record, etc., and the probate court may refuse to order the payment of the money if detrimental to the ward. Payment without such order is unauthorized and will not protect the person making it: *Banning v. Gotshall*, 62 OS 210, 56 NE 1030; see also *Knedler v. Doster*, 69 OS 573, 70 NE 1125.

3. An action may be maintained in this state by a minor to recover damages for personal injuries, through his guardian, appointed in Pennsylvania, although such minor lives in such foreign state: *Pennsylvania R. Co. v. Raub*, 11 CC(NS) 157, 20 CD 542 [affirmed, without report, 79 OS 454, 87 NE 1139].

4. Foreign guardian ineligible to appointment as such in Ohio will not be permitted to collect money due the ward in this state: *Habighurst v. Stevenson*, 10 DecRep 162, 19 Bull 106.

5. An administrator or guardian in one state cannot sue in the courts of another state without authority from the latter: *Smith v. Madden*, 78 Fed 833, 9 OFD 320, 37 Bull 391.

6. Courts of Indiana held to be powerless to authorize conveyance of interest in real estate in Ohio by guardian

of insane person, but such action should have been brought in courts of state of Ohio: *Smith v. McKelvey*, 28 App 361, 162 NE 722.

§ 2111.43 Foreign wards and guardians.
(GC § 10507-58)

Wards living outside this state and owning lands within it are entitled to the benefit of Chapters 2101. to 2131., inclusive, of the Revised Code. Guardians appointed by foreign courts for nonresident wards may bring and maintain actions and enforce the collection of judgments rendered in such cases in their favor in the manner and to the extent that they could if appointed in this state, upon giving security for the costs which may accrue therein as other nonresidents do under sections 2323.30 to 2323.36, inclusive, of the Revised Code.

HISTORY: GC § 10507-58; 114 v 320 (397). Eff 10-1-53. Analogous to former GC § 10955.

Research Aids

Actions touching foreign ward's land:

O-Jur2d: Guardian and Ward §§ 132, 157, 196; Partition § 38

ALR

Capacity of guardian to sue or to be sued outside state where appointed. 94 ALR2d 162.

CASE NOTES AND OAG

1. There is nothing in GC § 12044 (RC § 5307.19) that limits its application to guardians appointed by Ohio probate courts, or that would exclude partition actions from the operation of this section: *Kunzelmann v. Duval*, 61 App 360, 14 OO 519, 22 NE(2d) 632.

2. An action may be maintained in this state by a minor, resident in Pennsylvania, through his guardian appointed in that state, to recover damages for personal injuries: *Pennsylvania R. Co. v. Raub*, 11 CC(NS) 157, 20 CD 542 [affirmed, without report, 79 OS 454, 87 NE 1139].

3. A guardian appointed in another state cannot as such guardian sue in this state: *Smith v. Madden*, 78 Fed 833, 37 Bull 291, 9 OFD 320.

§ 2111.44 Sale of lands of foreign wards.
(GC § 10507-59)

Applications for the sale of real estate by guardians of wards who live out of this state shall be made in the county in which the land is situated. If such real estate is situated in two or more counties, such application shall be made in one of the counties in which a part of it is situated. Additional security, which may be approved by the probate court of the county in which the application is made, shall be required from such guardian when deemed necessary.

HISTORY: GC § 10507-59; 114 v 320 (397). Eff 10-1-53. Analogous to former GC § 10956.

Research Aids

Sale of lands of foreign wards:

O-Jur2d: Guardian and Ward §§ 163, 167

[TERMINATION OF GUARDIANSHIP]

§ 2111.45 [Marriage of ward.]

The marriage of a ward shall determine the guardianship as to the person but not as to the estate of the ward.

HISTORY: GC § 10507-20; 114 v 320 (388); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10929.

Comparative Legislation

Termination by marriage:

Cal.—Probate Code, § 1433

Ind.—Burns' Stat, § 29-1-18-47

Mich.—MCLA, § 703.23

N.Y.—SCPA, § 1701

Text Discussion

1 Anderson Fam. L. § 7.7

Research Aids

Termination by marriage:

O-Jur2d: Guardian and Ward § 223

Am-Jur2d: Guardian and Ward § 55

§ 2111.46 Guardianship of minors. (GC § 10507-60)

When a guardian has been appointed for a minor before such minor is over fourteen years of age, such guardian's power shall continue until the ward arrives at the age of majority, unless removed for good cause or unless such ward selects another suitable guardian. After such selection is made and approved by the probate court and the person selected is appointed and qualified, the powers of the former guardian shall cease. Thereupon his final account as guardian shall be filed and settled in court.

Upon the termination of a guardianship of the person, estate, or both of a minor before such minor reaches eighteen years of age, if a successor guardian is not appointed and if the court finds that such minor is without proper care, the court shall certify a copy of its finding together with as much of the record and such further information as the court deems necessary, or as the juvenile court may request, to the juvenile court for further proceedings and thereupon such court shall have exclusive jurisdiction respecting such child.

HISTORY: GC § 10507-60; 114 v 320 (398); 121 v 557 (570). Eff 10-1-53. Analogous to former GC § 10919.

Cross-References to Related Sections

Marriage terminates guardianship, RC § 2111.45.

Resignation or removal of guardian, RC § 2109.24.

Comparative Legislation

Termination:

Cal.—Probate Code, § 1590

Ind.—Burns' Stat, § 29-1-18-47

Mich.—MCLA, § 703.8

N.Y.—SCPA, § 1707

Pa.—Purdon's Stat, Tit. 20, § 5131

Fla.—FSA, § 744.464

Research Aids

Effect of termination before ward reaches majority:

O-Jur2d: Guardian and Ward § 223

Termination by minor ward's selection of another guardian:

O-Jur2d: Guardian and Ward §§ 71, 118

CASE NOTES AND OAG

1. Death of the ward terminates all duties and powers upon the part of the guardian: *Simpson v. Holmes*, 106 OS 437, 140 NE 395 [approving and following *Sommers v. Boyd*, 48 OS 648].

2. A guardian will not be removed merely because his ward has taken a dislike to him and will have no dealings with him: *France v. Frantz*, 4 NP 278, 6 OD 555.

3. After a ward arrives at majority, the guardianship ceases ipso facto, and his further dealings are those of a mere agent and are not covered by the bond: *In re Streit*, 12 OD(NP) 158.

4. An uncle has sufficient interest in a minor to move for the removal of a guardian on account of jurisdiction, and upon refusal, he may appeal to the common pleas court: *In re Murray*, 8 CC(NS) 498, 18 CD 652 [affirming 4 NP(NS) 233, 16 OD 612].

5. Removal of a guardian requires substantial evidence that will clearly convince the court that the interests of the ward cannot otherwise be preserved, in order to establish that the interest of the trust demands it, as required by RC § 2109.24: *In re Conley*, 39 OO(2d) 292, 10 OMisc 197, 224 NE(2d) 183.

6. The properly appointed guardian of a minor will not be removed on the application of another relative of the minor and evidence relating only to the qualifications of the present guardian as compared to those of the applicant: *In re Conley*, 39 OO(2d) 292, 10 OMisc 197, 224 NE(2d) 183.

§ 2111.47 Wards other than minors.

Upon reasonable notice to the guardian, to the ward, and to the person on whose application the appointment was made, and upon satisfactory proof that the necessity for the guardianship no longer exists or that the letters of appointment were improperly issued, the probate court shall order that the guardianship of an incompetent terminate and shall make an appropriate entry upon the journal. Thereupon the guardianship shall cease, the accounts of the guardian shall be settled by the court, and the ward shall be restored to the full control of his property as before the appointment. Such entry terminating the guardianship of an insane person shall have the same effect as a determination by the court that such person is restored to sanity.

HISTORY: GC § 10507-61; 114 v 320 (398); 129 v 1448 (1454), § 1. Eff 10-25-61.

See former GC §§ 11010, 11013.

Forms

1 A&H Probate FORM 2111.47a et seq.

Research Aids

Termination of guardianship:

O-Jur2d: Guardian and Ward §§ 228-231

Am-Jur2d: Guardian and Ward § 54 et seq

Law Reviews

Ohio annotations to Restatement of Conflict of

Laws, § 109. Prof. Fletcher R. Andrews of Western Reserve Univ. 12 CinLRev 410.

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1. This section provides an adequate remedy for the removal of a guardian and the exclusive method for the exercise of original jurisdiction in such a proceeding: In re Clendenning, 145 OS 82, 30 OO 301, 60 NE(2d) 676.

2. A proceeding to terminate the guardianship of an incompetent is governed by the provisions of this section which place upon the ward the duty of producing "satisfactory proof that the necessity for the guardianship no longer exists": In re Breece, 173 OS 542, 20 OO(2d) 155, 184 NE(2d) 386.

3. The sole issue before the court in a proceeding to terminate the guardianship of an incompetent is whether the ward has presented "satisfactory proof that the necessity for the guardianship no longer exists," and, where such "satisfactory proof" is presented, the court is under a mandatory duty to terminate the guardianship: In re Breece, 173 OS 542, 20 OO(2d) 155, 184 NE(2d) 386.

4. The presumption that a person adjudicated an incompetent continues to be incompetent is rebuttable, and will not prevail where, in a proceeding pursuant to this section to terminate the guardianship of an incompetent, there is substantial and overwhelming evidence that the necessity for the guardianship no longer exists: In re Breece, 173 OS 542, 20 OO(2d) 155, 184 NE(2d) 386.

4.1 A guardian of a mentally incompetent ward does not have a right of appeal, under RC § 2101.42, from an order of the probate court terminating the guardianship pursuant to the provisions of RC § 2111.47 upon satisfactory proof that the ward has regained his mental competency and the necessity for the guardianship has ceased to exist, where the record does not reflect any interest of the guardian adverse to the ward in such order of termination, or show that the guardian has been aggrieved in any manner by the order of termination: In re Love, 19 OS(2d) 111, 48 OO(2d) 107, 249 NE(2d) 794.

5. The next friend of an incompetent adult may initiate the proceedings provided in this section for the termination of the guardianship of such ward on the ground that the letters of appointment were improperly issued: In re Kelley, 1 OApp(2d) 137, 30 OO(2d) 159, 204 NE(2d) 96.

6. The provisions of this section, which allow the termination of a guardianship "upon satisfactory proof that the necessity for the guardianship no longer exists," are mandatory and, upon a proper showing being made, the guardianship shall be terminated: In re Tillman, 100 App 291, 60 OO 254, 136 NE(2d) 291.

7. In a proceeding under this section, to terminate guardianship of an incompetent, the probate court shall, after proper notice and upon satisfactory proof

that the necessity for the guardianship no longer exists, order that the guardianship of the incompetent terminate and make an appropriate entry upon the journal: In re Nitschke, 113 App 243, 17 OO(2d) 223, 177 NE(2d) 628.

7.1 The probate court's finding that a ward has been restored to reason, in an action to terminate the guardianship, is not absolutely binding upon another court in another proceeding: In re Appropriation for Highway Purposes, 47 OO(2d) 420, 19 OMisc 81, 246 NE(2d) 626 (1969).

8. The constitutional rights of one who has voluntarily consented to the appointment of a guardian under the statutes providing for such appointment are protected by this section, wherein provision is made for the court to determine in a proper hearing whether the necessity for the guardianship continues to exist: In re Williams, 78 OLA 98, 151 NE(2d) 602 (App).

9. When one has voluntarily consented to the appointment of a guardian under the statutes providing for such appointment and the court has acted upon the matter and made the appointment, the ward cannot terminate the guardianship by merely withdrawing his consent: In re Williams, 78 OLA 98, 151 NE(2d) 602 (App).

10. To terminate a guardianship under the provisions of this section there must be satisfactory proof that the necessity for the guardianship no longer exists or that the letters of appointment were improperly issued: In re Barr, 80 OLA 488, 156 NE(2d) 357 (PC).

11. This section, providing for the termination of a guardianship, is the exclusive method whereby a guardianship may be terminated and control of a ward's property restored: In re Titington, 82 OLA 563, 162 NE(2d) 628 (PC).

12. Any other kind of attack upon the validity of a guardianship other than the statutory methods provided under RC §§ 2101.42 and 2111.47 may be regarded as collateral and as such cannot succeed: In re Titington, 82 OLA 563, 162 NE(2d) 628 (PC).

13. The services of an attorney who acts in good faith on an unsuccessful motion to terminate the guardianship of an incompetent at his request, are in the nature of necessities and are proper charges against the estate of the incompetent: In re Wolfe, 14 OO 525 (PC).

14. In an action to contest a will it is proper to instruct the jury that the law provides that an entry terminating a guardianship shall have the force and effect of a determination by the court that such person is restored to sanity (this section), so long as the court also instructs that there still remains for the jury a duty to determine whether or not the decedent was capable of making a will: Eikenberry v. McFall, 33 OLA 525.

DECISIONS UNDER FORMER GC § 11010

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1. Testimony by applicant which was clear and definite as to age, dates, children and property, together with lack of testimony of any acts or omissions indicating applicant was not able to take care of

his property, showed applicant was mentally qualified and should be restored to estate: *Rhoads v. Rhoads*, 29 App 449, 163 NE 724.

2. The foregoing case contains an excellent discussion as to what testimony may be given by lay witnesses in such a proceeding.

3. There is no appeal from the overruling, by the probate court, of a motion made by a lunatic to have his guardian's letters revoked, on the ground that they had been improperly issued: *Messenger v. Bliss*, 35 OS 587.

4. An appeal will lie from an order of the probate court overruling a motion of an imbecile ward to determine the guardianship: *Hiett v. Nebergall*, 45 OS 702, 17 NE 558.

5. An imbecile ward may, under former GC § 11010 (RC § 2111.47), file an application or motion in the court for a termination of the guardianship upon the ground that he has been restored to reason, or that the letters of guardianship have been improperly issued, and an appeal will lie to the court of common pleas from the order of the probate court made upon the hearing of such motion: *Robinson v. Wagner*, 95 OS 300, 116 NE 514 [for former opinion, see *In re Robinson*, 18 NP(NS) 286, 30 OD 433, which was reversed, 25 CC(NS) 26, 35 CD 156; motion to certify record overruled, 13 OLR 499].

6. Where upon the hearing of the cause in the court of common pleas on appeal, judgment is rendered against the imbecile ward, he may in his own name file a petition in error in the court of appeals to have such judgment reviewed: *Robinson v. Wagner*, 95 OS 300, 116 NE 514 [for former opinion, see *In re Robinson*, 18 NP(NS) 286, 30 OD 433, which was reversed, 25 CC(NS) 26, 35 CD 156; motion to certify record overruled, 13 OLR 499].

7. Death of the ward terminates all duties and powers upon the part of the guardian: *Simpson v. Holmes*, 106 OS 437, 140 NE 395 [approving and following *Sommers v. Boyd*, 48 OS 648].

8. Unpaid debts of the ward or guardian must be redressed through the personal representative of the ward's estate: *Simpson v. Holmes*, 106 OS 437, 140 NE 395.

8.1 Where it appears that a ward's consent to the appointment of a guardian on the ground of physical incompetency was given under an apparent misapprehension of the ward's rights, the guardianship should be terminated: *In re Luft*, 91 App 409, 45 OO 333, 59 OLA 33.

9. The fact that a person who has been committed to a state hospital for the insane has been discharged therefrom, does not operate as a vacation of an order of the probate court which appointed a guardian for such person: *Reno v. Love*, 26 CD 296, 60 Bull 197 (Ed) [affirmed, without opinion, 88 OS 623].

10. In a proceeding to terminate a guardianship over an imbecile, the sole question is whether the ward was properly declared to be an imbecile at the time the appointment was made, or whether since the making of the appointment he has been restored to reason: *In re Kramer*, 8 NP(NS) 217, 19 OD 444.

11. While the order of termination *ipso facto* disposes of the guardian, it is not an order based upon the qualification of the guardian, as in the case of the guardian of a minor ward, but of capacity of ward: *In re Kramer*, 8 NP(NS) 217, 19 OD 444.

[§ 2111.47.1] § 2111.471 Transfer of court having jurisdiction.

If the ward for whom a guardian has been appointed removes to another county within this

state and acquires a new residence or legal settlement therein, the probate court having jurisdiction over the guardian and the ward, may, on its own motion, or on motion of the guardian or any interested party, with the consent of the probate court of the county to which such ward has removed, transfer the jurisdiction over said guardian and ward to such probate court, provided it appears that such transfer would be in the best interest of the ward.

Thereupon, the original probate court shall prepare certified copies of the appointment, letters of guardianship, bond, inventory, the last account, if any, a full and complete transcript of its docket and journal entries up to and including the order of transfer and copies of such other papers as may be requested by the receiving court, and shall cause the same to be filed in the probate court accepting jurisdiction, all costs to be paid by the guardian out of the assets of the estate of the ward.

Upon the filing of the certified copies of the original papers and the transcript, and the payment of costs, the probate court to which the proceedings have been transferred may assign a case number and by journal entry, accept jurisdiction. A copy of the entry accepting jurisdiction shall be returned to the court of original jurisdiction. Thereupon, the probate court to which the proceedings have been transferred shall acquire jurisdiction over the guardian and the ward as though such probate court had jurisdiction and appointed the guardian in the first instance, and the jurisdiction of the probate court from which the proceedings have been transferred shall cease.

HISTORY: 129 v 7 (10), § 1. **EF** 10-5-61.

Forms

1 **A&H Probate FORM 2111.47.1a et seq.**

Research Aids

Transfer of court having jurisdiction:
O-Jur2d: Guardian and Ward § 74

[ACTS VALIDATED]

§ 2111.48 Certain acts validated. (GC § 10507-25)

All sales, leases, encumbrances, or liens made or created on any real estate located in Ohio by guardians for persons who are incompetent by reason of advanced age or mental or physical disability since August 17, 1919, by order of any court of this state shall not be declared invalid for the reason that such guardians for incompetents were not vested with all the statutory powers given to guardians of idiots, imbeciles, and lunatics. Such acts of guardians for incompetents are legal and effective.

HISTORY: GC § 10507-25; 114 v 320 (389). Eff 10-1-53. ALR
See former GC § 10991.

Sale without order of court. 108 ALR 936.

Research Aids

Real estate transactions entered into by guardian
validated:

O-Jur2d: Guardian and Ward § 126

CHAPTER 2113: EXECUTORS AND ADMINISTRATORS—APPOINTMENT; POWERS; DUTIES

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- 2113.02 Limitation for granting original administration.
- 2113.03 Release from administration.
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- 2113.26 Contents of application.
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- 2113.30 Continuing decedent's business.

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- 2113.64 Investment of unclaimed money.

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- 2113.69 Newly discovered assets.

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- 2113.70 Suit against foreign executors and administrators.

- 2113.71 Jurisdiction.

- 2113.72 Proceedings against foreign executor or administrator.

- 2113.73 Security for distributees and indemnification for sureties.

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- 2113.81 Money and property to be held in trust for safekeeping for nonresidents of the United States.

- 2113.82 Payments of money or property by county treasurer or trustee.

[APPOINTMENT]

- § 2113.01** What court shall grant letters.
(GC § 10509-1)

Upon the death of a resident of this state intestate, letters of administration of his estate shall be granted by the probate court of the county in which he was a resident at the time he died.

If the will of any person is admitted to probate in this state, letters testamentary or of administration shall be granted by the probate court in which such will was admitted to probate.

HISTORY: GC § 10509-1; 114 v 320 (400); 120 v 649 (654), § 1. EF 10-1-53.

Comment

The 1943 revision of this section was made necessary by reason of the amendment of GC § 10504-15 (RC § 2107.11), permitting original probate in this state of the will of a nonresident decedent.

Cross-References to Related Sections

Application for appointment, RC § 2113.07

Corporation for administration of charitable trust, RC § 1719.06.

Trustees for absentees, RC § 2119.01.

See RC § 2131.02 which refers to this chapter.

See RC §§ 2115.01, 2117.06, 2117.15, 2117.25, 2119.03 which refer to Chapter 2113. et seq.

Comparative Legislation

Jurisdiction to grant letters:

Cal.—Probate Code, § 301

Ill.—Rev Stat, ch 3, § 9-2

Ind.—Burns' Stat, § 29-1-10-1

Ky.—KRS, § 395.030

Mich.—MCLA, § 701.19

N.Y.—SCPA, § 201

Pa.—Purdon's Stat, Tit. 20, § 711

Fla.—FSA, § 733.401

Forms

1 A&H Probate FORM 2113.01a et seq.

Outline of Procedure

General administration procedure. Leyshon No. 75-1, A&H No. 50.

Appointment of administrator. Leyshon No. 35, A&H No. 6; Executor. Leyshon No. 41, A&H No. 12.

Research Aids

Jurisdiction to grant letters:

O-Jur2d: Executors and Administrators § 38

ALR

Diverse adjudications by courts of different states as to domicile of decedent as regards taxation, administration, or distribution of estate. 121 ALR 1200.

Effect of divorce, separation, desertion, unfaithfulness, and the like, upon right to administer upon estate of spouse. 34 ALR2d 876.

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Scope

1. As to the necessity of administration, see *McBride v. Vance*, 73 OS 258, 76 NE 938, 112 AmSt 723, 4 AnnCas 191, and *In re Heinz*, No.99585, Probate Court, Franklin County.

2. The act of March 23, 1840, to provide for the settlement of estates of deceased persons, does not extend to estates in the course of settlement when it took effect: *McGovney v. State*, 20 O 93.

3. Our statutes provide for administration in this state, of the estate of a nonresident leaving an estate in Ohio: *Williams v. Welton*, 28 OS 451. But under the present probate code, see RC §§ 2129.01 to 2129.24.

4. Whether former GC § 10511 (see now RC § 2107.09), which authorizes the probate of a will in a county in which is located property which passes by such will, whether testator lives in such county or not, is repealed by former GC § 10604 (see now RC §§ 2113.01, 2129.04), which provides that letters testamentary should be granted by the county of which the deceased was a resident when he died, was discussed but not decided: *State ex rel Barbee v. Allen*, 96 OS 10, 117 NE 13.

5. This section is not in conflict with GC § 10504-15 (RC § 2107.11). The term "resident," as used in this section, is not synonymous with the term "domiciled" in either GC § 10504-10 (RC § 2107.09) or GC § 10504-15 (RC § 2107.11): *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

6. For the history of the law of the administration of decedent's estates, see *Yarian v. Stouffer*, 14 App 306.

Jurisdiction

12. In Ohio the jurisdiction of equity in the administration of estates is entirely auxiliary and can be exercised only when the remedy conferred upon the probate court is either imperfect or inadequate: *McDonald v. Aten*, 1 OS 293; *Taylor v. Huber*, 13 OS 288 [followed, *Fleming v. McGuffey*, 12 NP(NS) 19, 21 OD 387; distinguished, *Davis v. Corwine*, 25 OS 668; *Arbaugh v. Millet*, 5 CC 295, 3 CD 146]; *Piatt v. Longworth*, 27 OS 159; *Yarian v. Stouffer*, 14 App 306.

13. By the provisions of Const., Art. IV, § 8 and former GC § 10492 (see now RC § 2101.24), plenary jurisdiction is conferred on the probate court to grant and revoke letters testamentary and of administration, to direct and control the conduct and settle the accounts of executors and administrators, and order the distribution of estates: *Trumpler v. Royer*, 95 OS 194, 115 NE 1018 [affirming *Royer v. Trumpler*, 7 App 312, 27 OCA 117, 28 CD 186; for a later report, overruling motion to certify record, see *Trumpler v. Royer*, 16 OLR 108, 63 Bull 223].

14. The jurisdiction over a decedent's estate ac-

quired by the probate court of one county by the appointment of an administrator under this section is not exclusive of the jurisdiction over the same estate later acquired by the probate court of another county by virtue of proceedings under GC §§ 10504-10, 10504-15 and 10504-35 (RC §§ 2107.09, 2107.11, 2107.26): *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

15. The power of the probate court over the administration of the estate of decedents is said to be so broad and complete that the general jurisdiction over the estates of decedents which originally belonged to equity has been taken away from the common pleas court and transferred to the probate court: *Fleming v. McGuffey*, 12 NP(NS) 19, 21 OD 387 [for former opinion, see 8 NP(NS) 430, 19 OD 521].

16. A court of probate has inherent power, without specific statutory authority, to grant administration limited to the defense of a particular suit: *McArthur v. Scott*, 113 US 340, 28 LEd 1015, 5 Sct 652.

—Domicile

21. The jurisdiction of a probate court, acquired under this section, to appoint an administrator for the estate of an intestate who was a resident of the county of such court at the time he died, is terminated and superseded by the admission to probate of a will of the same decedent by the probate court of another county in which such decedent was domiciled at the time of death: *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

22. When a person moves from one county to another with the intention of making that his permanent residence, the probate court of the latter county has jurisdiction to grant letters of administration upon his death: *In re Welch*, 15 OO 189 (PC).

23. Whether a testator was an inhabitant of Ohio at the time of his death is one of the jurisdictional facts upon which the court is required to pass, upon application for original probate of a will: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming, on rehearing, *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43; which was modified in memorandum opinion, *Wilberding v. Miller*, 88 OS 609; and was on appeal from *Miller v. Miller*, 13 NP(NS) 1].

24. Whether the adjudication of the probate court that decedent was domiciled within its jurisdiction was conclusive, was avoided in *Hoffman v. Fleming*, 66 OS 143, 64 NE 63 [for holding below that such adjudication was void, see *Fleming v. Hoffman*, 8 NP 86, 10 OD 560], the court holding that the sureties on the executor's bond were estopped to deny jurisdiction.

25. It is now held that such judgment is final as against collateral attack: *Wilberding v. Miller*, 90 OS 28, 106 NE 665 [modifying and affirming, on rehearing, 88 OS 609, which modified in memorandum opinion, *Miller v. Miller*, 15 CC(NS) 481, 24 CD 43, the executor's bond were estopped to deny jurisdiction]; *State ex rel Barbee v. Allen*, 96 OS 10, 117 NE 13; *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86 OS 350].

27. A person can have more than one legal residence at a given time, but can have only one legal domicile. The probate court of the county in Ohio where a decedent had a legal domicile has jurisdiction to appoint an administrator of his estate notwithstanding such decedent may have had, for some purposes, a residence without Ohio: *Hill v. Blumenberg*, 19 App 404.

29. A court of another state is not bound by an adjudication of a court of Ohio as to the domicile of intestate: *Hine v. Cowles*, 18 CC(NS) 518, 33 CD 175 [affirmed, without opinion, *Cowles v. Cowles*, 86

OS 350].

30. Personal property of a deceased inmate of Ohio reformatory for women should be administered by the probate court of the county in which such inmate resided at the time of her death: 1921 OAG vol.1, p.63.

31. Jurisdiction of probate court to administer estate of one who died at Ohio soldiers' home: 1927 OAG p.1745.

—Property

37. Appointment of administrator gives the probate court jurisdiction not only of the estate but also of the administrator's person, until his accounts are settled. That jurisdiction is not ousted by the fact that the court makes an order requiring him to make settlement, and at the same time orders his removal and appoints a successor: *In re Morrison*, 68 OS 252, 67 NE 567.

38. The probate court has no jurisdiction under this section to appoint an administrator for the estate of a decedent not "an inhabitant of this state" at the time of his death. But under Art. IV, § 8 of the constitution of Ohio, the probate court of Crawford county has jurisdiction of the subject matter of the administration of decedent's estate, and having such jurisdiction, may, by virtue of the provisions of the treaty of the United States with Austria-Hungary by force of the second clause of Art. VI of the constitution of the United States, without any statutory provision therefor, appoint an administrator of the estate of a subject of that empire, not "an inhabitant of this state," but who died here leaving an estate in this county: *Steel Castings Co. v. Farkas*, 15 NP(NS) 609, 27 OD 220.

—Federal courts

43. The administration of the estates of deceased inhabitants of the state is a state and not a federal matter: *Pagano v. Cerri*, 93 OS 345, 112 NE 1037, LRA 1917A, 486.

Necessity of administration

48. As a general rule, administration is a prerequisite to the devolution of the personal estate of a decedent. Such personal property does not vest in the heirs but is in abeyance until administration is granted and is then vested in the administrator: *McBride v. Vance*, 73 OS 258, 79 NE 938, 112 AmSt 723; *Davis v. Corwine*, 25 OS 668; *Porter v. Doppes*, 12 App 391; *McCord v. Central Trust & Co.*, 13 App 26, 31 OCA 494 [motion to certify record overruled, 18 OLR 112, 65 Bull 278].

49. In the absence of special circumstances, the next of kin cannot maintain an action in his own name to recover the unadministered personal estate of the decedent or collect debts or other choses of action due him. Such action can be maintained only by the personal representative of the deceased: *Davis v. Corwine*, 25 OS 668; *McBride v. Vance*, 73 OS 258, 76 NE 938, 112 AmSt 723; *McCord v. Central Trust & Co.*, 13 App 26, 31 OCA 494 [motion to certify record overruled, 18 OLR 112, 65 Bull 278].

50. On the death of the owner of personal property, it passes to his administrator or executor: *McBride v. Vance*, 73 OS 258, 76 NE 938, 112 AmSt 723 [distinguished, *Meister v. Feuerstein*, 19 CC(NS) 460, 32 CD 525]; *Rogers v. Metropolitan Life Ins. Co.*, 24 NP(NS) 49 [for former opinion in court of appeals, see 15 App 333].

51. Unpaid debts of the ward or guardian must be redressed through the personal representative of the ward's estate: *Simpson v. Holmes*, 106 OS 437, 140 NE 395.

52. Only where there is collusion between the

administrator and defendants may the heir or next of kin of the deceased bring an action to recover assets of the estate, joining the administrator as a party defendant: *Porter v. Doppes*, 12 App 391.

55. Where there is any personal property to distribute, or any debts owing to the decedent, there must be an administration of the estate, unless estates not exceeding in value one hundred dollars be exempted by former GC § 10617 (see now RC §§ 2109.-48, 2113.06, 2113.07): *Barreille v. Bettman*, 199 Fed 838.

56. If a trust is created and successive beneficiaries die, the next of kin may sue in his own name as beneficiary without successive administrations: *Taylor v. Huber*, 13 OS 288.

Relation back of powers of administrator

61. Where administration is granted upon the estate of a deceased ward, the assets vest immediately in the administrator whose title dates back to the time of the decease. He, and not the former guardian, is the proper person to list the personal estate for taxation: *Sommers v. Boyd*, 48 OS 648, 29 NE 497.

62. Due qualification of an administrator relates back to the time of his appointment as regards acts done by him in the interim which are for the benefit of the estate: *Archdeacon v. Cincinnati Gas & C. Co.*, 76 OS 97, 81 NE 152.

Other questions

67. Where a married woman, domiciled in Ohio, dies intestate, leaving children, and her surviving husband afterward obtains letters of administration in Pennsylvania, and a report is made on his final settlement there, and his children except, they cannot maintain a suit here for distribution while the settlement in Pennsylvania is pending: *Adams v. Adams*, 7 OS 83.

68. One claiming the estate of a decedent may challenge the appointment of an administrator if made in a county wherein the decedent was not an inhabitant or resident at the time of his death, as required by former GC § 10604 (see now RC §§ 2113.-01, 2129.04): *In re Gingery*, 103 OS 559, 134 NE 449.

69. A claim for wrongful death is part of decedent's estate, and an administrator can be appointed to recover it, even though deceased left no other assets: *In re Arduino*, 9 NP(NS) 369, 20 OD 461.

70. Under the treaty with Italy, the consul of that government has the right to intervene in the administration of the estate of a decedent who was a citizen of that country: *In re Arduino*, 9 NP(NS) 369, 20 OD 461.

71. A presumption of death arising from long continued absence is not conclusive, and if the person who is supposed to be dead is not so in fact, the administration of his estate is a nullity: *Oglesby v. Rose*, 11 NP(NS) 188, 21 OD 291.

72. There is no requirement that notice be given to the Italian consul of application for administration on the estate of a deceased Italian subject, where the applicant for letters is a brother of decedent and a minor son of the decedent is in court consenting thereto: *In re Balbo*, 16 NP(NS) 9, 29 OD 603.

73. Executors or administrators de son tort are no longer recognized in Ohio: *In re Pollock*, 17 NP(NS) 490, 60 Bull 273.

§ 2113.02 Limitation for granting original administration. (GC § 10509-13)

Administration shall not be originally granted as of right after the expiration of twenty years from the death of the testator or intestate. But, within his county, each probate judge may grant letters of original administration upon the estate of a deceased person after the expiration of twenty years upon the petition of interested persons or their agent and on good cause shown therefor. Before allowing the prayer of such petition, such judge may direct notice thereof to be given by publication, for a period not exceeding thirty days, in one or more of the newspapers printed in the county where such petition is filed.

HISTORY: GC § 10509-13; 114 v 320 (403). **EF 10-1-53.** Analogous to former GC § 10626.

Forms

1 A&H Probate FORM 2113.02a et seq.

Outline of Procedure

Appointment of administrator after twenty years. *Leyshon No. 36; A&H No. 7*

Research Aids

Lapse of time:

O-Jur2d: Executors and Administrators § 66

Am-Jur2d: Executors and Administrators § 84

Notice:

O-Jur2d: Executors and Administrators § 68

ALR

Statute of limitations: Effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued. 28 ALR3d 1141.

CASE NOTES AND OAG

1. This section gives to the probate court authority to appoint an administrator more than twenty years after decedent's death where the statutory procedure is followed: *Thornberry v. Freudiger*, 28 OLA 142.

§ 2113.03 Release from administration.

(A) Upon the application of any interested party, after notice of the filing of the application has been given to the surviving spouse and heirs at law in the manner and for the length of time the probate court directs, and after three weeks' notice to all interested parties by publication once each week in a newspaper of general circulation in the county, unless the notices are waived or found unnecessary, the court, when satisfied that the assets of an estate are fifteen thousand dollars or less in value, and that creditors will not be prejudiced, may make an order relieving the estate from administration and directing delivery of personal property and transfer of real estate to the persons entitled to them.

For the purposes of this section, the value of an estate that can reasonably be considered to ap-

proximate fifteen thousand dollars, and that is not composed entirely of money, stocks, bonds, or other property the value of which is readily ascertainable, shall be determined by an appraiser selected by the applicant, subject to the approval of the court. The appraiser's valuation of the property shall be reported to the court in the application to relieve the estate from administration. The appraiser shall be paid in accordance with section 2115.06 of the Revised Code.

For the purposes of this section, the amount of property to be delivered or transferred to the surviving spouse or minor children of the deceased as the allowance for support, shall be established in accordance with section 2117.20 of the Revised Code.

When a delivery, sale, or transfer of personal property has been ordered from an estate that has been relieved from administration, the court may appoint a commissioner to execute all necessary instruments of conveyance. The commissioner shall receipt for the property, distribute the proceeds of the conveyance upon court order, and report to the court after distribution.

When the decedent died testate the will shall be presented for probate, and if admitted to probate, the court may relieve the estate from administration, and order distribution of the estate under the will.

An order of the court relieving an estate from administration shall have the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of unsecured creditors.

(B) An application to relieve an estate from administration shall be in writing and shall contain the following information:

- (1) The name, date, and place of death of the decedent;
- (2) The names, ages, and addresses of the persons entitled to the next estate of inheritance under the statutes of descent and distribution, and their respective degrees of relationship to the decedent;

(3) A summary statement of the character and value of the property comprising the estate;

(4) A list of all known creditors of the decedent, and the amount of their claims;

(5) If the decedent died intestate, a statement to that effect.

(C) The application shall be in the following form, and this form shall be used exclusively by the probate courts in this state:

“Application for Release of Estate from
Administration
Revised Code, Sec. 2113.03

No. Doc. Page Filed, 19....

Common Pleas Court, Probate Division,
County, Ohio

In the Matter of)
The Estate of) No.
) , 19....
Deceased)

....., being first duly sworn, says
that late a resident of the
..... of County, Ohio,
died on the
(testate or intestate)

day of, 19....., leaving
surviving spouse, and the following persons en-
titled to the next estate of inheritance under the
statutes of descent and distribution whose names,
ages, their respective degrees of relationship to
the decedent, their relationship to the surviving
spouse of the decedent, and addresses are as fol-
lows:

Name Age	Relationship to Decedent	Relationship to Surviving Spouse of Decedent	Address

The applicant selects to act
when required, as appraiser of the real and per-
sonal property of the decedent, the value of which
is not readily ascertainable.

The following is a summary statement of the
character and value of the property comprising
the estate.

Appraiser's Report:

I certify that the foregoing is a true and correct
appraisement of the property exhibited to me.

Dated, 19.....
Appraiser

Recapitulation of Assets

Personal Property of the value of \$.....
Real Estate of the value of \$.....
Total Estate \$.....

That the debts owing by the decedent and to
whom owing are as follows:

Name	Address	For What	Amount

The estate being \$15,000 or less in amount, the applicant asks that the estate be relieved from administration and that delivery or transfer of the property be made to the following persons:

Name	Address	Property to be Delivered or Transferred

Applicant

Waiver

We the undersigned, surviving spouse and heirs at law of the above named decedent and interested parties in the above entitled action hereby waive service of notice in the above entitled action and consent to the delivery or transfer of the described property as prayed for above.

Dated this day of, 19.....
.....
.....
.....
.....

Order Relieving Estate from Administration

The court finds that the decedent died on, 19....., and that the entire estate of the decedent consists of assets having the value of \$

The court finds from the representations made that further notice is unnecessary, that the estate is within the provisions of section 2113.03 of the Revised Code, and that creditors will not be prejudiced by granting the order. It is therefore ordered and decreed that the estate be, and is hereby relieved from administration, and it is further ordered that the property of the estate be delivered and transferred to the following persons:

Name	Address	Property to be Delivered or Transferred

Probate Judge.

HISTORY: GC § 10509-5; 114 v 320 (402); 116 v 385 (393); 122 v 427; 130 v 615 (EF 9-24-63); 132 v H 68

(EF 12-11-67); 134 v S 54 (EF 12-3-71); 135 v S 25 (EF 11-21-73); 136 v S 145 (EF 1-1-76); 136 v S 466. EF 5-26-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.03 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2113.03 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Comparative Legislation

Appraisalment and distribution of small estates:

- Cal.—Probate Code, § 630
- Ill.—Rev Stat, ch 3, § 25-1
- Ind.—Burns' Stat, § 29-1-8-1
- Ky.—KRS, § 395.450
- Mich.—MCLA, § 708.39
- N.Y.—SCPA, § 1301
- Pa.—Purdon's Stat, Tit. 20, § 3102
- Fla.—FSA, § 735.301

Forms

- 1 A&H Probate FORM 2113.03a et seq.

Outline of Procedure

Relief of estate from administration. Leyshon No. 99-1; A&H No. 79

Research Aids

- Release from administration:
O-Jur2d: Executors and Administrators §§ 14, 15

CASE NOTES AND OAG
[DECISIONS UNDER LAW PRIOR TO SB 145
AMENDMENT]

1. Where a decedent died leaving a spouse surviving and leaving as an only asset a bank deposit of six hundred thirty-three dollars, the probate court can exempt such estate from administration as an estate having less than five hundred dollars, under this section, by ordering five hundred dollars delivered direct to the surviving spouse as property not deemed assets of the estate: In re McMillen, 8 OO 433 (PC).

1.1 There is no other provision for informal administration: In re McKenzie, 74 OLA 106, 139 NE(2d) 505.

2. A probate court may relieve an estate of less than five hundred dollars from administration as provided by this section. The necessary affidavit provided for in GC § 2768 (RC § 317.22) may be made by one or more of the next of kin and the county auditor and county recorder should accept such affidavit in transferring the title to the real estate from the deceased to the next of kin or heirs entitled to the real estate, in estates in which administration has been dispensed with: 1933 OAG No.910.

2.1 Where the real property of a deceased person passes by the laws of descent and there is no administration of the estate, the title to real property may be transferred through the probate court under this section and RC § 2113.61: 1935 OAG No. 4793.

3. A probate judge had permissive power to grant an application for the certificate to transfer real estate in an estate consisting of real estate only, exceeding five hundred dollars in value, and where no administration of the estate is had or intended, providing the application is made by an heir or devisee, or a successor in interest, in accordance with GC § 10509-102 (RC § 2113.61): 1936 OAG No.5193.

4. Where property, other than moneys, clothing and personal effects, is found in connection with or

pertaining to the body of a deceased person, in a case where death resulted in circumstances requiring action by the county coroner, and where such property is taken in custody by the coroner, it becomes his duty, under RC § 309.17, to "deposit" such property with the probate court. Such "deposit" should be accomplished by making application to the court either for the appointment of an administrator or for relief of the estate of such deceased person from administration as provided in this section: 1958 OAG No.2153.

§ 2113.04 Payment of wages of deceased employee without administration.

Any employer, including the state or a political subdivision, at any time after the death of his or its employee, may pay all wages or personal earnings due to the deceased employee to: (A) the surviving spouse; (B) any one or more of the children eighteen years of age or older; or (C) the father or mother of the deceased employee, preference being given in the order named, without requiring letters testamentary or letters of administration to be issued upon the estate of the deceased employee, and without requiring an Ohio estate tax release where the wages or personal earnings do not exceed one thousand dollars. The payment of wages or personal earnings is a full discharge and release to the employer from any claim for the wages or personal earnings. If letters testamentary or letters of administration are thereafter issued upon the estate of the deceased employee, any person receiving payment of wages or personal earnings under this section is liable to the executor or administrator for the sum received by him.

HISTORY: GC § 10509-5a; 119 v 394 (423); 124 v 27; 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.04 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Full-time state employee, vacation and holidays, RC § 121.16.1.

Payment of unused vacation leave in case of death of county employee to be according to this section, RC § 325.19.

Payment of unused vacation leave in case of death of state employee to be according to this section, RC § 121.16.1.

Research Aids

Disposition with administration:

O-Jur2d: Executors and Administrators § 14

CASE NOTES AND OAG [DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. There is no provision in law for the compensation of state employees in money for unused vacation leave except that in the case of the death of any such employee a money payment with respect to unused vacation leave to which such employee

was entitled in the year of his death shall be made, as provided in RC § 121.16.1, to his surviving spouse, his children eighteen years of age or older, or his parents, as provided in this section, or to his estate: 1956 OAG No.6580.

1.1 The survivors or personal representatives of the estate of an employee of a county after his death have no right to receive pay for unused vacation time accumulated by the employee before his death: 1958 OAG No. 2374.

2. Pursuant to RC § 121.16.1 as effective November 4, 1959, a state employee may accumulate vacation leave earned, but not used during his state service; and in case of the death of a state employee the monetary value of all such unused vacation leave, if not exceeding \$300.00, should be paid in accordance with this section and, if exceeding \$300.00, to his estate: 1960 OAG No.1575.

3. Neither RC § 121.16.1 nor this section authorizes the payment of any amount of money to survivors or personal representatives of the estate of a deceased employee of a school district for unused vacation time accumulated by the employee before his death: 1961 OAG No.2579.

4. A public officer, such as a county auditor, is not an employee as such word is used in RC § 325.19; and, upon the death of such officer, no amount may be paid for earned but unused vacation leave under this section to his estate: 1962 OAG No.3239.

§ 2113.05 Letters testamentary shall issue.

When a will is approved and allowed, the probate court shall issue letters testamentary to the executor named in the will, if he is suitable, competent, accepts the trust, and gives bond if that is required. The court may issue letters testamentary to a surviving spouse or one of the next of kin, even though a nonresident of the county or of this state.

If no executor is named in a will, or if the executor named dies, fails to accept the trust, resigns, or is otherwise disqualified, letters of administration with the will annexed shall be granted to a suitable person or persons, named as devisees or legatees in the will, who would have been entitled to administer the estate if the decedent had died intestate, unless the will indicates an intention that the person or persons shall not be granted letters of administration. Otherwise, the court shall grant letters of administration with the will annexed to some other suitable person.

HISTORY: GC § 10509-2; 114 v 320 (401); 116 v 385; 125 v 903 (974) (Eff 10-1-53); 133 v S 134 (Eff 6-12-70); 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.05 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC §§ 2109.21, 2113.12, 2113.19 which refer to this section.

Comparative Legislation

Letters of administration with will annexed:

Cal.—Probate Code, § 501

Ind.—Burns' Stat, § 29-1-10-8

Ky.—KRS, § 395.050
 Mich.—MCLA, § 704.28
 N.Y.—SCPA, § 1418

Letters testamentary:

Cal.—Probate Code, § 501
 Ill.—Rev Stat, ch 3, § 6-11
 Ind.—Burns' Stat, § 29-1-10-1
 Ky.—KRS, § 395.015
 Mich.—MCLA, § 704.28
 N.Y.—SCPA, § 1414
 Pa.—Purdon's Stat, Tit. 20, § 901
 Fla.—FSA, § 733.401

Forms

- 1 A&H Probate FORM 2113.05a et seq.
- 1 A&H Probate FORM 2113.01a et seq: Application, issuance of letters; objections.

Outline of Procedure

Appointment of administrator. Leyshon No. 35, A&H No. 6; Executor. No. 41, A&H No. 12

Research Aids

- Administrator w.w.a.:
 - O-Jur2d: Executors and Administrators § 46
 - Am-Jur2d: Executors and Administrators §§ 47, 603
- Right of executor named in will:
 - O-Jur2d: Executors and Administrators §§ 41, 42
 - Am-Jur2d: Executors and Administrators § 46

ALR

- Delegation by will of the power to nominate executor. 11 ALR2d 1284.
- Liability insurer's potential liability to estate dependent upon establishment of claim against estate, as justifying grant of administration. 67 ALR2d 936.

CASE NOTES AND OAG [DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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Appointment of executor

1. If the executor named in the will does not accept the trust, he is not the representative of the beneficiaries, and notice to him of proceedings to probate the will should not be, by construction, extended to them: *Feuchter v. Keyl*, 48 OS 357, 27 NE 860.

1.1 An order of the probate court appointing an executor is void, if made without jurisdiction, and it may be disregarded in any other court; but if made in the exercise of proper jurisdiction over the subject matter and estate, although based upon erroneous conclusions of law or fact, it cannot be collaterally attacked: *Union Sav. Bank &c. Co. v. Western Union Tel. Co.*, 79 OS 89, 86 NE 478, 128 AmSt 675 [reversing *Western Union Tel. Co. v. Union Sav. Bank*

&c. Co., 20 CD 380, and affirming *Smith v. Western Union Tel. Co.*, 7 NP(NS) 609, 19 OD 537].

2. An order by the probate court appointing as administrator of the estate of a decedent a person other than the one named in the will is not subject to review by appeal, where there is a finding by the probate court that the applicant for appointment designated in the will is not a suitable person to administer the estate: *Miller v. Miller*, 3 App 143, 19 CC(NS) 243, 26 CD 195.

2.1 A party named in a will as executrix, admittedly otherwise competent, is not entitled to the trust, as a matter of right, if she is not, because of conflicting interests, a suitable person under the circumstances, and the determination of such question rests in the sound discretion of the probate court: *In re Bowman*, 76 OLA 597, 143 NE(2d) 150 (App).

2.2 Revised Code § 2113.05, vests discretion in the probate court to determine whether the person named in the will as executor or executrix is not only a competent person but also a suitable person: *In re Bowman*, 76 OLA 597, 143 NE(2d) 150 (App).

2.3 A person does not become the executor of an estate until he has qualified for the office under the statute, and has been appointed to the trust by the court: *Hermann v. Crossen*, 81 OLA 322, 160 NE(2d) 404 (App).

2.4 A probate court has authority to exercise reasonable discretion in determining if an applicant for letters testamentary is a competent and suitable person, and an order granting or refusing letters of appointment is reviewable for a determination of whether there has been an abuse of discretion: *In re Young*, 4 OApp(2d) 315, 33 OO(2d) 357, 212 NE(2d) 613.

2.5 A "suitable" person, qualified for appointment as an executor under the provisions of this section means a person who is reasonably disinterested in the estate and the legatees and beneficiaries under the will: *In re Young*, 4 OApp(2d) 315, 33 OO(2d) 357, 212 NE(2d) 613.

2.6 The appointment by a probate court of an executor who is not in a position to reasonably fulfill the obligations of a fiduciary, and, therefore, not a "suitable" person to act in a fiduciary capacity, constitutes an abuse of discretion: *In re Young*, 4 OApp(2d) 315, 33 OO(2d) 357, 212 NE(2d) 613.

2.7 The fact that to act as executor would be a disservice to the person named is not to be considered by the court in determining suitability: *In re Ruggles*, 39 OApp(2d) 39, 68 OO(2d) 177, 315 NE(2d) 486 (1973).

2.8 Where a testator nominates one to be the executrix of his estate, such nominee is not disqualified merely because she was financially indebted to the decedent at the time of his death. A person nominated in a will to be the executrix of an estate is entitled to such appointment unless she is clearly disqualified under RC § 2113.05: *In re Estate of Nagle*, 40 OApp(2d) 40, 69 OO(2d) 22, 317 NE(2d) 242 (1974).

3. Where a testator names a trust company as co-executor of his will, the trust company is purchased and taken over by another trust company, and the latter company makes application to be appointed as co-executor, a denial of the application is not an abuse of discretion on the part of the court, where the new company is both a debtor and a creditor of the estate: *First-Central Trust Co. v. Dunn*, 19 OLA 496.

4. There is no irreconcilable inconsistency between this section, which makes the appointment of the executor named in the will mandatory, and former GC § 10629 (see now RC §§ 2109.24, 2113.18), which

confers a discretion upon the court to remove for non-residence: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

5. If testator names two executors in his will, and one of them dies before testator, the court should appoint the survivor as sole executor of the will, if he is legally competent: *In re March*, 60 Bull 5.

—Suitable and competent

8. In determining the suitability of a person named in a will as executor, the lack of complexity of the estate is a factor to be considered by the trial court: *In re Ruggles*, 39 OApp(2d) 39, 68 OO(2d) 177, 315 NE(2d) 486 (1973).

9. An executor named in a will who has some physical disability, but whose mental alertness and capacity are demonstrated by extensive examination, in the absence of any medical testimony that his physical condition has some effect on his mental condition, is suitable within the meaning of RC § 2113.05: *In re Ruggles*, 39 OApp(2d) 39, 68 OO(2d) 177, 315 NE(2d) 486 (1973).

10. A person is "legally competent" if he is of legal age, of sound mind, and if he has not been convicted of a crime which renders him infamous: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

11. If a person who is named as executor in a will is not of sufficient business ability to manage the estate to the best interest of the parties, such lack of ability may be grounds for removing such executor, after he is appointed, but it does not authorize the court to refuse to appoint him: *In re March*, 60 Bull 5.

§ 2113.06 To whom letters of administration shall be granted.

Administration of the estate of an intestate shall be granted to persons mentioned in this section, in the following order:

(A) To the surviving spouse of the deceased, if resident of the state;

(B) To one of the next of kin of the deceased, resident of the state.

If the persons entitled to administer the estate fail to take or renounce administration voluntarily, they shall be cited by the probate court for that purpose.

If there are no persons entitled to administration, or if they are for any reason unsuitable for the discharge of the trust, or if without sufficient cause they neglect to apply within a reasonable time for the administration of the estate, their right to priority shall be lost, and the court shall commit the administration to some suitable person who is a resident of the state. Such person may be a creditor of the estate.

This section applies to the appointment of an administrator de bonis non.

HISTORY: GC § 10509-3; 114 v 320 (401); 116 v 385 (393); 136 v S 145 (Eff 1-1-76); 136 v S 466. Eff 5-26-76.

Analogous to former GC § 10617.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.06 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2113.06 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Cross-References to Related Sections

See RC § 2113.19 which refers to this section.

Comparative Legislation

Letters of administration—to whom issued:

Cal.—Probate Code, § 422

Ill.—Rev Stat, ch 3, § 9-1

Ind.—Burns' Stat, § 29-1-10-1

Ky.—KRS, § 395.005

Mich.—MCLA, § 704.1

N.Y.—SCPA, § 707

Pa.—Purdon's Stat, Tit. 20, § 3155

Fla.—FSA, § 733.303

Forms

1 A&H Probate FORM 2113.06a et seq.

1 A&H Probate FORM 2113.12a et seq: Citation to take or renounce administration.

Outline of Procedure

Failure to take or renounce administration. *Leyshon No. 74; A&H No. 48*

Research Aids

Administrator de bonis non:

O-Jur2d: Executors and Administrators § 529

Citation:

O-Jur2d: Executors and Administrators § 67

Disqualifications:

O-Jur2d: Executors and Administrators §§ 58-62

Am-Jur2d: Executors and Administrators § 67 et seq.

Effect of delay on priority:

O-Jur2d: Executors and Administrators §§ 65, 66

Who may be appointed:

O-Jur2d: Executors and Administrators §§ 49-57

Am-Jur2d: Executors and Administrators 50 et seq.

ALR

Brevity of period after death of decedent as affecting propriety to grant letters testamentary or of administration. 133 ALR 1483.

Construction and application of statutes relating specifically to preferences in appointments as administrator with the will annexed. 164 ALR 844.

Law Review

Marriage is a damnably serious business. *Ellis V. Rippner*. 40 OBar (No. 10) 291.

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1. Under the provisions of this section the resident surviving spouse is entitled to priority in the appointment as administrator of the estate of an intestate unless such spouse is incompetent or is for any reason unsuitable for the discharge of the trust or has without sufficient cause neglected to apply within a reasonable time for the administration of the estate: *In re Golembiewski*, 146 OS 551, 33 OO 41, 67 NE(2d) 328.

2. Where such incompetency exists by reason of minority, a guardian of the spouse is not eligible, as such, for appointment as administrator: *In re Golembiewski*, 146 OS 551, 33 OO 41, 67 NE(2d) 328.

3. The provisions of this section are mandatory, and when a surviving spouse is a minor, one of the next of kin of the deceased, resident of the county, is entitled to appointment as administrator in the absence of incompetency, unsuitability or neglect: *In re Golembiewski*, 146 OS 551, 33 OO 41, 67 NE(2d) 328.

4. The right of priority of such next of kin is not dependent upon the extent of his interest in the assets of the estate: *In re Golembiewski*, 146 OS 551, 33 OO 41, 67 NE(2d) 328.

4.1 Where one has a claim against an estate, it is incumbent upon him, if no administrator has been appointed, to procure the appointment of an administrator against whom he can proceed: *Wrinkle v. Trabert*, 174 OS 233, 22 OO(2d) 248, 188 NE(2d) 587.

4.2 When an action is brought by the filing of a complaint, within the statute of limitations, complainant has one year thereafter in which to cause the appointment of a suitable personal representative and obtain service of summons against him. [Paragraphs 5 and 6 of *Wrinkle v. Trabert*, 174 OS 233, 22 OO(2d) 248, supplanted by CivR 3(A) and 4(A)(B) and (C)]: *Hayden v. Ours*, 44 OMisc 62, 73 OO(2d) 224, 337 NE(2d) 183 (CP 1975).

4.3 In a negligence action for the recovery of damages, instituted under RC § 2117.07 against an administrator seeking to recover only from the decedent's liability insurer, where the administrator of the estate of the decedent has been discharged and the estate closed, the probate court may reappoint the administrator for the purpose of accepting service of summons: *In re George*, 24 OS(2d) 18, 53 OO(2d) 10, 262 NE(2d) 872 (1970) [reversing 20 OApp(2d) 87, 49 OO(2d) 110, 252 NE(2d) 176 (1969)].

5. There is no provision of this section that requires the probate court to follow the line of inheritance in the appointment of an administrator for the estate of a decedent where there is no surviving spouse or next of kin capable of appointment: *Shannon v. Hendrixson*, 4 OO 517 (App).

5.1 The term, "next of kin," as used in GC § 10509-3 (RC § 2113.06), means only those persons who are entitled to inherit all or some portion of the estate of the deceased, and a person who is entitled to inherit nothing from the estate has no priority in appointment as administrator of the estate and has no capacity to attack the appointment of

another person: *In re Kelly*, 102 App 518, 3 OO(2d) 56, 144 NE(2d) 130.

5.2 A constructive waiver of her statutory priority to act in administering her husband's estate could reasonably be deduced from the surviving spouse's unreasonable delay in seeking the right to administer her husband's estate and her disinterested conduct as to the affairs thereof after his death: *Troha v. Sneller*, 108 App 153, 9 OO(2d) 195, 151 NE(2d) 595.

5.3 The duty to cite a surviving spouse whose waiver does not accompany an application for appointment as administrator of an estate by one lower in priority is, by both RC §§ 2113.06 and 2113.07, placed upon "the probate court." Failure to issue such citation cannot be charged to an applicant for letters of administration, where all the facts have been disclosed: *Troha v. Sneller*, 108 App 153, 159, 9 OO(2d) 195, 151 NE(2d) 595.

5.4 A surviving spouse became an unsuitable person to carry out the trust of administering her husband's estate, in which she had no interest by the terms of a prenuptial agreement, where she delayed an unreasonable time before she sought the right to administer the estate, showed by her conduct that she was disinterested therein and made an adverse claim against those legally entitled thereto: *Troha v. Sneller*, 108 App 153, 9 OO(2d) 195, 151 NE(2d) 595; 79 OLA 74, 151 NE(2d) 595 (App).

5.5 This section, setting forth the persons to whom, and the order in which, letters of administration shall be granted, is mandatory and requires the probate court to appoint an administrator of an estate from the preferred class therein described: *In re Vickers*, 110 App 499, 13 OO(2d) 274, 170 NE(2d) 85.

6. When the defendant in an action dies intestate the "proper person" for purposes of substitution pursuant to Civil Rule 25(A)(1) is the person appointed by the Probate Court pursuant to RC § 2113.06 to administer the estate of such deceased defendant: *Highland View Hosp. v. Dempsey*, 62 OO(2d) 367, 33 OMisc 209, 294 NE(2d) 925 (MC 1972).

7. The surviving spouse of a common-law marriage may be a suitable person under the provisions of RC § 2113.06 to be granted letters of administration: *In re Hammonds*, 67 OO(2d) 27, 39 OMisc 96 (CP 1973).

8. A person who renounces his right to administer an estate may not nominate one to serve in his stead: *In re Welch*, 15 OO 189 (PC).

9. The surviving spouse of a common law marriage is not a suitable person under the provisions of this section to be granted letters of administration: *In re Woods*, 21 OO 98, 6 OSupp 236 (PC).

10. This section, prescribing to whom letters of administration shall be granted, primarily pertains to administrators of estates, and not to executors named in wills: *In re Evans*, 27 OLA 550.

11. The appointment of an administrator is required to be made from the preferred class described in this section, unless the court finds that the persons in the preferred class are incompetent or unsuitable for the discharge of the trust, in which case a person not coming within the class prescribed may be appointed: *In re Froebe*, 27 OLA 594.

12. Under this section and GC § 10509-4 (RC § 2113.07), where an application for appointment as administrator is made by a daughter of deceased, a presumption of competency must be indulged in unless and until it appears that the applicant is incompetent to act as administratrix: *In re Campbell*, 39 OLA 513 (App).

15. Under the provisions of this section, a grandchild of an intestate decedent who is a resident of

the county is entitled to preference over a child of such decedent who is not a resident of the county, for appointment as administrator of the estate of such decedent: *In re Fields*, 44 OLA 284 (App).

16. This section and GC § 10509-4 (RC § 2113.07) are *in pari materia*; therefore, an affidavit that the applicant has no knowledge of a last will and testament of the deceased must be filed by a person seeking appointment as administrator *de bonis non* as well as by an administrator: *In re Cassell*, 53 OLA 65, 83 NE(2d) 72 (PC).

17. In the application of this section, where the probate court found that there was no surviving spouse, no next of kin resident of the county, and the next of kin resident of the state were minor grandchildren of the decedent, the court thereby acquires jurisdiction to commit the administration of decedent's estate to some suitable person or persons resident of the county: *In re Cassell*, 53 OLA 65, 83 NE(2d) 72 (PC).

18. Where the probate court appoints a suitable person to administer an estate, in the exercise of its jurisdiction under this section, no notice or citation to or waiver or renunciation of blood relatives is required: *In re Cassell*, 53 OLA 65, 83 NE(2d) 72 (PC).

19. Where administratrix, wife of decedent, filed her application in behalf of her minor children, next of kin of decedent, and who was appointed as a "suitable person . . . resident of the county," and not under her priority as surviving spouse, her waiver in a separation agreement of her right to administer her husband's estate was merely a waiver of her priority under this section, and did not operate as a complete bar to her being appointed administrator: *In re Williams*, 79 OLA 592, 153 NE(2d) 727 (PC).

20. The law favors the placing of administration of estates, by virtue of this section, first in the hands of the family of the decedent, and an eligible member of decedent's family who has signed a waiver and consent to the appointment of one not a member of the family may renounce and withdraw such waiver and consent where there has been no action in the estate other than the naked appointment: *In re Garvin*, 85 OLA 560, 175 NE(2d) 551 (PC).

21. The secretary of state has no duty to accept for filing the articles of incorporation of a corporation other than a trust company, the purpose of which is to engage in the business of serving, for hire, as executor, administrator and guardian: 1956 OAG No.6200.

DECISIONS UNDER FORMER GC § 10617

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Scope and construction

1. Laws of Ohio do not recognize an administrator *de son tort*: *Dixon v. Cassell*, 5 O 533; *Bustard v. Dabney*, 4 O 68.

2. The qualifications of an administrator provided for by this section apply to an administrator with the will annexed, who is appointed under the provisions of former GC § 10612 (see now RC § 2113.12): *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

5. "Unsuitable," as used in the third clause, is defined in former GC § 10629 (see now RC §§ 2109.24, 2113.18), which should be read with this section for that purpose: *Long v. Bowersox*, 8 NP(NS) 249, 19 OD 494.

Right to administer

10. Where a subject of the kingdom of Italy died intestate in this state, leaving a widow and two minor children residents and subjects of the kingdom of Italy, the Italian consul is not entitled to the prior paramount and exclusive right of administration, but is eligible to such appointment under the fourth subdivision of this section, subject to the exercise of the discretion of the probate court of such county: *Pagano v. Cerri*, 93 OS 345, 112 NE 1037, LRA 1917A, 486; see also *Cerri v. Montalto*, 93 OS 482, 113 NE 1069.

11. Notwithstanding this section, under the treaty with Italy, the consul of that government has the right to intervene in the case of the death of a citizen of Italy in this country: *In re Arduino*, 9 NP(NS) 369, 20 OD 461.

12. Where the accredited representative of the Austro-Hungarian government appoints a representative to act, in his absence, as administrator of a deceased citizen of the Austro-Hungarian monarchy, and the appointment is made a matter of record in the probate court of the county in which the death of the decedent occurred, it becomes the duty of the probate court to appoint such accredited representative as administrator of the estate of the said decedent, statutory provisions to the contrary notwithstanding: *In re Stingacs*, 12 NP(NS) 107, 22 OD 88.

13. Where an heir of the decedent is eligible to appointment as administrator of the estate of a deceased Italian, his claim thereto is superior to that of the Italian consul, and letters must of necessity be issued to him: *In re Costanzo*, 15 NP(NS) 225, 60 Bull 413.

14. The provisions of this section are not controlled by a provision in a treaty to the effect that the consular agent or some similar official appointed by the state of which the decedent was a citizen shall have the right to be appointed as administrator of such estate so far as the laws of each country will permit, but the consular agent is a member of the third class which consists of such persons as the court shall deem fit: *In re Costanzo*, 15 NP(NS) 225, 60 Bull 413.

15. A consular agent of the kingdom of Italy has neither an exclusive nor a naked right, under treaty stipulations or within the class designated in this section, to appointment as administrator of the estate of an Italian subject dying intestate in this state, where one of the next of kin is a resident of the state; nor is he entitled to notice of the death of a subject of the king of Italy, unless there are no known heirs in this country and he is himself a resident of the county in which the appointment is to be made or has a representative in such county who has been duly certified

to the court: *In re Todarello*, 15 NP(NS) 593, 62 Bull 201.

16. Article XIV of the treaty between the United States and Sweden, which provides that the representative of a consul shall be appointed administrator of the estate of a citizen of his country dying without will or testament in the territory of the other contracting party "so far as the laws of each country will permit," merely requires that the court shall consider the consul in selecting from the fourth class named in this section, having always the best interests of the estate in view: *In re Todarello*, 15 NP(NS) 593, 62 Bull 201.

17. An Italian consul has no paramount and exclusive right to appointment to administer the estate of a deceased subject of his government, dying intestate and without next of kin in the jurisdiction of the court, but on the contrary, he is relegated to the fourth class by the provisions of this section: *In re Balbo*, 16 NP(NS) 9, 29 OD 603.

18. The procuring of an alien consul to act as the administrator of a deceased resident of Ohio does not, in an action against other residents of Ohio, present such a case of diverse citizenship as to give jurisdiction to a federal court. The appointment of such alien consul will be regarded as having been procured collusively and fraudulently if the testimony discloses that the sole purpose in having the said consul named as administrator was to give the federal court jurisdiction of the action for wrongful death thereafter brought by him: *Cerri v. Akron-Peoples Tel. Co.*, 219 Fed 285, 13 OLR 425.

—Husband or widow

23. A widow has priority in the administration of her husband's estate, unless she comes within the provisions of the third clause of this section: *Long v. Bowersox*, 8 NP(NS) 249, 19 OD 494.

24. It is improper to issue letters to a surviving partner without citing the widow or next of kin, if residents of the county, for the purpose of accepting or rejecting the appointment, although thirty days have gone since the partner's death and no application for administration has been made by any of them: *Warnock v. Page*, 14 OD(NP) 278 [affirmed, *Page v. Warnock*, 15 CD 695, 2 OLR 528].

—Next of kin

29. The next of kin are entitled to a reasonable time within which to apply for letters of administration; and an application made within eighteen days after intestate's death, by next of kin residing in another county, is made within a reasonable time. When, without allowing such reasonable time, the probate court appointed a stranger as administrator, the appointment is illegal, and should be revoked on application of the next of kin: *Todhunter v. Stewart*, 39 OS 181.

30. If next of kin file an application for appointment of a stranger as administrator, which is refused, it is not a waiver of right of next of kin to the appointment: *In re Patterson*, 26 NP(NS) 579.

—Creditor

35. The right of creditors of one who dies seized of lands in Ohio, but whose heirs are nonresidents, to take out letters of administration on the estate, continues, even if there is a foreign will, for unless the will is produced and duly recorded, the probate court of the county in which the land is situated has the right to, and upon application must, grant letters of administration, and if the will be produced, letters may be granted with the will annexed: *Bustard v. Dabney*, 4 O 68.

Discretion of court

40. A proceeding for the appointment of an administrator is a proceeding in rem, and if the court has jurisdiction its decision binds the whole world: *Ewalt v. Ames*, 6 App 374, 27 OCA 465, 29 CD 133, 62 Bull 389 (Ed) [citing *Cross v. Armstrong*, 44 OS 613].

41. As between parties of equal suitability and statutory rights, the court may well choose the one possessing the confidence of and desired by a majority of the beneficiaries, and the fact that another court, on the same showing, might have made a different selection, is not proof of abuse of discretion, nor ground for review: *Sargent v. Corbley*, 7 CC(NS) 226, 18 CD 125.

42. Where the applicants for appointment as administrator of the estate of a deceased Italian are the Italian consul on the one hand, and on the other a stranger who is acceptable to ineligible heirs of the decedent who are residents of this country, the choice is entirely a matter of discretion on the part of the probate judge: *In re Costanzo*, 15 NP(NS) 225, 60 Bull 413.

Effect of appointment

47. Where a debtor becomes the administrator of his creditor's estate, that extinguishes the debt, which becomes assets in the hands of the debtor as administrator: *Bigelow v. Bigelow*, 4 O 138.

Error

53. The common pleas court has jurisdiction to review an order of the probate court denying the right to administer the estate of a deceased person, which this section confers upon the next of kin, if a suitable person: *Schumacher v. McCallip*, 69 OS 500, 69 NE 986.

54. Although error may be prosecuted to an order denying the right of certain persons to administer an estate, under this section, this cannot be done on an order removing an administrator under former GC § 10629 (see now RC §§ 2109.24, 2113.18): *In re Ferguson*, 3 NP(NS) 549, 16 OD 486.

55. Any person having a right to be heard on the question of an appointment of an administrator under this section may have an adverse judgment reviewed for error under GC § 12241 (see now RC § 2505.24): *McCallip v. Sharp*, 13 OD(NP) 650.

Other questions

60. The statute of limitations does not begin to run against a debt based upon a contract not in writing, which becomes due by reason of the decease of the debtor, until the appointment of an administrator or executor of the estate of such debtor, and due notice thereof: *Hoiles v. Riddle*, 74 OS 173, 78 NE 219, 113 AmSt 946.

61. No presumption arises that the administrator of an estate is not beneficially interested. The presumption is rather the other way, especially where he is of the same name as deceased, for this section prefers the husband or widow, next of kin, etc., over strangers: *In re Arkenberg*, 1 NP(NS) 9, 13 OD 656.

62. If the personal property of one who has been wrongfully killed amounts to about one hundred dollars, the court will appoint an administrator for his estate without considering whether such appointment should be made if decedent had left no property, and the sole object of such appointment had been to enforce the claim for damages for such wrongful death: *In re Costanzo*, 15 NP(NS) 225, 60 Bull 413.

63. Where there is any personal property to distribute, or any debts owing to the decedent, there must be an administration of the estate, unless estates not exceeding in value one hundred dollars be exempted by former GC § 10617 (see now RC §§ 2109.-

21, 2113.06, 2113.07): *Barrielle v. Bettman*, 199 Fed 838.

§ 2113.07 Application for appointment as executor or administrator.

Before being appointed executor or administrator, every person shall make and file an application under oath, which must contain the names of the surviving spouse and all the next of kin of the deceased known to the person, their post-office addresses if known, a statement in general terms as to what the estate consists of and its probable value, and a statement of any indebtedness the deceased had against the person making the application.

The application may be accompanied by a waiver signed by the persons who have priority to administer the estate, and in the absence of a waiver those persons shall be cited by the probate court for the purpose of ascertaining whether they desire to take or renounce administration.

Letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not to his knowledge a last will and testament of the intestate.

HISTORY: GC § 10509-4; 114 v 320 (401); 116 v 307; 116 v Pt II 28; 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.07 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

- 1 A&H Probate FORM 2113.07a et seq.
- 1 A&H Probate FORM 2113.01a et seq: Application, issuance of letters; objections.
- 1 A&H Probate FORM 2113.05a et seq: Order appointing executor or administrator.
- 1 A&H Probate FORM 2113.06a et seq: Application for letters; renunciation of administration.
- 1 A&H Probate FORM 2113.12a et seq: Citation to take or renounce administration.
- 1 A&H Probate FORM 2113.19a et seq: Administration de bonis non.

Outlines of Procedure

Appointment of administrator. Leyshon No. 35, A&H No. 6; Executor. Leyshon No. 41, A&H No. 12; Failure to take or renounce administration. Leyshon No. 74, A&H No. 48

Research Aids

Application:

- O-Jur2d: Executors and Administrators § 63 et seq.
- Am-Jur2d: Executors and Administrators § 82 et seq.

Citation:

- O-Jur2d: Executors and Administrators § 67

ALR

- Adverse interest or position as disqualification for appointment as personal representative. 18 ALR2d 633.

Right of minor next of kin to apply through next friend for appointment of administrator. 161 ALR 1389.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. The making and filing of an affidavit by the person to be appointed administrator, that there is not to his knowledge a last will and testament of the intestate, is a condition precedent to the granting of letters of administration of such estate: *State ex rel Overlander v. Brewer*, 147 OS 386, 34 OO 338, 72 NE(2d) 84.

2. The appointment by the probate court of an executor or administrator of an estate, without the latter filing a statement of any indebtedness owed by him to the estate, as required by GC § 10509-4 (RC § 2113.07), is voidable and not void: *McKelvey v. McKelvey*, 90 App 563, 48 OO 207, 107 NE(2d) 555.

3. The person or persons resident of the county entitled to administer the estate, referred to in this section, are defined in GC § 10509-3 (RC § 2113.06) as the next of kin of the deceased, resident of the county: *In re Applegate*, 45 OO 24 (PC).

§ 2113.08 Notice of appointment.

Within one month after appointment of an executor or administrator, the probate judge shall cause notice of the appointment to be published in some newspaper of general circulation in the county in which the letters were issued for three consecutive weeks, but the notice shall not be necessary when there is no estate, except a right of action for wrongful death.

An affidavit of the publisher or agent of the newspaper making publication that is filed and recorded, together with a copy of the notice, in the probate court within four months after the appointment shall be admitted as evidence of the time, place, and manner in which notice was given.

HISTORY: GC §§ 10509-6, 10509-7; 114 v 320 (402); 116 v 307; 116 v Pt II 28; 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.08 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC §§ 2113.09, 2113.10, 2117.32, 2129.09 which refer to this section.

Comparative Legislation

Notice of appointment:

- Cal.—Probate Code, § 441
- Ill.—Rev Stat, ch 3, § 9-5
- Ind.—Burns' Stat, § 29-1-7-7
- Ky.—KRS, § 395.016
- Mich.—MCLA, § 702.56
- N.Y.—SCPA, § 1801
- Fla.—FSA, § 733.203

Forms

- 1 A&H Probate FORM 2113.08a et seq.

1 A&H Probate FORM 2113.05a et seq: Notice of appointment; order.

Research Aids

Notice:

O-Jur2d: Executors and Administrators §§ 68, 69

Am-Jur2d: Executors and Administrators §§ 85, 86

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. A notice of appointment is good, though the fact of the appointment is not expressly and explicitly stated therein, and the notice consists merely of a demand, officially signed by the administrator, that all persons indebted to the estate come forward and make payment, and that all persons having claims against the same are notified to present the same: *Gilbert v. Little*, 2 OS 156.

1.1 The filing of the affidavit herein provided is a mode of perpetuating the evidence of the publication of notice of appointment, and is for the convenience and protection of the executor or administrator. It forms no part of the notice and is not for the benefit of creditors. [But see case note 6, this section.] Hence, although such proof of publication of notice is not filed until a year after the giving of bond, the two years' limitation within which actions may be brought will begin to run from the date of the giving of the bond: *Ardrey v. Shell*, 77 OS 218, 82 NE 1075.

2. Statutes relating to administration of estates must, if possible, be construed together and so as to harmonize and give effect to their various provisions: *Beck v. Schmidt*, 38 App 476, 176 NE 595.

3. Whatever power administrator possesses with respect to administration of estate is derived from statute: *Beck v. Schmidt*, 38 App 476, 176 NE 595.

3.1 When a domiciliary or ancillary administrator is appointed in Ohio, notice is published as provided by this section, but until there has been a proceeding under RC chapter 2129, an Ohio claimant receives no notice of appointment in another state: *Kibbey v. Mercer*, 11 OApp(2d) 51, 40 OO(2d) 223, 228 NE(2d) 337.

4. This section places the duty of publishing notice of the appointment of an executor or administrator upon the probate judge, and in the absence of countervailing evidence it must be presumed that the probate judge published the notice according to law: *Swearingin v. Rendigs*, 53 App 221, 5 OO 457, 4 NE(2d) 695.

5. The object of requiring notice of the appointment of an executor or administrator is to be for the benefit of the creditors alone so that they may know within what time their claims must be presented: *Croxton Mining Co. v. Hubbard*, 8 App 105, 28 OCA 249, 30 CD 150 [motion to certify record overruled, 16 OLR 107, 63 Bull 223].

6. The fact that under former GC § 10712 (see now RC § 2113.08) the probate judge is to cause the notice of the appointment of the administrator to be published, does not prevent the operation of the express provision of former GC § 10757 (see now RC § 2113.10) to the effect that if the new administrator does not give such notice he shall not have the benefit of the period of limitations: *Croxton Mining Co. v. Hubbard*, 8 App 105, 28 OCA 249, 30 CD 150 [motion to certify record overruled, 16 OLR 107, 63 Bull 223].

§ 2113.09 Effect of failure to give notice. (GC § 10509-158)

If notice is not given of the appointment of an executor, an original administrator, or an ad-

ministrator de bonis non within the one month prescribed for that purpose by section 2113.08 of the Revised Code, or the evidence thereof is not perpetuated as provided by such section, and such notice cannot be made and a period of twenty-one years or more has elapsed since the appointment of such executor, administrator, or administrator de bonis non, the required notice of appointment and the proof of publication of such notice shall be deemed to have been given and filed, so as to be an absolute bar to any claim of creditors against the estate represented by such executor, administrator, or administrator de bonis non. Where a period of less than twenty-one years has elapsed since the appointment of such executor, administrator, or administrator de bonis non, on the petition of the executor or administrator or on the petition of any person having an interest in real estate the title to which is adversely affected by the omission of publication of such notice of appointment and proof of same, the probate court shall order such notice to be given at any time afterwards, in which case the periods of time limited for the commencement of actions against executors and administrators and for other purposes, which begin to run from the date of the appointment, shall begin to run respectively from the time such order of court is made, if notice is published in accordance therewith.

HISTORY: GC § 10509-158; 114 v 320 (436). Eff 10-1-53.

Forms

1 A&H Probate FORM 2113.09a et seq.

Research Aids

Failure to give notice:

O-Jur2d: Executors and Administrators §§ 70, 531

Am-Jur2d: Executors and Administrators § 87

Law Review

Avoiding probate of decedents' estates. *Gilbert A. Sheard*. 36 CinLRev 70.

CASE NOTES AND OAG

1. This section treats the filing of proof of notice as a method of perpetuating evidence, that is, it forms no part of the notice itself: *Ardrey v. Shell*, 77 OS 218, 82 NE 1075.

2. In order that a lapse of time may bar a claim against an estate, it is necessary that notice of the appointment of an administrator or executor must be given in accordance with the provisions of GC § 10509-158 (this section): *Swearingin v. Rendigs*, 53 App 221, 5 OO 457, 4 NE(2d) 695.

§ 2113.10 Notice of appointment, administrator de bonis non. (GC § 10509-155)

Notice of the appointment of a new administrator shall be given by the probate judge in the manner prescribed by section 2113.08 of the Revised Code.

HISTORY: GC § 10509-155; 114 v 320 (435). Eff 10-1-53. Analogous to former GC § 10757.

Research Aids**Procedure:****O-Jur2d:** Executors and Administrators § 531**Requirements as to notice:****O-Jur2d:** Executors and Administrators §§ 68, 69**Am-Jur2d:** Executors and Administrators §§ 85, 86**CASE NOTES AND OAG**

1. The object of requiring notice of the appointment of an executor or administrator is to be for the benefit of the creditors alone so that they may know within what time their claims must be presented: *Croxton Mining Co. v. Hubbard*, 8 App 105, 28 OCA 249, 30 CD 150 [motion to certify record overruled, 16 OLR 107, 63 Bull 223].

2. Former GC § 10757 (see now RC § 2113.10) requires notice to be given of the appointment of a new administrator, and where there is a failure to give such notice the limitation provided by former GC § 10722 (see now RC § 2117.12) will not avail as a defense to an action brought more than six months after the rejection of the claim: *Croxton Mining Co. v. Hubbard*, 8 App 105, 28 OCA 249, 30 CD 150 [motion to certify record overruled, 16 OLR 107, 63 Bull 223].

3. An order of the probate court directing that "notice of appointment of a new administrator," as provided in this section, be given "in the same manner prescribed with respect to an original administrator," which order fixes the period of four months following such appointment wherein creditors shall present their claims to the new administrator, falls within the general rule that every act of a court of competent jurisdiction, having jurisdiction of the parties and the subject matter, is presumed valid, and this presumption cannot be overcome in a collateral proceeding unless it is made to appear that the action by the court is void for want of authority: *Haag v. Meffley*, 89 App 471, 46 OO 274, 103 NE(2d) 37.

§ 2113.11 Notice when deceased was an alien. (GC § 10509-8)

Upon the filing of an application for appointment as executor or administrator of the estate of a deceased alien with surviving heirs residing in a foreign country, or as soon thereafter during the administration of the estate as the probate court ascertains that the deceased was an alien, the court shall cause notice of the proceedings to be forwarded by registered mail to the nearest consular representative of the country of which the deceased was a citizen. The executor or administrator shall inform the court that the deceased was an alien as soon as such fact is ascertained by such executor or administrator, but failure to inform the court of such fact or to notify such consular representative as provided in this section shall not delay nor invalidate the administration proceedings or any part thereof.

HISTORY: GC § 10509-8; 114 v 320 (402). Eff 10-1-53.**Comment**

When distribution is to be made to heirs, devisees or legatees who reside in foreign countries, fiduciaries should ascertain if there are any existing federal regulations or prohibitions against such distribution. [For additional comment, see *Addams and Hosford's Ohio Probate Practice*, *Davies' Revision*.]

Forms

1 A&H Probate FORM 2113.11a et seq.

Research Aids**Notice when deceased was an alien:****O-Jur2d:** Diplomatic and Consular officers §§ 3, 4**§ 2113.12 Procedure if executor renounces.**

If a person named as executor in the will of a decedent refuses to accept the trust, or, if after being cited for that purpose, neglects to appear and accept, or if he neglects for twenty days after the probate of the will to give bond, the probate court shall grant letters testamentary to the other executor, if there is one capable and willing to accept the trust, and if there is no such other executor named in the will, the court shall commit administration of the estate, with the will annexed, to some suitable and competent person, pursuant to section 2113.05 of the Revised Code.

HISTORY: GC § 10509-10; 114 v 320 (403); 116 v 385; 133 v S 134. Eff 6-12-70.

Analogous to former GC § 10612.

Comparative Legislation**Executor renounces:**

Cal.—Probate Code, 520

Ill.—Rev Stat, ch 3, § 23-1

Ind.—Burns' Stat, § 29-1-10-2

Ky.—KRS, § 395.050

Mich.—MCLA, § 704.13

N.Y.—SCPA, § 1417

Pa.—Purdon's Stat, Tit. 20, § 3312

Fla.—FSA, § 733.502

Forms

1 A&H Probate FORM 2113.12a et seq.

1 A&H Probate FORM 2109.26a et seq: Substitute fiduciary.

1 A&H Probate FORM 2113.15a et seq: Letters of special administration.

Outline of ProcedureFailure to take or renounce administration. *Leyshon* No. 74; A&H No. 48**Research Aids****Administrator w.w.a.:****O-Jur2d:** Executors and Administrators § 46, 67**Am-Jur2d:** Executors and Administrators, § 603**Renunciation or refusal to accept:****O-Jur2d:** Executors and Administrators § 45**Am-Jur2d:** Executors and Administrators § 77 et seq.**ALR**

Scope and effect of waiver or renunciation of right to administer decedent's estate. 153 ALR 220.

CASE NOTES AND OAG

1. Where a will directs land to be sold by the executors, but they resign without so doing, the sale, or conveyance, or both, may be made by an administrator with the will annexed: *Elstner v. Fife*, 32 OS 358.

2. For history of this section, see *In re Evans*, 27 OLA 550.

3. An administrator with a will annexed must have the qualifications of an administrator provided by former GC § 10617 (see now RC §§ 2109.21, 2113.06, 2113.07): *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

5. If testator names two executors in his will, and one of them dies before testator, the court should appoint the survivor as sole executor of the will, if he is legally competent: *In re March*, 60 Bull 5.

§ 2113.13 Minority of an executor.

When a person appointed executor is under the age of eighteen years at the time of proving the will, administration may be granted with the will annexed during his minority, unless there is another executor who will accept the trust. If there is such an executor, the estate shall be administered by him until the minor arrives at full age when such former minor may be admitted as executor with him upon giving bond as provided in section 2109.04 of the Revised Code.

HISTORY: GC § 10509-11; 114 v 320 (403); 135 v S 1. Eff 1-1-74.

Analogous to former GC § 10613.

Research Aids

Minority of an executor:

O-Jur2d: Executors and Administrators § 43

Am-Jur2d: Executors and Administrators § 71

ALR

Capacity of infant to act as executor or administrator, and effect of improper appointment. 8 ALR3d 590.

CASE NOTES AND OAG

1. A minor shall not be appointed, but some one shall be appointed to act for him until he is of legal age: *In re Sultzbach*, 5 NP 218, 5 OD 516.

§ 2113.14 Executor of an executor not to administer. (GC § 10509-12)

The executor of an executor has no authority, as such, to administer the estate of the first testator. On the death of the sole or surviving executor of a last will, administration of that part of the estate of the first testator not already administered may be granted, with the will annexed, to such person as the probate court appoints.

HISTORY: GC § 10509-12; 114 v 320 (403). Eff 10-1-53. Analogous to former GC § 10615.

Comment

This section abrogates the common law rule, for it was according to the common law doctrine that an executor of an executor, howsoever far in degree remote, stands as to the points of being, having and doing in the same state and plight, as the first and immediate executor.

Research Aids

Executor of executor:

O-Jur2d: Executors and Administrators §§ 529, 530

Am-Jur2d: Executors and Administrators § 612

[SPECIAL ADMINISTRATOR]

§ 2113.15 Special administrator. (GC §§ 10509-14, 10509-15)

When there is delay granting letters testamentary or of administration, the probate court may appoint a special administrator to collect and preserve the effects of the deceased.

Such special administrator must collect the chattels and debts of the deceased and preserve them for the executor or administrator who thereafter is appointed. For that purpose such special administrator may begin and maintain suits as administrator and also sell such goods as the court orders sold. He shall be allowed such compensation for his services as the court thinks reasonable, if he forthwith delivers the property and effects of the estate to the executor or administrator who supersedes him.

HISTORY: GC §§ 10509-14, 10509-15; 114 v 320 (403, 404). Eff 10-1-53. Analogous to former GC § 10621.

Cross-References to Related Sections

See RC §§ 2113.16, 2113.17 which refer to this section.

Comparative Legislation

Special letters of administration:

Cal.—Probate Code, § 460

Ill.—Rev Stat, ch 3, § 10-1

Ind.—Burns' Stat, § 29-1-10-15

Ky.—KRS, § 395.410

Mich.—MCLA, § 702.60

N.Y.—SCPA, § 1118

Pa.—Purdon's Stat, Tit. 20, § 4301

Forms

1 A&H Probate FORM 2113.15a et seq.

1 A&H Probate FORM 2113.06a et seq: Application for letters.

Outline of Procedure

Appointment of special administrator. Leyshon No. 40; A&H No. 11

Research Aids

Compensation:

O-Jur2d: Executors and Administrators § 259

Am-Jur2d: Executors and Administrators § 655

Powers and duties:

O-Jur2d: Executors and Administrators §§ 539-542

Am-Jur2d: Executors and Administrators §§ 653, 654, 659.

Special administrators:

O-Jur2d: Executors and Administrators §§ 537 et seq.

Am-Jur2d: Executors and Administrators § 649 et seq.

ALR

Authority of special or temporary administrator, or administrator pendente lite, to dispose of, distribute, lease, or encumber property of estate. 148 ALR 275.

CASE NOTES AND OAG

1. Special administrator who refused to deliver estate forthwith to administrator with will annexed was entitled to no compensation or fees: *Phares v. Lincoln Nat. Bank*, 42 App 433, 182 NE 360, 36 OLR 365.

2. Special administrator had no authority to contest foreign administration, and was entitled to no compensation or allowance for expenses incurred by reason thereof: *Phares v. Lincoln Nat. Bank*, 42 App 433, 182 NE 360, 36 OLR 365.

3. On special administrator's final account, court properly disallowed claim for legal services in will contest to which he was not party (former GC § 10619): *Dicken v. Strasburger*, 31 App 18, 166 NE 143.

§ 2113.16 Powers of special administrator to cease. (GC §§ 10509-16, 10509-17)

Upon granting of letters testamentary or of administration, the power of a special administrator appointed under section 2113.15 of the Revised Code shall cease and he forthwith must deliver to the executor or administrator all the chattels and moneys of the deceased in his hands. The executor or administrator may be admitted to prosecute any suit begun by the special administrator, as an administrator *de bonis non* is authorized to prosecute a suit commenced by a former executor or administrator.

If such special administrator neglects or refuses to deliver over the property and estate to the executor or administrator, the probate court may compel him to do so by citation and attachment. The executor or administrator also may proceed, by civil action, to recover the value of the assets from such special administrator and his sureties.

HISTORY: GC §§ 10509-16, 10509-17; 114 v 320 (404). Eff 10-1-53. Analogous to former GC §§ 10622, 10623.

Research Aids

Action to recover assets from special administrator:

O-Jur2d: Executors and Administrators § 542

Am-Jur2d: Executors and Administrators §§ 622, 623

Actions by successor representative:

O-Jur2d: Executors and Administrators § 631; Abatement § 29

Am-Jur2d: Executors and Administrators §§ 620, 621

Termination of special administrator's powers:

O-Jur2d: Executors and Administrators § 539

Am-Jur2d: Executors and Administrators § 657

CASE NOTES AND OAG

1. Under this section a trial court must grant a motion for revivor and substitution of the duly appointed and qualified executors of an estate, in an action instituted by a special administrator of the estate of their decedent, to recover a judgment for money claimed to be due the estate of such decedent: *Heekin v. Palmer*, 101 App 216, 1 OO(2d) 168, 138 NE(2d) 431.

§ 2113.17 Special administrator not liable to creditors. (GC § 10509-18)

A special administrator appointed under section 2113.15 of the Revised Code is not liable to an action by a creditor of the deceased. The time of limitation for suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual

form, as if such special administration had not been granted.

HISTORY: GC § 10509-18; 114 v 320 (404). Eff 10-1-53. Analogous to former GC § 10624.

Research Aids

Limitation of actions:

O-Jur2d: Executors and Administrators § 542

Am-Jur2d: Executors and Administrators § 652

No liability to creditors:

O-Jur2d: Executors and Administrators § 542

[REMOVAL]

§ 2113.18 Removal of executor or administrator. (GC § 10509-19)

The probate court may remove any executor or administrator if there are unsettled claims existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate or persons interested therein.

HISTORY: GC § 10509-19; 114 v 320 (404). Eff 10-1-53. Analogous to former GC § 10629.

Comparative Legislation

Grounds for removal:

Cal.—Probate Code, § 521

Ill.—Rev Stat, ch 3, § 23-2

Ind.—Burns' Stat, § 29-1-10-6

Ky.—KRS, § 395.160

Mich.—MCLA, § 704.29

N.Y.—SCPA, § 711

Pa.—Purdon's Stat, Tit. 20, § 3182

Fla.—FSA, § 733.504

Research Aids

Removal:

O-Jur2d: Executors and Administrators § 77; Fiduciaries § 326

Am-Jur2d: Executors and Administrators § 114

ALR

Premature grant of letters of administration or letters testamentary as affecting acts or proceedings thereunder. 113 ALR 1398.

Creditor's or debtor's right to attack issuance of letters of administration. 123 ALR 1225.

Personal interest of executor, administrator adverse to or conflicting with those of other persons interested in estate as ground for revocation of letters or removal. 119 ALR 306.

Right of appeal from order on application for removal of personal representative, guardian, or trustee. 37 ALR2d 751.

CASE NOTES AND OAG

1. Determinations of the probate court in the administration of an estate, overruling exceptions to the inventory filed by the executor and refusing to remove such executor in removal proceedings brought against him, do not estop the institution of concealment proceedings against him by an administrator, subsequently appointed with the will annexed, for concealment of assets of the estate during the time he served as executor, where the subject matter and the issues involved in such prior proceedings were not identical with those involved in the subsequent concealment proceedings: *Gordon v. Dewan*, 4 OApp (2d) 214, 33 OO(2d) 254, 202 NE(2d) 325.

2. The application to remove the administrator should have been sustained upon the ground that it is for the best interest of the trust that it be done and particularly because of the unsettled claims and demands existing between him and the estate: *In re Stauffer*, 40 OLA 254, 57 NE(2d) 145.

§ 2113.19 Administrator de bonis non.

When a sole executor or administrator dies without having fully administered the estate, the probate court shall grant letters of administration, with the will annexed or otherwise as the case requires, to some suitable person pursuant to section 2113.05 or 2113.06 of the Revised Code. Such person shall administer the goods and estate of the deceased not administered, in case there is personal estate to be administered to the amount of twenty dollars or debts to that amount due from the estate.

HISTORY: GC § 10509-20; 114 v 320 (404); 133 v S 134. E# 6-12-70.

Analogous to former GC § 10631.

Comparative Legislation

Appointment of administrator de bonis non:

- Cal.—Probate Code, § 510
- Ind.—Burns' Stat., § 29-1-10-7
- Ky.—KRS, § 395.300
- Mich.—MCLA, § 704.51
- N.Y.—SCPA, § 1007
- Pa.—Purdon's Stat., Tit. 20, § 3326
- Fla.—FSA, § 733.503

Forms

- 1 A&H Probate FORM 2113.19a et seq.
- 1 A&H Probate FORM 2109.26a et seq: Death, incapacity or disqualification of fiduciary.
- 1 A&H Probate FORM 2113.06a et seq: Application for letters.
- 1 A&H Probate FORM 2113.12a et seq: Citation to take or renounce administration.

Outline of Procedure

Appointment of administrator de bonis non, etc. Leyshon Nos. 37, 38, 39; A&H No. 8, 9, 10.

Research Aids

- Appointment of administrator de bonis non:
 - O-Jur2d: Executors and Administrators § 529
 - Am-Jur2d: Executors and Administrators § 603 et seq.

ALR

Construction and application of statutes relating specifically to preferences in appointments as administrator with the will annexed. 164 ALR 844.

CASE NOTES AND OAG

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Necessity of appointment

1. There is no such thing in Ohio as an executor de son tort: *Benjamin v. Le Baron*, 15 O 517.

2. Though the administrator may have disposed of all the estate of an intestate, yet, if he die, no legal proceeding can be had to charge that estate without appointing an administrator de bonis non: *Piatt v. St. Clair*, 5 O 555.

3. The probate court is without authority to appoint an administrator de bonis non of an estate of one who leaves no personal property, even though the attorneys agreed that the appointment should be made: *Hopkins v. Barger*, 21 OLA 386.

4. Where there is no personal property and no debts, there can be no appointment under this section: *Gurley v. Armentraut*, 6 CC(NS) 156, 17 CD 199.

Validity of appointment

9. A mortgagee, by verbally agreeing to accept a release of the equity of redemption in settlement of a mortgage obligation, and a tender of deed, cancels the mortgage debt and the mortgagee ceases to be a creditor of the estate entitled to make application for the appointment of an administrator de bonis non under this section: *Cooney v. Orth*, 20 OLA 570.

10. Whether or not the court has authority to appoint a successor to an administrator on the latter's death cannot be questioned in a collateral proceeding: *Carr v. Hall*, 65 OS 394, 62 NE 439, 87 AmSt 623, 58 LRA 641 [followed, *Smith v. Western Union Tel. Co.*, 7 NP(NS) 609, 19 OD 537].

11. The probate court having, on application made therefor, refused to appoint an administrator de bonis non, and the court of common pleas, after a hearing on the merits on appeal, having made such appointment, the parties cannot thereafter contest the validity of the appointment by contending for the first time that appeal would not lie from the judgment of the probate court: *Ewalt v. Ames*, 6 App 374, 27 OCA 465, 29 CD 133, 62 Bull 389 (Ed).

12. The qualification of the successor to an administrator is not a jurisdictional fact, and such fact need not affirmatively appear in the journal entries to sustain its regularity in proceedings on error: *Ferguson v. Ferguson*, 3 NP(NS) 549, 16 OD 486.

13. Where a widow received the balance remaining in the hands of the administrator after settlement of her husband's estate without making any claim for an allowance for her first year's support, it is not competent for the probate court after the lapse of nearly forty years to grant an application for the appointment of an administrator de bonis non for the sole purpose of setting off said allowance to her: *Evans v. Evans*, 9 NP(NS) 589, 20 OD 676.

Powers of administrator de bonis non

18. At common law, no action could be sustained by an administrator de bonis non against the representatives of a deceased administrator or the sureties on his official bond: *Blizzard v. Filler*, 20 O 479.

19. An administrator de bonis non cannot, without legislative aid, maintain an action against the representatives of a deceased administrator, or sureties on his bond. Is it the duty of an administrator de bonis

non to render account of the administration of deceased administrator; and if so, what is the effect of the finding of probate court: *Curtis v. Lynch*, 19 OS 392.

20. Without legislative aid, an administrator de bonis non, whose predecessor's powers have ceased by death, can have recourse only to the administration bond of the deceased administrator: *Douglas v. Day*, 28 OS 175.

21. Administrator de bonis non has the right and power to sue for and recover assets of the estate wherever found: *Jelke v. Goldsmith*, 52 OS 499, 40 NE 167, 49 AmSt 730.

22. Where an executor dies or resigns without filing any account of the administration of his trust, it is the duty of his successor in the trust to compel an accounting and payment to him of any balance due from such executor to said estate: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, AnnCas 1914A, 190.

23. A trustee, eo nomine, should be appointed to administer the trust created under a will creating a trust for the testator's widow's life in property devised to a son and a daughter, and directing "the same to be parted and divided between them share and share alike as they may agree; said division not to be made until after the decease of my said wife Matilda, but the property to remain intact until that event, and until then the rents of the real property shall go into my estate for the purpose of paying the eight hundred dollars per year to my said wife," etc., "and in case either my son or daughter should die before a division of my estate, leaving no heir or heirs, that in that case the whole of said property shall go to the survivor of them." An administration de bonis non will include the administration of the testamentary trust until a trustee for the purpose is appointed: *Peoples Sav. Bank v Gardner*, 18 CC(NS) 204, 32 CD 692.

Remedy

28. The remedy for the erroneous refusal of a probate court to appoint an administrator de bonis non is error and not mandamus: *State ex rel Voight v. Lueders*, 101 OS 259, 128 NE 72.

§ 2113.20 Will proved after administration as of an intestate. (GC § 10509-21)

If a will of a deceased is proved and allowed after letters of administration have been granted as of an intestate estate, the first administration shall be revoked, unless before such revocation a petition contesting the probate of such will is filed in the court of common pleas. If such a petition is filed, the probate court may allow the administration to be continued in the hands of the original administrators until the final determination of such contest. If the will is sustained, the first administration must be revoked. In either case, upon the revocation of the first administration and the appointment of an executor or administrator with the will annexed, such executor or administrator shall be admitted to prosecute or defend any suit, proceeding, or matter begun by or against the original administrator, in like manner as an administrator de bonis non is authorized to prosecute or defend a suit commenced by a former executor or administrator.

HISTORY: GC § 10509-21; 114 v 320 (405). **EF 10-1-53.**
Analogous to former GC § 10632.

Comment

Under the above section where the power of an administrator has been extinguished by the establishment of a will, then an executor is appointed under the will. Such former administrator would be required to settle his accounts the same as if removed or resigned, and the original executor would in some respects occupy the position of an administrator de bonis non with the will annexed. His relation to the previous administrator would be similar to that of an administrator de bonis non. If the case is appealed, the court may in its discretion continue the administration in the hands of the first administrator until the final proceedings of the contest have been accomplished. This section particularly confers upon the new executor or administrator with the will annexed, power to prosecute and defend any suit, proceeding, or matter commenced by or against the original administrator. Distinction between the administrator originally appointed under the above section, and that of a special administrator, is that he was regularly appointed for the purpose of accomplishing the full administration of the estate, and not for a special purpose, but his administration was terminated by the fact that a valid will of the testator was established in court. If the will is contested, a verdict rendered setting aside the will, and proceedings in error commenced, the court will not appoint a receiver.

Outline of Procedure

Appointment of administrator with will annexed. *Leyshon Nos. 38, 39; A&H No. 9, 10.*

Research Aids

Actions:

O-Jur2d: Executors and Administrators §§ 631, 589; Abatement § 29.

Discovery of later will:

O-Jur2d: Executors and Administrators § 75

ALR

Person to be appointed as special or temporary administrator pending will contest. 136 ALR 604.
Construction and application of statutes relating specifically to preferences in appointment as administrator with the will annexed. 164 ALR 844.
Right of substitution of successive personal representatives as parties plaintiffs. 164 ALR 702.
Statutes dealing with existing administration, upon discovery of will. 65 ALR2d 1201.

CASE NOTES AND OAG

1. Where an estate has been fully settled, and all the moneys in the hands of the administrator have been paid over in pursuance of an order of court, should a will be discovered and proved subsequent to such settlement, the executor cannot compel the former administrator to account for the money or property by him received and paid over: *Barkaloo v. Emerick*, 18 O 268.

2. A proceeding by an administrator to sell real estate, and a deed made pursuant thereto, are not rendered void by the subsequent probate of the will of the decedent: *Gasienica v. Dec*, 31 App 502, 166 NE 692.

§ 2113.21 Powers of executors, administrators, and testamentary trustees during a will contest. (GC § 10509-22)

When a will is contested, the executor, the administrator de bonis non, with the will annexed, or the testamentary trustee may, during the contest, do the following:

(A) Control all the real estate which is included in the will but not specifically devised and all the personal estate of the testator not administered before such contest;

(B) Collect the debts and convert all assets into money, except those which are specially bequeathed;

(C) Pay all taxes on such real and personal property and all debts;

(D) Repair buildings and make other improvements if necessary to preserve the real property from waste;

(E) Insure such buildings upon an order first obtained from the probate court having jurisdiction of such executor, administrator, or testamentary trustee;

(F) Advance or borrow money on the credit of such estate for such repairs, taxes, and insurance which shall be a charge thereon;

(G) Receive and receipt for a distributive share of an estate or trust to which such testator would have been entitled, if living.

The court may require such additional bonds as from time to time seems [seem] proper.

HISTORY: GC § 10509-22; 114 v 320 (405). Eff 10-1-53. Analogous to former GC § 10633.

Research Aids

New bond:

O-Jur2d: Fiduciaries § 180

Payment of taxes:

O-Jur2d: Taxation § 429

Powers when will contested:

O-Jur2d: Executors and Administrators § 89; Trusts § 176

ALR

Duty or right of executor or administrator to pay tax on real estate of his decedent. 163 ALR 724.

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Mandatory obligations, 12

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Repairs to building, 10

Trustee, contingent sale of property by, 11

1. An executor is not bound to resist the contest of a will: *Andrews v. Andrews*, 7 OS 143; *McCord v. McCord*, 104 OS 274, 135 NE 548 [see also *McCord v. McCord*, 91 OS 441, and 7 App 129, 28 OCA 137, 29 CD 429].

2. Although a fiduciary acting under a will has the right to defend the will, he has no duty so to do and may cast that burden upon the legatees and devisees: *Hecker v. Schuler*, 12 OS(2d) 58, 41 OO(2d) 277, 231 NE(2d) 877 (1967).

4. This section has for its purpose provisions that the executor named in the will may, during a contest

to have the will declared invalid, perform certain functions as executor and pay the costs of such administration: *In re Hendrick*, 71 App 247, 26 OO 67, 49 NE(2d) 106.

5. The effect of a contest of a will upon the powers of executors during the contest is defined in this section, which is to clothe the administrator or executor with authority to carry on the mandatory obligations of the estate, but to hold distribution in abeyance: *Adams v. Gurklies*, 88 App 225, 40 OO 393, 91 NE(2d) 706.

6. Substantially by virtue of the provisions of this section the functions of the administrator as to the distribution of the estate are suspended. He has power to proceed to collect the debts and to convert all the assets into money, except such as are specifically bequeathed. Likewise he is to have control of the real estate included in the will, but not specifically devised; if specifically devised, it would be under the control of the legatee. Likewise, if not at all devised, it would be under the control of the heirs, unless an application would be made by the executor or administrator to sell the real estate to pay debts. For a contest of the will will not suspend the right of an executor to file a petition to sell real estate to pay debts. As to the property under his control, both real and personal, he has the power to preserve the same; and whenever it is necessary to preserve the real estate from waste, or repair the buildings, he may insure the same, and may borrow money for that purpose. For it must be remembered that generally no administrator or executor can borrow money upon the responsibility of the estate; if he borrows money for a proper purpose he may credit himself with it in his account, but it is done upon his own responsibility. Even under this statute, if made a charge upon the estate, it must be done with the approbation of the probate court. He cannot sell real estate to make distribution: *Smith v. Hayward*, 5 NP 501, 5 OD 462 [affirmed, 45 Bull 228]; *Welsh v. Perkins*, 5 O 52.

7. The court of common pleas cannot appoint a receiver of real estate specifically devised, in an action to contest a will devising the same. As soon as a will is probated the devisee is entitled to control the same. This case does not decide that there might not be a receiver, but the mere fact of a contest will not be sufficient; no receiver can be appointed afterward: *Burgess v. Sullivan*, 2 NP(NS) 327, 14 OD 712.

8. The fact that the executor represents the testator in giving effect to his wishes as embodied in his last will, does not justify the executor, as a matter of law, in undertaking the defense of a contest of such will at the expense of the estate: *In re Curry*, 20 NP(NS) 49, 27 OD 485.

9. In a case where the attack on the will was chiefly due to the fact that a large special bequest was made to the executor, such an allowance is not permissible, the hardship cast upon the legatee in making the defense against an attack which was perhaps not justified being only one of the burdens incident to the acquisition and ownership of property: *Weir v. Weir*, 7 CC(NS) 289, 18 CD 199.

10. An executor has authority to make needed repairs on a building specifically devised with the direction to turn the property over to the devisee at any time after one year from the death of the testator, but such repairs should only go to the extent of keeping the property in as good condition as the executor found it. If an executor defends in an action to set the will aside, and the action results in sustaining the will, he may be allowed a reasonable amount for counsel fees in that behalf, and where his contract with counsel was on the basis of a contingent fee the allowance will be made more liberal because of that fact: *In re Ullman*, 12 CC(NS) 340, 21 CD 370.

14. Under a will giving to an executor and trustee power to sell and lease real estate belonging to the testatrix, suspension of that power for the time being, pending a contest of the will, did not preclude the trustee from entering into an agreement for the sale or lease of property, contingent upon the validity of the said will being established, where the contracting purchaser knew of the existence of proceedings involving the validity of the will; and the termination of such a suit in a judgment upholding the will leaves the trustee clothed with all the power and authority conferred by the will as and from the date of his appointment. An executor and trustee, having authority under the will to sell or lease property, is at liberty to enter into an agreement whereby a purchaser is to pay for the property in part and take a lease for a period of years with a privilege of purchase for the amount remaining due under the agreement, interest on said amount to be paid at a stipulated rate during the term of the lease: *Bernheim v. Stark*, 29 OCA 17, 30 CD 452.

15. When a will is contested the executor, the administrator de bonis non with the will annexed, or the testamentary trustee not only may, during the contest, perform the acts outlined in this section, but also must, during such contest, perform those acts which he is commanded to perform by statute: *In re Kehoe*, 27 OO(2d) 35, 199 NE(2d) 29 (PC).

§ 2113.22 Proceedings against former executor or administrator.

An administrator or executor appointed in the place of an executor or administrator who has resigned or been removed, whose letters have been revoked, or whose authority has been extinguished is entitled to the possession of all the personal effects and assets of the estate unadministered, and all other funds collected and unaccounted for by such executor or administrator, and may maintain a suit against the former executor or administrator and his sureties on the administration bond to recover such effects, assets and funds and for all damages arising from the maladministration or omissions of the former executor or administrator.

HISTORY: GC § 10509-23; 114 v 320 (405) (Eff 10-1-53); 128 v 76 (79), § 1. Eff 11-9-59.

Analogous to former GC § 10634.

Research Aids

Actions against former executor or administrator:

O-Jur2d: Executors and Administrators § 595; Fiduciaries § 232

Am-Jur2d: Executors and Administrators §§ 622, 623.

Right of successor administrator to possession of estate:

O-Jur2d: Executors and Administrators §§ 535, 595

Am-Jur2d: Executors and Administrators § 610 et seq.

ALR

Right of substitution of successive personal representatives as parties plaintiff. 164 ALR 702

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Construction

1. "Personal effects and assets" include indebtedness of an administrator, resigned, to the estate on account of assets received and converted to his own use: *Slagle v. Entrekin*, 44 OS 637, 10 NE 675; see also *Gardner v. Ashbrook*, 53 OS 678, 44 NE 1136.

Action against representative of deceased administrator

6. Neither at common law, nor by the above statute, nor upon general chancery principles, could an action be sustained by an administrator de bonis non against the representatives of a deceased administrator, or the sureties in his official bond: *Blizzard v. Filler*, 20 O 479.

7. Where a cause of action has arisen under this section, it shall not cease to exist upon the death of the former executor or administrator, but shall survive against his representatives: *Tracy v. Card*, 2 OS 431 [distinguishing *Blizzard v. Filler*, 20 O 479].

9. Where an administrator died, and his account having been filed by his administrator, and exceptions having been filed to same by the administrator de bonis non, the court found that he was indebted to the estate, the administrator de bonis non cannot maintain an action on such finding against the representative of the deceased administrator, but he must seek his remedy, under the statute, on the administration bond of the decedent: *Curtis v. Lynch*, 19 OS 392.

10. The personal representative of an executor who died in office, before an account was due or filed in reference to the trust, is not liable under this section to the administrator de bonis non of the testator in an action brought against him alone as such personal representative, to recover for unadministered assets of the estate of such testator, where none of such assets came into the possession or under the control of such personal representative: *Jones v. Willis*, 66 OS 114, 63 NE 605; 72 OS 189, 74 NE 166 [see also *Holcomb v. Willis*, 72 OS 684].

11. Where an executor dies or resigns without filing any account of the administration of his trust, it is the duty of his successor in the trust to compel an accounting and payment to him of any balance due from such executor to said estate: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, AnnCas 1914A, 190.

12. Where an executor dies without filing any account of the administration of his trust, it is the duty of his personal representative to file such an account for him and pay over to the successor in the trust any balance that may be found due the estate from the deceased executor: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, AnnCas 1914A, 190.

Action against former administrator

17. An administrator de bonis non can maintain an action against a former executor or administrator for assets of the estate which have come to his hands and are not accounted for. The judgment obtained against such former administrator on such claim is evidence against him and his sureties in an action on his administration bond, and can only be impeached by the sureties by proving fraud or mistake: *O'Conner v. State*, 18 O 225.

18. Administrator de bonis non can sue former administrator and his sureties on bond to recover for default in administering money received in action for wrongful death: *United States Fidelity &c. Co. v. Decker*, 122 OS 285, 171 NE 333.

Action against sureties

24. Where a removed administrator has settled with the court, and the balance in his hands is ascertained, suit may be sustained against his sureties without obtaining a separate judgment against him: *Treasurer of Franklin County v. McIlvain*, 5 O 200.

26. Where an executor gives a new bond under the provisions of former GC § 10861 (see now RC § 2109.18) et seq, the sureties thereon are liable to a succeeding administrator, cum testamento, for assets embezzled by the executor before the new bond was given: *Foster v. Wise*, 46 OS 20, 16 NE 687, 15 Am St 542 [*Slagle v. Entrekin*, 44 OS 637, followed, and *Eichelberger v. Gross*, 42 OS 549, distinguished]; see also *Gardner v. Ashbrook*, 53 OS 678, 44 NE 1136; *Smith v. Worley*, 12 App 367.

Finding of probate court of amount due

31. Unless an appeal has been taken, or the judgment reversed, the amount found due by the probate court is conclusive, in the settlement of the administrator's account, as against the bondsmen: *Slagle v. Entrekin*, 44 OS 637, 10 NE 675; see also *Gardner v. Ashbrook*, 53 OS 678, 44 NE 1136.

Jurisdiction

36. The common pleas court is without jurisdiction over an action brought by an executor against his co-executor for an accounting. Such an issue must be to and finally determined by the probate court: *Loney v. Walker*, 8 App 256, 27 OCA 543, 29 CD 418.

§ 2113.23 Sales of former executor or administrator valid. (GC § 10509-24)

When letters of administration are revoked, when an executor or administrator, or administrator with the will annexed, is removed, resigns, or dies, when a will is declared invalid, or when an election to take under section 2105.06 of the Revised Code is made by or for a surviving spouse, all previous sales, leases, encumbrances, whether of real or personal property, made lawfully and in good faith by the executor or administrator, or administrator with the will annexed, and with good faith on the part of the purchasers, and all lawful acts done in the settlement of the estate or execution of the will shall be valid as to such executor, administrator, administrator with the will annexed, purchasers for value in good faith, lessees for value in good faith, encumbrancers for value in good faith, all other parties dealing with said fiduciary for value in good faith, and all parties lawfully claiming by, through or under any of them. But the sums paid out or distributed to legatees or other distributees, when necessary for the proper execution of a will or administration of an estate, may be recovered from the persons receiving them.

HISTORY: GC § 10509-24; 114 v 320 (406); 125 v 903 (974); 125 v 411 (413). **Eff** 10-16-53. Analogous to former GC § 10635.

Research Aids

Effect of discovery and probate of will:

O-Jur2d: Executors and Administrators § 75

Am-Jur2d: Executors and Administrators § 122

Effect of termination of office:

O-Jur2d: Executors and Administrators § 79

Am-Jur2d: Executors and Administrators § 122

Recovery of estate from legatees and distributees:

O-Jur2d: Executors and Administrators § 361

Am-Jur2d: Executors and Administrators § 584 et seq.

ALR

Statutes dealing with existing administration, upon discovery of will. 65 ALR2d 1201.

Law Review

Probate code amendments. Francis J. Eberly. 14 OSLJ 368.

CASE NOTES AND OAG

1. Should a will be discovered after the estate of a decedent has been fully settled, and all moneys and assets which have come into his hands have been paid over by the administrator in pursuance of an order of court, and the will be then duly proved, the executor appointed in such will cannot compel the former administrator to account for the money and other property received and so paid over: *Barkaloo v. Emerick*, 18 O 268.

2. If a legacy has been paid under a will which is set aside thereafter, interest runs from the date at which the legacy is paid, and not from the date at which the will is set aside: *Bermont v. Gotshall*, 110 OS 425, 144 NE 137.

3. Under this section, a land sale proceeding brought by the administrator is binding on the administrator de bonis non with the will annexed: *Kincaid v. Dawson*, 87 App 299, 43 OO 16, 93 NE(2d) 731.

4. Under this section, an administrator who has paid himself a legacy, from the fact that he is not an heir at law will, after the will has been set aside, stand charged to refund said legacy together with interest at six per cent thereon from the date of the filing of exceptions to his final account: *In re Thompson*, 23 NP(NS) 544.

[LIMITATIONS]**§ 2113.24 Limitations. (GC § 10509-122a)**

If any claim must be presented or any notice given to an executor or administrator, or if any action, suit, or proceeding must be instituted against him within any limited period of time prescribed by statute, and if during such period the administrator or executor dies, resigns, or is removed, or the office becomes vacant for any other reason, the time between such death, resignation, removal, or the occurrence of such vacancy and the appointment of a successor shall be excluded in computing the period of such time limitation.

HISTORY: GC § 10509-122a; 119 v 394 (423), § 7. **Eff** 10-1-53.

Research Aids

Limitations:

O-Jur2d: Executors and Administrators §§ 302, 604

ALR

Character or kind of action or proceeding within statute permitting new action after limitation period, upon failure of timely action. 79 ALR 2d 1309.

Voluntary dismissal or nonsuit as within provision of statute extending time for new action in case of dismissal or failure of original action otherwise than upon merits. 79 ALR2d 1290.

Law Review

Ohio statutes of limitation on claims against estates. Francis J. Eberly. 16 OSLJ 206.

CASE NOTES AND OAG

1. Where claimant, who was also administratrix under another name, did not file her claim until April 8, following her removal as administratrix on December 11, such claim was barred under section 2117.02, Revised Code, and the time computed from the date of the original appointment and not from the date of the successor's appointment as provided by this section. *Allen v. Hunter*, 1 App(2d) 278, 30 OO(2d) 296, 204 NE(2d) 545.

[COLLECTION OF ASSETS]

§ 2113.25 Assets to be collected. (GC §§ 10509-85, 10509-86)

So far as he is able, the executor or administrator of an estate shall collect the assets and complete the administration of such estate within nine months after the date of his appointment.

Upon application of the executor or administrator and notice to the interested parties, if the probate court deems such notice necessary, the court may allow further time in which to collect assets, to convert assets into money, to pay creditors, to make distributions to legatees or distributees, to file partial, final, and distributive accounts, and to settle estates. The court, upon application of any interested party, may authorize the examination under oath in open court of the executor or administrator upon any matter relating to the administration of the estate.

HISTORY: GC §§ 10509-85, 10509-86; 114 v 320 (420); 119 v 394 (406), § 1. Eff 10-1-53. Analogous to former GC §§ 10684, 10685.

Comment

While the executor or administrator is required to complete the administration of the estate within nine months, there is no requirement that the administration remain open for the full period of nine months. Under RC § 2113.53, the executor or administrator may complete the administration of the estate at the end of six months, if he can comply with the conditions enumerated therein. He cannot fully protect himself, however, if he makes distribution to the legatees or distributees prior to the expiration of six months.

Cross-References to Related Sections

See RC §§ 2113.26, 2113.27 which refer to this section.

Comparative Legislation

Collection of assets:

- Cal.—Probate Code, § 571
- Ill.—Rev Stat, ch 3, § 10-1
- Ind.—Burns' Stat, § 29-1-13-1
- Ky.—KRS, § 395.190
- Mich.—MCLA, § 707.1
- N.Y.—SCPA, § 2101
- Pa.—Purdon's Stat, Tit. 20, § 3311
- Fla.—FSA, § 733.602

Forms

1 A&H Probate FORM 2113.25a et seq.

Research Aids

Collection of assets:

- O-Jur2d: Executors and Administrators §§ 91, 92
- Am-Jur2d: Executors and Administrators § 181
- Time allowed for completing administration:
- O-Jur2d: Executors and Administrators §§ 353, 363;
- Fiduciaries § 255

Law Review

Distribution and accounts. C. Terry Johnson. 43 OBar (No. 10) 291.

CASE NOTES AND OAG

1. Where a testator provides that the amount of a legacy shall be invested in government bonds at all times and the maximum rate of interest paid on such bonds is two and one-half per cent per annum, it is not error to require the executor to pay interest at that rate instead of the statutory rate during delay in paying the legacy beginning nine months after the notice of the executor's appointment: In re Shanafelt, 164 OS 258, 58 OO 7, 129 NE(2d) 816.

2. In this state a general legacy bears interest at the statutory rate beginning nine months after the notice of the appointment of the executor unless it be clearly apparent that the testator did not so intend: In re Shanafelt, 164 OS 258, 58 OO 7, 129 NE(2d) 816; In re Rothschild, 66 OLA 237, 114 NE(2d) 143.

3. A petition filed by an administrator, alleging that plaintiff's decedent, without consideration and under undue influence exercised by the grantees, conveyed certain real property, that the conveyance was not decedent's voluntary act, and that the personal property of decedent is insufficient to pay the debts of the estate, consisting of medical and funeral expenses and costs of administration, and praying that the conveyance be set aside and the realty sold to pay debts of the estate, states a cause of action and is warranted by this section which requires an executor or administrator to collect the assets of an estate: *Miller v. Bigelow*, 67 App 371, 21 OO 324, 36 NE (2d) 860.

DECISIONS UNDER FORMER GC § 10684

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Assets, 6 et seq
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Scope and effect

1. This section seems to recognize that an executor should have at least one year in which to collect assets and to ascertain the condition of the estate: *Gray v. Case School*, 62 OS 1, 56 NE 484.

Assets—domestic

6. Where a man eighty-three years of age, having a wife and young children, desired on account of his infirm condition to give up his farm, which had a value of about eight thousand dollars, and was persuaded to exchange it for city property, which could be occupied by himself and family and some income derived from the renting of rooms, the fact that in the exchange he received a consideration of perhaps two thousand dollars less than he gave, does not constitute such gross inadequacy as would warrant a court in giving judgment for the difference in an ac-

tion brought therefor by his administrator: *Lepps v. Bryson*, 13 NP(NS) 33, 30 OD 571.

7. After satisfying a lien upon a seat in the New York Stock Exchange, the proceeds thereof are assets in the hands of the administrator: *Bank v. Andrews*, 24 NP(NS) 361.

8. For the powers and duties of an administrator of a broker with reference to stock belonging to customers, debts due from customers, etc., see *Bank v. Andrews*, 24 NP(NS) 361.

9. An administrator of an insolvent estate may maintain a suit in equity to recover personal property transferred by the decedent in fraud of his creditors. "Assets" means property, real or personal, tangible or intangible, legal or equitable, which can be made available for the payment of debts: *Insurance Co. v. Bank*, 173 Fed 398.

—Foreign

14. An action cannot be maintained by an administrator appointed under the laws of this state, to recover money, the proceeds of lands lying in Pennsylvania (the property of the intestate), which were sold by a guardian as the property of his wards, on the order of the orphans' court of that state, for as the administrator could not reach the lands there, he cannot reach the proceeds: *Donley v. Shields*, 14 O 359; see also *Meehan v. Burr*, 58 OS 689, 51 NE 1099.

15. An administrator appointed in this state cannot maintain an action in this state, under the laws of the state of Illinois, authorizing the personal representative of a person who comes to his death by the wrongful act, neglect or default of another, to maintain an action against such other for damages, for the benefit of the widow or next of kin of such deceased person: *Woodward v. Michigan, S. &c. R. Co.*, 10 OS 121.

Collection

20. It is the administrator's duty to collect a note and mortgage due the estate (former GC § 10684 [see now RC § 2113.25] et seq), and he cannot accept conveyance of realty in satisfaction thereof; he cannot credit his account with expenses of transaction nor list the realty conveyed as part of the estate: *In re Tredway*, 29 App 265, 163 NE 223.

21. An action by an administrator to recover of a railroad company compensation and damages for wrongful taking and appropriating lands of the decedent during his lifetime, cannot be maintained for the reason that such wrongful taking did not divest the decedent of his title to the land, and the land, therefore, descended at his death to his heirs: *Lawrence R. Co. v. O'Harra*, 50 OS 667, 36 NE 14.

22. A collection of assets means that the personal property shall be reduced to money, and after the payment of all debts and the collection of all assets, then the estate is ready for distribution. The only thing that the statute contemplates as assets for distribution is money: *Young v. Roberts*, 7 CC 105, 3 CD 685 [affirmed, without report, 54 OS 622].

23. Only when there is collusion between the administrator and defendants may the heir or next of kin of the deceased bring an action to recover assets of the estate, joining the administrator as a party defendant: *Porter v. Doppes*, 12 App 391.

Procedure

28. If a clause in a will authorizes the executor "to safely invest all monies," and such executor is shown to have received assets of greater value than the property which he owns at the time of his death, it will be presumed that he acted lawfully and in pursuance of his authority, and that he held such property in

trust for the beneficiaries under such will: *Hoehn v. Hoehn*, 17 CC(NS) 113, 32 CD 53.

29. Probate courts being courts of plenary and exclusive jurisdiction in the matter of appointing administrators, their records cannot be collaterally impeached; hence, in an action by an administrator of a deceased partner for an accounting of partnership property by the surviving partner, the right of plaintiff to maintain the action cannot be raised: *Peters v. Firestone*, 12 NP(NS) 609, 22 OD 296.

§ 2113.26 Contents of application. (GC § 10509-87)

An application made by an executor or administrator under section 2113.25 of the Revised Code shall set forth the grounds of the application, the amount of money in the hands of the executor or administrator applicable on the debts of the deceased, and that he has used due diligence in performing the duties enumerated therein. Such application shall be supported by the affidavit of the executor or administrator.

HISTORY: GC § 10509-87; 114 v 320 (420); 119 v 394 (406), § 1. Eff 10-1-53. Analogous to former GC § 10686.

Cross-References to Related Sections

See RC § 2113.27 which refers to this section.

Research Aids

Extension of time to complete administration:

O-Jur2d: Executors and Administrators § 363

§ 2113.27 Extension of time limited. (GC § 10509-88)

The probate court shall not at any one time grant an extension of more than six months from the date of application under sections 2113.25 and 2113.26 of the Revised Code, except that in cases where the estate is subject to estate or inheritance taxes which cannot be determined and paid within six months, the court may grant an extension for such longer period as it deems proper. The office of the executor or administrator shall not cease with the time allowed by law or the court for the performance of the duties enumerated in such sections.

HISTORY: GC § 10509-88; 114 v 320 (420); 119 v 394 (406), § 1. Eff 10-1-53. Analogous to former GC §§ 10688, 10689.

Comment

The court may grant an extension of more than six months if the estate is subject to estate or inheritance taxes which cannot be determined and paid within such period. As the final determination of liability for the federal estate tax usually requires from one to two years, and frequently more than two years, the committee was of the opinion that an executor or administrator in such case should not be required to seek an extension of time every six months.

The former requirement (prior to August 22, 1941) that the time shall not be extended beyond three years has been eliminated.

Research Aids

Extension of time limited:

O-Jur2d: Executors and Administrators § 363

Office does not terminate on expiration of time:

O-Jur2d: Executors and Administrators § 80

CASE NOTES AND OAG

1. The time allowed for the collection of assets may be extended for a period of five years from and after the date of the administration bond: *Bray v. Darby*, 82 OS 47, 91 NE 861; see also *Royer v. Hall*, 82 OS 453, 92 NE 1122.

2. The authority of an executor or administrator to represent the estate, unless terminated in one of the modes provided by statute, continues until the estate is fully settled. The probate court, for good cause, may remove him, or accept his resignation. But while assets of the estate remain in his hands unadministered, his authority to administer the same is not extinguished by an order, made upon what purports to be the settlement of his final account, directing that he be discharged from his trust: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

3. Though an administrator has filed his final account, and though the estate has been finally settled and closed, the title to stocks, bonds, and securities belonging to the intestate and fraudulently concealed from the administrator remains in the administrator, and the intestate's sole heir cannot sue for their recovery, where they have not been distributed to him by the probate court, or filed in court for his benefit with the right to sue thereon, as is permitted by former GC § 10701 (repealed, 114 v 320, 475): *Puder v. Agler*, 242 Fed 95, 15 OLR 433, 62 Bull 410.

4. Where an administrator collected all the assets that were then collectible and more than twenty years thereafter assets became collectible, he was still administrator of the estate and could collect the assets: *Taylor v. Thorn*, 29 OS 569.

§ 2113.28 Time allowed to collect assets not to defer account. (GC § 10509-171)

The time allowed by the probate court to collect the assets of an estate shall not operate as an allowance of further time to file the accounts required by section 2109.30 of the Revised Code.

HISTORY: GC § 10509-171; 114 v 320 (439). **Eff** 10-1-53. Analogous to former GC § 10824.

Cross-References to Related Sections

When assets must be collected, RC § 2113.25.

Research Aids

Time extension does not defer accounts:

O-Jur2d: Fiduciaries § 255

[NEW ADMINISTRATOR]

§ 2113.29 New administrator. (GC § 10509-157)

When assets come to the hands of a new administrator, after any of the periods limited for the commencement of suits against him, he shall account for them and be liable to suits and proceedings on account thereof, as is provided with respect to an original administrator.

HISTORY: GC § 10509-157; 114 v 320 (436), § 1. **Eff** 10-1-53. Analogous to former GC § 10759.

Research Aids

Accounting and liabilities of new administrator:

O-Jur2d: Executors and Administrators § 536

Am-Jur2d: Executors and Administrators § 610

ALR

Duty and liability in respect to specifically bequeathed personal property not needed for payment of debts, of executor or administrator with will annexed. 127 ALR 1071.

Law Review

Ohio statutes of limitation on claims against estates. Francis J. Eberly. 16 OSLJ 206.

CASE NOTES AND OAG

1. Administrator must account for after-acquired assets. But rents of real estate accruing between intestate's death and sale of his lands by administrator are not such assets: *Overturf v. Dugan*, 29 OS 230.

[CONTINUING BUSINESS]

§ 2113.30 Continuing decedent's business. (GC § 10509-9)

Except as otherwise directed by the decedent in his last will and testament, an executor or administrator may, without personal liability for losses incurred, continue the decedent's business during one month next following the date of the appointment of such executor or administrator, unless the probate court directs otherwise, and for such further time as the court may authorize on hearing and after notice to the surviving spouse and distributees. In either case no debts incurred or contracts entered into shall involve the estate beyond the assets used in such business immediately prior to the death of the decedent without the approval of the court first obtained. During the time the business is continued, the executor or administrator shall file monthly reports in the court, setting forth the receipts and expenses of the business for the preceding month and such other pertinent information as the court may require. The executor or administrator may not bind the estate without court approval beyond the period during which the business is continued.

HISTORY: GC § 10509-9; 114 v 320 (402); 116 v 385 (394), § 1. **Eff** 10-1-53.

Forms

1 A&H Probate FORM 2113.30a et seq.

Research Aids

Carrying on business:

O-Jur2d: Executors and Administrators §§ 173, 174

Am-Jur2d: Executors and Administrators § 220 et seq.

ALR

Estoppel of one doing business with personal representative purporting to carry on decedent's business, to assert representative's personal liability. 3 ALR3d 757.

Liability of personal representative for losses in carrying on, without testamentary authorization, decedent's business. 58 ALR2d 365.

Priority of claims arising out of continuation of decedent's business by personal representative. 83 ALR2d 1406.

CASE NOTES AND OAG

1. For decisions prior to this statute, see *Mills v. Connor*, 104 OS 409, 135 NE 616, and *Lucht v. Behrens*, 28 OS 231.

2. Revised Code § 2113.30, which provides that after the expiration of one month following the date of his appointment an administrator is required to apply to the probate court for authority to continue the business, has no application where the administrator is not continuing the business but is in the process of liquidation of assets under a court order for the sale of such assets at private sale: *In re Brown*, 98 App 297, 57 OO 342, 129 NE(2d) 509 [affirming 67 OLA 291, 129 NE(2d) 497].

3. Where certain moneys are due from the executor to the purchaser at a private sale of the remaining portion of deceased's business being liquidated by the administrator, the failure of the executor to account for such moneys does not relieve the administrator of his duty to correctly report the full amount of the sale price, under RC § 2113.30: *In re Brown*, 98 App 297, 57 OO 342, 129 NE(2d) 509 [affirming 67 OLA 291, 129 NE(2d) 497].

4. Under the provisions of this section, an executor has the right, even without the authorization of the probate court, to continue the business of the decedent for one month after his appointment and upon proper proof be credited with all expenses incurred during such period as well as the expenses incurred prior to the death of the decedent: *In re Szakacs*, 86 OLA 333, 175 NE(2d) 119 (App).

[ACCOUNTS]

§ 2113.31 Responsibility of executor or administrator. (GC § 10509-172)

Every executor or administrator is chargeable with all chattels, rights, and credits of the deceased which come into his hands and are to be administered, although not included in the inventory required by section 2115.02 of the Revised Code. Such executor or administrator is also chargeable with all the proceeds of personal property and real estate sold for the payment of debts or legacies, and all the interest, profit, and income that in any way comes to his hands from the personal estate of the deceased.

HISTORY: GC § 10509-172; 114 v 320 (439). Eff 10-1-53. Analogous to former GC § 10826.

Cross-References to Related Sections

Application for determination of inheritance taxes, RC § 5731.36.

Research Aids

What chargeable generally:

O-Jur2d: Executors and Administrators §§ 94-96.

ALR

Tort claimant against decedent's estate as person or party interested, or as creditor, entitled to object to account or report of personal representative. 87 ALR2d 1231

CASE NOTES AND OAG

Scope

1. By a former statute (2 Chase, 1309, § 8), the administrator was required to charge himself with the amount of the estate, according to the inventory

of sale, including all debts due the estate and moneys on hand at death: *Piatt v. Longworth*, 27 OS 159.

2. If the executor or administrator personally owe the estate, he must include that in his current report, even if it has not been inventoried: *In re Raab*, 16 OS 273; *Tracy v. Card*, 2 OS 431; *Bigelow v. Bigelow*, 4 O 138.

3. The executor need not include a debt upon which he is only contingently liable, nor one owing, not to the deceased, but to his former representative: *Shields v. Odell*, 27 OS 398.

4. Immediately upon the appointment of a debtor as administrator or executor such debt becomes assets of the estate, and it must be accounted for: *McGaughey v. Jacoby*, 54 OS 487, 44 NE 231; *James v. West*, 67 OS 28, 65 NE 156.

5. Title to all personal property belonging to a decedent vests in his administrator upon the acceptance of the trust, as of the date of death, but an administrator has no right to any property except that held or owned by the decedent at the time of his death: *Hoover v. Hoover*, 90 App 148, 47 OO 37, 104 NE(2d) 41.

Proceeds of realty

11. If the executor fraudulently sells real estate at much less than its fair value, the court may charge him in his account with the fair value of the lands so sold: *Brown v. Reed*, 56 OS 264, 46 NE 982 [affirming *Reed v. Brown*, 10 CC 44, 6 CD 15].

12. Where lands are sold by an executor at private sale for their full value, such executor must account for the total amount of the purchase price received by him, if necessary for the payment of debts. If sold for less than the full value, he must nevertheless account for the full value thereof: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, *AnnCas* 1914A, 190.

13. Even if the estate is insolvent the heirs are entitled to the rents and profits until the land is sold by order of the court for the payment of debts: *Overturn v. Dugan*, 29 OS 230.

14. Rents collected by the executor or administrator to be applied by agreement with the parties to the payment of claims against the estate, thereby rendering it unnecessary to sell the land, are personal assets and must be accounted for: *Turpin v. Turpin*, 16 OS 270; *Campbell v. McCormick*, 1 CC 504, 1 CD 281.

[§ 2113.31.1] § 2113.311 Management of real estate by executor or administrator.

(A) If, within a reasonable time after the appointment of the executor or administrator, no one in authority has taken over the management and rental of any real estate of which the decedent died seized, the executor or administrator, or an heir or devisee may, unless the will otherwise provides, make application to the probate court for an order authorizing the executor or administrator to assume such duties. Such application shall contain:

(1) A brief statement of the facts upon which the application is based and such other pertinent information as the court may require;

(2) A description or identification of the real estate and the interest owned by the decedent at the time of his death;

(3) The names and addresses, if known to the

applicant, of the persons to whom such real estate passed by descent or devise.

Notice of the time of hearing on such application shall be given to the persons designated in sub-paragraph division (A) (3) of this section, unless for good cause the court dispenses with such notice, and also to the executor or administrator, unless the executor or administrator is the applicant.

If the court finds that the statements contained in the application are true and that it would be for the best interest of such heirs or devisees that the application be granted, it may authorize the executor or administrator to assume the management and rental of such real estate.

The court may require bond, new or additional, in an amount to be fixed by the court and conditioned that the executor or administrator will faithfully and honestly discharge the duties devolving upon him by the provisions of this section.

(B) In the exercise of such authority, the executor or administrator shall be authorized to do the following:

- (1) Collect rents;
- (2) From the rents collected:

(a) Pay all taxes and assessments due on such real estate, and all such usual operating expenses in connection with the management thereof;

(b) Make repairs when necessary to preserve such real estate from waste, provided that an order of the court shall first be obtained if the cost of such repairs exceeds one hundred dollars;

(c) Insure buildings against loss by fire or other casualty and against public liability;

(3) Advance money upon an order first obtained from the court, for such repairs, taxes, insurance, and all usual operating expenses, which shall be a charge on such real estate;

(4) Rent the property on a month to month basis, or, upon an order first obtained from the court, for a period not to exceed one year;

(5) Prosecute actions for forcible entry and detention of such real estate.

The executor or administrator shall, at intervals not to exceed twelve months, pay over to the heirs or devisees, if known, their share of the net rents, and shall account for all money received and paid out under authority of this section in his regular accounts of the administration of the estate, but in a separate schedule. If any share of the net rents remains unclaimed, it may be disposed of in the same manner as is provided for unclaimed money under section 2113.64 of the Revised Code.

The authority granted under this section shall terminate upon the transfer of the real estate to the heirs or devisees in accordance with section 2113.61 of the Revised Code, or upon a sale thereof, or upon application of the executor or administrator, or for a good cause shown, upon

the application of an heir or devisee.

Upon application the court may allow compensation to the executor or administrator for extraordinary services, which shall be charged against the rents, and if said rents be insufficient, shall be a charge against such real estate.

Upon application the court may allow reasonable attorney fees paid by the executor or administrator when an attorney is employed in connection with the management and rental of such real estate, which shall be charged against the rents, and if said rents be insufficient, shall be a charge against such real estate.

HISTORY: 128 v 76, § 1. **EF** 11-9-59.

Forms

1 A&H Probate FORM 2113.31.1a et seq.

Research Aids

Management of real estate:

O-Jur2d: Executors and Administrators § 181

Am-Jur2d: Executors and Administrators § 246 et seq.

ALR

Power and authority, in the absence of determining clause in will, or executor or administrator to lease out, or to rent, decedent's real estate. 95 ALR2d 258.

Law Review

Distribution and accounts. C. Terry Johnson. 43 OBar (No.11) 321.

§ 2113.32 Executors and administrators not to profit. (GC § 10509-173)

No profits shall be made by executors or administrators by the increase of any part of an estate, nor shall they sustain any loss by the decrease or destruction of such estate without their fault.

HISTORY: GC § 10509-173; 114 v 320 (440). **EF** 10-1-53. Analogous to former GC § 19827.

Research Aids

No liability for loss without fault:

O-Jur2d: Executors and Administrators § 94; Fiduciaries §§ 21, 44

Am-Jur2d: Executors and Administrators §§ 216-219, 236-238

Not to profit:

O-Jur2d: Executors and Administrators § 94

Am-Jur2d: Executors and Administrators, § 518

CASE NOTES AND OAG

1. Where executors are given power to loan money upon mortgage for a specified time, they have a discretion to loan it for less periods than the whole time named, to reloan, and to change the mortgage securities. If they take insufficient security, but later procure the borrower to furnish other security deemed by them to be sufficient and such as they would have been justified in taking in the first place, they are not liable for loss happening through unforeseen defects in the latter security: *Miller v. Proctor*, 20 OS 442.

2. All the power, influence and skill of one occupying such a relation is to be used for the advantage of the beneficial owner, and not for personal gain; and all increase, gains and profits, whether arising

from the natural increase in value of the property, or from the management of the trustee, are the absolute property of the beneficiary: *Berkmeyer v. Kellerman*, 32 OS 239.

3. It is a well-settled rule in equity that a trustee is not permitted to so manage the subject of his trust, as to make profits or gain therefrom for himself. The beneficiaries in the trust have a right to expect and require the exercise of his best judgment, care and diligence on their behalf, and the gains resulting therefrom inure to their sole benefit. What such trustee may not do directly he is not permitted to do through the intervention of an agent or attorney: *Cox v. John*, 32 OS 532.

§ 2113.33 Not responsible for bad debts. (GC § 10509-174)

An executor or administrator is not accountable for debts inventoried as due to the decedent, if it appears to the probate court that, without his fault, they remain uncollected.

HISTORY: GC § 10509-174; 114 v 320 (440). **EF** 10-1-53. Analogous to former GC § 10828.

Research Aids

Accountability for bad debts:

O-Jur2d: Executors and Administrators § 94

CASE NOTES AND OAG

1. This section does not modify former GC § 10691 (GC § 10509-67 [RC § 2115.21]), and a debt due the estate from the executor is assets, whether good or bad: *McGaughey v. Jacoby*, 54 OS 487, 44 NE 231; *Allen v. McCoy*, 57 OS 641, 50 NE 1126 [reversing *McCoy v. Allen*, 9 CC 607, 6 CD 659; approved, *Jones v. Willis*, 72 OS 189, 74 NE 166]; see also *Holcomb v. Willis*, 72 OS 684, 76 NE 1126.

2. Administrator not to be charged with money in his hands tied up by litigation: *James v. West*, 67 OS 28, 65 NE 156.

3. But a debt owed by an executor to the estate cannot be classed as a bad debt: *Jones v. Willis*, 72 OS 189, 74 NE 166; *McGaughey v. Jacoby*, 54 OS 487, 44 NE 231.

§ 2113.34 Chargeable with property consumed. (GC § 10509-175)

If an executor or administrator neglects to sell personal property which he is required to sell, and retains, consumes, or disposes of it for his own benefit, he shall be charged therewith at double the value affixed thereto by the appraisers.

HISTORY: GC § 10509-175; 114 v 320 (440); 125 v 903 (975). **EF** 10-1-53. Analogous to former GC § 10829.

Research Aids

Chargeable for property consumed:

O-Jur2d: Fiduciaries § 124

Am-Jur2d: Executors and Administrators §§ 267, 268

§ 2113.35 Commissions.

Executors and administrators shall be allowed commissions upon the amount of all the personal estate, including the income therefrom, received and accounted for by them and upon the proceeds of real estate sold under authority contained

in a will, as follows:

(A) For the first one thousand dollars at the rate of six per cent;

(B) All above one thousand and not exceeding five thousand dollars at the rate of four per cent;

(C) All above five thousand dollars at the rate of two per cent.

Executors and administrators shall also be allowed a commission of one per cent on the value of real estate not sold. Executors and administrators shall also be allowed a commission of one per cent on all property not subject to administration that is includable for purposes of computing the Ohio estate tax, except joint and survivorship property.

The basis of valuation for the allowance of such commissions on property sold shall be the gross proceeds of sale, and for all other property the date of death value thereof as finally fixed for purposes of computing the Ohio estate tax. The commissions allowed to executors and administrators in this section shall be received in full compensation for all their ordinary services.

Should the probate court find, after hearing, that an executor or administrator has in any respect not faithfully discharged his duties as such executor or administrator, the court may deny such executor or administrator any compensation whatsoever or may allow such executor or administrator such reduced compensation as the court thinks proper.

HISTORY: GC § 10509-192; 114 v 320 (443); 116 v 385 (402); 119 v 394 (416); 135 v H 691. **EF** 6-19-74.

Analogous to former GC § 10837.

Cross-References to Related Sections

See RC § 2113.36 which refers to this section.

Research Aids

Compensation:

O-Jur2d: Executors and Administrators § 245 et seq; Fiduciaries § 278

Am-Jur2d: Executor and Administrator § 486 et seq

ALR

Loss or depreciation of assets for which executor or administrator is not responsible as affecting the amount of his compensation. 110 ALR 994.

Appraised value of estate as shown by inventory or value at time of settlement as basis for determining commissions of executor or administrator. 173 ALR 1346.

Law Reviews

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Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

CASE NOTES AND OAG

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Amount of compensation

1. Where the testator directed certain legacies to be paid by his executors and devised lands charged with the payment of the legacies and costs of administration, and the devisee paid and took receipts from the legatees and tendered the amount of costs of administration to the executors, exclusive of any per cent on the legacies, the executors are not entitled to a per cent on the legacies: *Williams v. Williams*, 8 OS 300.

2. Payment of a debt of decedent by the conveyance of mortgaged real estate in satisfaction of the same, is not such a disbursement as will entitle the personal representative to the percentage designated by law. But a court will refuse to interfere to disallow such a charge after long acquiescence and a final settlement of the estate: *Piatt v. Longworth*, 27 OS 159.

3. Where there is a bequest of the income of certain funds, commissions due the administrator should be prorated against principal and income: *Boggs v. Taylor*, 29 OS 172 [for another case involving same subject matter, see 26 OS 604].

4. This section should be construed with former GC § 10809 (see now RC § 2127.38) in determining the per centum compensation for the sale of real estate, and it is to be computed on the aggregate amount arising from both real and personal property, and not each separately. In graduating the per centum compensation the higher rate prescribed by former GC § 10837 (see now RC §§ 2113.35, 2127.37) should be first applied to the personal estate: *Stone v. Strong*, 42 OS 53. Compare *Flory v. Cripps*, 132 OS 487, 8 OO 484, 9 NE(2d) 500 [affirming 6 OO 142 (PC)].

5. In proceedings to sell lands to pay debts, the executor's compensation is to be paid first, computed under this section, on the money arising from such sale. But if a mortgagee, whose lien is fixed by the court, becomes the purchaser, the executor is entitled to no compensation on that part of the purchase money applicable to the satisfaction of the mortgage: *Stone v. Strong*, 42 OS 53. Compare *Flory v. Cripps*, 132 OS 487, 8 OO 484, 9 NE(2d) 500 [affirming 6 OO 142 (PC)].

6. This provision for compensation is identical with that provided for assignees by GC § 11143 (RC § 1313.50), and the same rule applies to both: *Andrews v. Johns*, 59 OS 65, 51 NE 880; *Shaw v. Fifth*

Ward Bldg. Assn., 6 CC 41, 3 CD 340.

7. The per centum compensation for the sale of real estate is to be computed upon the aggregate amount arising from the whole estate, graduated as provided by former GC § 10837 (see now RC §§ 2113.35, 2127.37), but the higher rate should be calculated on all the other property of the estate before making any calculation of per centum on the proceeds of the sale of mortgaged real estate: *Klimper v. Klimper*, 12 App 332, 31 OCA 267.

8. Interest is chargeable to a personal representative on sums appropriated by him in payment of his commissions, in advance of their judicial allowance, from the date of appropriation to the date of allowance. In re *Russell*, 60 App 385, 13 OO 239, 21 NE (2d) 604.

9. Unfaithfulness by an executor of a decedent's estate in the discharge of his duties is the sole basis on which a court can reduce or refuse to allow his compensation fixed by this section: In re *Marshall*, 78 App 457, 34 OO 183, 65 NE(2d) 527.

10. While the per centum allowed under this section has no application to the proceeds derived from the sale of real estate in a land sale proceeding, nevertheless the court, in the exercise of its authority under GC § 10509-193 (RC § 2113.36), will allow the fiduciaries as compensation for extraordinary services rendered in connection with the land sale proceeding two per cent of the proceeds derived from the sale: In re *Ohmer*, 22 OO 147 (PC).

11. Under the power conferred by this section upon the probate court to deny an administratrix "any compensation whatsoever" or "such reduced compensation as the court may think proper should" he "find, after hearing, that" she "has in any way not discharged his (her) duties as such" administratrix, the probate court did not err in denying compensation to an administratrix who did not contest nor appeal from her removal as such, even though her services in land sale proceedings were beneficial to persons interested in the estate: In re *Cohen*, 54 OLA 9 (App).

12. Executor not entitled to commissions on real estate which formed part of the residuary estate, and was conveyed in accordance with an agreement of the parties: *Union Sav. Bank & Co. v. Smith*, 4 CC(NS) 237, 16 CD 317 [affirmed, without report, *Smith v. Union Sav. Bank & Co.*, 74 OS 505].

12.1 Pursuant to this section, the probate court may, in its discretion, deny allowance of an administrator's fee to an administrator who the court finds did not faithfully discharge his duties: In re *Gray*, 118 App 547, 26 OO(2d) 65, 196 NE(2d) 131.

14. If an executor takes certain securities belonging to the testator, and holds such securities as a fund, the income of which is to be paid to such executor personally under the terms of testator's will, such executor is entitled to commissions upon the amount of the securities thus handled; and such executor will not be restricted to compensation upon the amount of cash collected and expended: In re *Messang*, 20 NP (NS) 60, sub nomine, In re *Massang*, 26 OD(NP) 533 [affirmed by court of appeals].

15. In view of the use of the word "must" in RC § 2113.35 the limit of compensation for executors and administrators for ordinary services provided by such section is mandatory and an executor or administrator upon undertaking to act in such fiduciary capacity is bound by the statutory regulation insofar as ordinary services are required: In re *Haggerty*, 70 OLA 463, 128 NE(2d) 680 (PC).

16. Extraordinary services of fiduciaries under a will or under the law would seem to include various forms of litigation if necessary, such as the filing of an action to construe a will or services in the de-

fense of a will; action for declaratory judgment; prosecution or defense of litigation necessary to protect the estate and actions to sell real estate and since such services usually require the employment by the fiduciary of counsel, the fiduciary is entitled to be reimbursed for the reasonable value thereof: *In re Haggerty*, 70 OLA 463, 128 NE(2d) 680 (PC).

17. An executor or administrator is entitled to only such fees for the administration of the decedent's estate as are provided for by statute unless upon application to the probate court an award is made for extraordinary services and exceptions will lie to an account in which the administrator has without court approval received more than the statutory fee: *In re Brown*, 67 OLA 291, 129 NE(2d) 497 (PC) [affirmed in part, 98 App 297, 57 OO 342, 129 NE(2d) 509].

18. Unfaithfulness of an executor or administrator of a decedent's estate in the discharge of his duties is the sole basis on which a court can reduce or refuse to allow his compensation as fixed by this section: *In re Brown*, 67 OLA 291, 129 NE(2d) 497 (PC) [affirmed in part, 98 App 297, 57 OO 342, 129 NE(2d) 509].

To whom payable

22. The executor or administrator of a surviving partner, who dies with partnership assets in his possession and while engaged in settling the partnership business, has the duty of completing such settlement, and may receive compensation out of the partnership funds for his services in the performance of this duty: *Dayton v. Bartlett*, 38 OS 357.

23. If an estate is settled in part by an executor or administrator, and in part by his successor, the compensation should not thereby be increased; but it should be apportioned among such executor or administrator in proportion to the value of the services rendered by them: *Bates v. Creed*, 2 App 59, 15 CC (NS) 433, 26 CD 338 [for opinion below, see *Creed v. Bates*, 14 NP(NS) 81; affirmed, *Colored Industrial School v. Bates*, 90 OS 288]; *Thurston v. Ludwig*, 4 App 486, 25 CC(NS) 298 [for another case arising from same subject matter, see *Wallace v. Ludwig*, 18 CC(NS) 422, 25 CD 652; which was reversed, without opinion, *Ludwig v. Wallace*, 91 OS 397]; *Hegner v. Hegner*, 9 App 147, 31 OCA 418 [motion to certify record overruled, 15 OLR 199, 62 Bull 291].

24. An executor to whom an interest for life in all the personalty is given, is not entitled to the entire compensation for settling such estate even if he attempts to make a final settlement; since an administrator de bonis non must be appointed to distribute the property to the remaindermen: *Hegner v. Hegner*, 9 App 147, 31 OCA 418 [motion to certify record overruled, 15 OLR 199, 62 Bull 291].

25. In determining the compensation to be paid an executrix the statutory commissions, as provided in former GC § 10837 (see now RC §§ 2113.35, 2127.37), are to be calculated upon the entire estate: *Hegner v. Hegner*, 9 App 147, 31 OCA 418 [motion to certify record overruled, 15 OLR 199, 62 Bull 291].

25.1 An administratrix may not be deprived of the compensation due to her under the provisions of RC § 2113.35 for her services for mere delay in making and returning the inventory of the estate, when she has not been given an order requiring her, at an early day therein named, to return same, as prescribed by RC § 2115.03, or has not been notified by the court of the expiration of the time to file such inventory, as prescribed by RC § 2109.24: *In re Burchett*, 16 OApp(2d) 45, 45 OO(2d) 133, 241 NE(2d) 787.

26. Trust company, appointed administrator without objection, and so acting, is entitled to compen-

sation although the act under which the appointment was made is invalid. The measure of such compensation is the amount allowed by statute to legally appointed executors and administrators: *Union Sav. Bank &c. Co. v. Smith*, 4 CC(NS) 237, 16 CD 317 [affirmed, without report, *Smith v. Union Sav. Bank &c. Co.*, 74 OS 505].

27. The court may apportion the statutory commissions between two or more executors in accordance with the services performed by each, where the accounts between the estate on the one hand and the executors on the other have not been settled and determined: *Meyers v. Hopkins*, 7 CC(NS) 240, 18 CD 208; *Hegner v. Hegner*, 9 App 147, 31 OCA 418 [motion to certify record overruled, 15 OLR 199, 62 Bull 291].

28. Where one who is of the next of kin and an heir at law, by agreement or with the knowledge and consent of the other next of kin and heirs at law, undertakes to settle and adjust the affairs of the estate of a decedent and by reason of such arrangement collects assets and pays valid checks of such estate and is later duly appointed to administer thereon, the letters of administration so issued relate back to the death of the decedent and thereby legitimize all transactions made prior and by virtue of such arrangement; and such subsequent appointee may claim and be allowed the statutory per centum upon all assets so collected and disbursed. For such purpose letters of administration likewise relate back to the death of the decedent: *In re Pollock*, 17 NP(NS) 490, 60 Bull 273.

29. An executor may be allowed commissions for collecting rent even though he had no authority to collect: *In re Thompson*, 23 NP(NS) 544.

30. Where the administrator has charged the statutory six per cent on the first thousand dollars and four per cent on the next four thousand, an administrator de bonis non, who succeeds him, can only charge the percentage his predecessor could have charged upon money subsequently collected, viz., two per cent: *In re Waring*, 7 NP 553, 5 OD 415.

31. The superintendent of banks has no authority to administer an estate of which an insolvent trust company was executor, and may not, in his final account in probate court as liquidator, secure a credit for services rendered by him between the time of the executor's insolvency and the appointment of an administrator de bonis non with will annexed to continue administration of the estate: *In re Baldwin*, 1 OO 252 (PC).

Limitations

36. Allowance of administrator's commissions after final account accepted, without opening up account and notice to interested parties, is not in the nature of a judgment, and such claim would be barred in six years: *Snider v. Graham*, 14 CC 386, 18 CD 3.

Attachment

41. A creditor of an executor cannot reach the executor's compensation by attachment, creditor's bill or otherwise, before it is allowed by the court. It would embarrass the settlement of estates and invade the jurisdiction of the probate court: *Overturf v. Gerlach*, 62 OS 127, 56 NE 653, 78 AmSt 704.

§ 2113.36 Further allowance; counsel fees.

Allowances, in addition to those provided by section 2113.35 of the Revised Code for an executor or administrator, which the probate

court considers just and reasonable shall be made for actual and necessary expenses and for extraordinary services not required of an executor or administrator in the common course of his duty.

Upon the application of an executor or administrator for further allowances for extraordinary services rendered, the court shall review both ordinary and extraordinary services claimed to have been rendered. If the commissions payable pursuant to section 2113.35 of the Revised Code, exceed the reasonable value of such ordinary services rendered, the court must adjust any allowance made for extraordinary services so that total commissions and allowances to be made fairly reflect the reasonable value of both ordinary and extraordinary services.

When an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration. The court may at any time during administration fix the amount of such fees and, on application of the executor or administrator or the attorney, shall fix the amount thereof. When provision is made by the will of the deceased for compensation to an executor, the amount provided shall be a full satisfaction for his services, in lieu of such commissions or his share thereof, unless by an instrument filed in the court within four months after his appointment he renounces all claim to the compensation given by the will.

HISTORY: GC § 10509-193; 114 v 320 (443); 119 v 394 (416); 135 v H 691. EF 6-19-74.

Analogous to former GC § 10838.

Forms

1 A&H Probate FORM 2113.36a et seq.

Research Aids

Attorney fees:

O-Jur2d: Executors and Administrators § 260 et seq.

Am-Jur2d: Executors and Administrators § 534 et seq.

Effect of provisions in will:

O-Jur2d: Executors and Administrators § 251

Am-Jur2d: Executors and Administrators §§492, 493

Extra compensation:

O-Jur2d: Executors and Administrators § 253 et seq.

Am-Jur2d: Executors and Administrators § 497 et seq.

ALR

Right of personal representative to allowance for attorneys' fees or other expenses incurred in unsuccessful effort to claim property for the estate out of the property involved. 126 ALR 1349.

Allowance out of decedent's estate for services rendered by attorney not employed by executor or administrator. 142 ALR 1459.

Right of executor or administrator to allowance for broker's commissions or other expenses incurred in sale of real property or collection of rents. 155 ALR 1314.

Validity and effect of provision in will limiting amount of fees of executor or trustee. 161 ALR 870.

Validity, construction, and effect of provisions of

will to effect that legacy or devise is made in consideration of, or in contemplation of, services to be rendered after testator's death, in carrying on testator's business or in administering or caring for estate. 116 ALR 361.

Allowance of attorneys' fees in litigation involving cy pres doctrine. 89 ALR2d 691.

Attorneys' fees and expenses incurred by personal representatives in successful defense of will contest as chargeable to the residuary estate or as apportionable among beneficiaries. 20 ALR2d 1226.

Right to allowance out of estate of attorney's fees incurred in attempt to establish or defeat will. 40 ALR2d 1407.

Right of executor or administrator to extra compensation for his legal services. 65 ALR2d 809.

Right of executor or administrator to extra compensation for his accounting services. 65 ALR2d 838.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates. 58 ALR3d 317.

Law Reviews

Power of testator to designate an attorney. (Case note.) 2 OSLJ 77.

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

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Expenses and extraordinary services

1. The allowance to an administrator for extraordinary services is part of the statement of his account and is to be considered by the court accordingly. Whether the allowance is made at the time of or prior to the filing of a settlement account, such allowance cannot take effect as prejudicing the rights of others interested in the settlement of the estate who have not had notice until the court, after legal notice, acts upon the settlement account itself: *McMahon v. Ambach Co.*, 79 OS 103, 86 NE 512; see also *McMahon v. Ambach*, 79 OS 445, 87 NE 1138.

2. In the absence of an express contract between attorney and client which covers the work to be done by the attorney or an objective to be accomplished by him and specifies the amount or measure of compensation he is to receive therefor, the attorney, upon dismissal by the client, even without cause, is limited to the recovery of the reasonable value of the services he has rendered for the client to the date of dismissal: *Bolton v. Marshall*, 153 OS 250, 41 OO 270, 91 NE(2d) 508.

3. Under this section reasonable attorney fees must be based upon the actual services performed by the attorneys and upon the reasonable value of those services: *In re Verbeck*, 173 OS 557, 558, 20 OO(2d) 163, 184 NE(2d) 384.

4. Costs connected with the administration of the estate of a decedent and other obligations incurred in that connection are "debts" of the estate: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

5. An executor is not entitled to charge the estate for the expense of conducting a defense of the will where it is adjudged invalid, although the executor is a necessary party under GC § 12080 (RC § 2741.02): *Thurston v. Ludwig*, 4 App 486, 25 CC(NS) 298 [for another case arising from same subject matter, see *Wallace v. Ludwig*, 18 CC(NS) 422, 25 CD 652; which was reversed, without opinion, *Ludwig v. Wallace*, 91 OS 397].

6. In the absence of a showing of an abuse of discretion, a court is not authorized to interfere with the execution of a power granted by the will of a testator to his executrix to pay to herself from his estate such sum or sums as she deems proper compensation for legal services and unusual services rendered as executrix which in her judgment are necessary or advisable in the administration of his estate: *In re Ellis*, 66 App 121, 19 OO 392, 32 NE(2d) 23.

7. Under this section, no distinction is made between ordinary and extraordinary legal services rendered to the executor in the administration of an estate: *In re Dickey*, 87 App 255, 42 OO 474, 94 NE(2d) 223.

8. Revised Code § 2113.36 authorizing the probate court to grant an additional allowance over and above that provided for in RC § 2113.35, for actual and necessary expenses and for extraordinary services not required of the administrator in the common course of his duty, does not require a formal written application therefor: *In re Brown*, 98 App 297, 57 OO 342, 129 NE(2d) 509.

9. Revised Code § 2113.36 which provides, in part that, "reasonable attorney fees paid by . . . the administrator shall be allowed as a part of the expenses of administration," does not expressly provide that the filing of an application therefor is essential: *In re Brown*, 98 App 297, 57 OO 342, 129 NE(2d) 509.

10. A testatrix's real estate was transferred by certificate to the devisees under her will. Thereafter, the executor, pursuant to the power contained in the will, sold the real estate without first having the

certificate of transfer cancelled or set aside. The purchaser requested the executor to secure a quit claim deed for the property from the devisees, they being willing to execute such deed, but the executor and his attorney refused on the ground that the executor had full power to sell the real estate in order to pay debts of the estate and that the previously issued transfer was void and of no effect. Later, after demand for return of his deposit payment was refused, the purchaser instituted suit to recover it. A quit claim deed was finally executed in order to terminate the litigation. The attorney and the executor sought to recover additional compensation from the estate for additional services for defending the purchaser's suit, and for extraordinary services. Held: That these additional services were not necessary and did not come within the purview of RC § 2113.36, which provides for the allowance of additional compensation for extraordinary services: *In re Schoenleben*, 99 App 212, 58 OO 366, 132 NE(2d) 245.

11. A probate court may allow, as a part of the expense in the administration of a decedent's estate, compensation to an executor and attorney for services rendered in the successful defense of such decedent's will: *In re Teopas*, 116 App 506, 22 OO(2d) 322, 188 NE(2d) 616.

12. There is no provision in the Code which limits the authority of the court under this section to allow reasonable compensation to the fiduciary for extraordinary services not required of him in the common course of his duty: *In re Ohmer*, 22 OO 147 (PC).

13. Where a funeral director, as the executor of an estate, failed to file his claim for burial expenses of the deceased within the time limits set forth in RC §§ 2117.02 and 2117.07, he may thereafter file such claim for the consideration of the probate court under the authority of this section: *In re Winders*, 45 OLA 353, 68 NE(2d) 677 (App).

14. An executor who successfully contested an earlier will and established a later one was entitled to counsel fees incurred and other necessary expenses involved: *In re Woods*, 80 OLA 336, 159 NE(2d) 638.

15. Whether an executor can be allowed credit in his account for expenses incurred in the successful defense of the will depends upon the circumstances of each particular case. In a case where the attack on the will was chiefly due to the fact that a large special bequest was made to the executor, such an allowance is not permissible: *Weir v. Weir*, 7 CC (NS) 289, 18 CD 199.

16. The mere fact that an allowance to an administrator for extraordinary services rendered his estate seems somewhat large, will not warrant the circuit court, on error, in reversing the judgment, the probate judge, with his expert knowledge of such services, having first fixed the amount, and the common pleas court, on appeal, having fixed the same amount: *Prentiss v. Woods*, 20 CC(NS) 380, 31 CD 367.

17. Under circumstances warranting it, the probate court has authority to allow special compensation and attorney fees to the administrator of the estate of an administrator of another estate, for extra services performed by the last administrator and his attorneys in and about the filing of the final account of the deceased administrator of the first estate: *Madden v. McGillin*, 24 CC(NS) 607, 35 CD 40.

18. An administrator operating a business is entitled to statutory compensation on funds under his control and for which he is responsible, although such funds did not come into his physical possession: *In re Kohanyi*, 16 NP(NS) 337.

19. Where it appears that a business such as the management of a newspaper has been successfully conducted, the debts paid and confidence imparted to

the enterprise, extra compensation, which together with the statutory commissions to the administrator, does not exceed three per cent of all the funds passing through his hands, is regarded, under the circumstances of this case, as a reasonable allowance. The administrator has really been operating a receivership together with the administration of an estate: *In re Kohanyi*, 16 NP(NS) 337.

20. A court would not be justified, in an application for additional allowance where the administrator has continued a going concern successfully, in ordering an examination to be made of the books of the business at the expense of the estate, where it is evident from the account filed by the administrator that the books have been well kept, but the books will be made accessible to interested persons desiring to examine them at their own expense: *In re Kohanyi*, 16 NP(NS) 337.

21. **Where an administratrix brings suit to sell the real estate of the decedent and such action is contested by one of the heirs at law, such administratrix is entitled to extra compensation for her time and expenses in attending upon such suit, because such services are not in the common course of duty.** She is likewise entitled to railroad fare and hotel bills under this section while traveling about in the discharge of the ordinary duties relating to the estate, and also to telephone tolls and postage. She is not entitled to per diem and allowance for expenses when traveling about the community where the estate is situated, in the discharge of her ordinary duties and where no expense is incurred. Such services are in the common course of her duty, for which the statutory per centum is intended to compensate: *In re Pollock*, 17 NP(NS) 490, 60 Bull 273.

Attorney fees—administration

21.1. The allowance of fees for services rendered by attorneys employed by an executor or administrator in the settlement of the estate in his hands is a matter to be determined by the probate court, and until so determined they do not constitute a valid claim against the estate: *Trumpler v. Royer*, 95 OS 194, 115 NE 1018 [affirming *Royer v. Trumpler*, 7 App 312, 27 OCA 117, 28 CD 186; for a later report, overruling motion to certify record, see *Trumpler v. Royer*, 16 OLR 108, 63 Bull 223].

22. As to the matter of payment, the law contemplates that the representative will himself pay the value of such services, and be reimbursed, by receiving credit for the amount paid, in the settlement of his accounts. Such items constitute a part of the expenses of administration, which, together with the funeral expenses, take precedence, under our statute, of all other demands: *Thomas v. Moore*, 52 OS 200, 39 NE 803.

23. Where a judicial determination is required to fix the amount of attorney fees to be paid, the determining factor is the reasonable value of the services. This determination cannot be arrived at in a controverted case solely by the application of a predetermined formula of percentages of inventory values: *In re Hickok*, 159 OS 282, 50 OO 290, 111 NE(2d) 925.

24. Although the usual practice in the allowance of attorneys' fees, for services rendered an estate, is for the executor or administrator to credit an allowance for such in an account filed and ask approval of the probate court, yet it is not error to permit the application to be filed and the allowance made prior to the filing of any account by the executor or administrator: *Kern v. Heilker*, 56 App 371, 9 OO 437, 10 NE(2d) 1005.

25. The bank is not entitled under this section to an allowance for legal services ordinarily "not re-

quired of an executor . . . in the common course of his duty": *In re Langenbach*, 70 App 132, 24 OO 447, 45 NE(2d) 129.

25.1 Where services are rendered by an attorney for a widow in effecting a settlement of all her rights and claims in and to the estate of her deceased husband, the probate court has jurisdiction to hear and determine an application by the attorney for the allowance of compensation out of the estate; but, although it may have been fortuitous for the estate that a settlement of many problems may have been effected, such circumstances do not justify payment of attorney fees by the estate: *In re Colosimo*, 104 App 342, 5 OO(2d) 24, 149 NE(2d) 31.

25.2 Fees which are reasonable must be reasonable both from the standpoint of the attorney rendering the services and from the standpoint of the estate out of which payment is being made. The ultimate determination of reasonableness must take into consideration all the factors relating to reasonableness of the fees in the particular case. The facts and circumstances vary so much from case to case that it is impossible to set forth an iron-clad rule other than that reasonable value must be substantiated by the evidence in the case: *In re Love*, 1 OApp(2d) 571, 30 OO(2d) 595, 206 NE(2d) 39.

25.3 Reasonable counsel fees cannot be arrived at in a controverted case solely by the application of a rule of court fixing a predetermined formula of percentages of the proceeds of sale: *Glimcher v. Doppett*, 5 OApp(2d) 269, 34 OO(2d) 435, 215 NE(2d) 423.

26. A probate court may not disallow the fees paid by an administratrix to an attorney employed by her in the administration of the estate as a penalty to him for failure to file an inventory within the time provided by law but must exercise its discretion in determining what constitutes reasonable fees for the attorney's services taking into consideration the scope of the services performed and whether they were performed in a professional manner: *In re Burchett*, 16 OApp(2d) 45, 45 OO(2d) 133, 241 NE(2d) 787.

26.1 A probate court can, sua sponte, vacate an erroneous order fixing attorney's fees for services rendered to and expenses incurred for an estate and file a new journal entry for a lesser figure which he finds to be the reasonable value of the services rendered for the benefit of an estate: *In re Cercone*, 18 OApp(2d) 26, 47 OO(2d) 20, 246 NE(2d) 578.

26.2 A compromise figure as to the legal fees for services performed by special tax counsel for an estate, agreed upon by and between counsel for the estate and the attorney for the special tax counsel, is in no way binding upon a probate court. Upon application to the court the sole question for determination is the reasonableness of the value of the services to the estate. This determination must be made by the probate court judge and his duty cannot be usurped by agreement of counsel: *In re Cercone*, 18 OApp(2d) 26, 47 OO(2d) 20, 240 NE(2d) 578.

27. The failure on the part of the administrator to make application to the probate court deprives that court of jurisdiction to hear and determine the matter on exceptions filed by the attorney to an account, in which the administrator has not claimed a credit for compensation paid to the attorney: *In re Wellmeier*, 11 OO 45 (PC).

27.1 A claim for attorney fees is a personal claim against the administrator and not against the estate: *In re Wellmeier*, 11 OO 45 (PC); *In re Whinery*, 11 OO 96 (CP).

28. The probate court may determine what part, if any, of attorney fees may be paid out of estate funds;

when that is done, the court's power is exhausted: *In re Whinery*, 11 OO 96 (CP).

29. Where a land sale proceeding, wrongfully begun, has been dismissed, and there are no assets other than such real estate, the court is not required to fix the fee of the attorney for the administrator: *Trisler v. Freyger*, 33 OO 335, 68 NE(2d) 96 (PC).

30. A fiduciary, who is an attorney, may perform his own legal services and shall be allowed a reasonable compensation for the services so rendered: *In re Cramer*, 34 OO 316, 69 NE(2d) 204 (PC).

31. The rule that executors and administrators are personally liable for the services of attorneys employed by them, but that such contracts do not bind the estate, is not modified by the amendment of GC § 10838 (RC § 2113.36), to the effect that "if no definite amount has been agreed upon, the court shall fix such attorney fees as may be reasonable": *McDonald v. French*, 32 OLA 356.

32. Fees of an attorney of an administrator in an action to sell real estate to pay debts, general costs of administration, and premiums due a surety company upon the administrator's bond cannot be allowed as extraordinary expenses under this section: *Sherman v. Millard*, 6 CC(NS) 338, 17 CD 175.

33. A reasonable allowance of fees will be made on equitable principles to counsel who, though not employed by the administrator, have rendered services which inured to the benefit of the trust: *In re Oskamp*, 1 NP(NS) 197, 49 Bull 568.

34. The fact that an executor is also an attorney does not preclude an allowance to him of fees for attorneys employed by him, where no allowance is made to him personally for performance of the same services; and the rendering of legal services for an executor is not necessarily inconsistent with the performance of like services by the same attorneys for the widow of the decedent: *King v. Alt*, 11 NP(NS) 433, 22 OD 183.

35. On appeal from an order of the probate court fixing attorney fees to be allowed to the executor, the court of common pleas will follow the decision of the probate court unless the facts indicate that such finding was made without due regard to the evidence presented and to the surrounding circumstances, especially as the probate judge in question has had a long experience in matters of that sort: *In re Messang*, 20 NP(NS) 60, sub nomine, *In re Massang*, 27 OD(NP) 481 [affirmed by court of appeals].

36. Attorney fees of twenty-five thousand dollars for procuring a one hundred thousand dollar trust fund for minors were held not excessive, considering the amount of work involved and the services rendered on a contingent fee basis: *Sampson v. Mattern*, 18 OLA 693.

38. This section, providing for the payment of legal services rendered in the administration of an estate, authorizes the payment of "reasonable attorney fees," which refers to what the services reasonably are worth and not to any contract or agreement of the parties, previously entered into: *In re Bancroft*, 81 OLA 548, 163 NE(2d) 68 (App).

39. Amount decreed for counsel fees was found to be manifestly against the weight of the evidence: *In re Morgan*, 85 OLA 481, 171 NE(2d) 921 (App).

—Contest of will

42. It is the duty of an administrator to preserve the assets of the estate; but it is not his duty to defend an action brought to decide who is entitled to the estate when the only heir at law is represented by counsel in the same case and actively contests the

action: *Foltz v. Boone*, 107 OS 562, 140 NE 761.

43. An application by an executor to the probate court to fix the amount of attorney fees for the defense of the will presents a matter within the jurisdiction of the court, and, where facts justify, the court may modify its order, made in response to such application, by a nunc pro tunc order: *State ex rel Stephens v. Wiseman*, 35 OLA 586, 42 NE(2d) 240 (App).

44. The executor is entitled to counsel fees and expenses incurred in successfully defending a will contest case even though the will is sustained by virtue of a compromise: *Union Sav. Bank & Co. v. Smith*, 4 CC(NS) 237, 16 CD 317 [affirmed, 74 OS 505, 78 NE 1137].

46. An executor who employs an attorney to represent the estate in a will contest has no power to bind the estate by his contract. The liability is the personal liability of the executor; and he must look to the estate for reimbursement to the extent of a reasonable compensation for such services as are beneficial to the estate: *In re Curry*, 20 NP(NS) 49, 27 OD 485.

Forfeiture by misconduct

48. Pursuant to the provisions of RC § 2113.35, the probate court may, in its discretion, deny allowance of an administrator's fee to an administrator who the court finds did not faithfully discharge his duties. In such case, the probate court may properly refuse to allow counsel fees to such administrator who also acted as attorney for such estate: *In re Gray*, 118 App 547, 26 OO(2d) 65, 196 NE(2d) 131.

49. Where named executrix refused to proceed to have will probated, and named trustee thereupon proceeded to perform such services, the trustee was entitled to reasonable compensation for such services under the same principle that would have enabled the executrix to have received reasonable compensation for services rendered beyond the common course of duty. *In re Allison*, 9 App(2d) 333, 38 OO(2d) 388, 224 NE(2d) 386.

50. The question of extraordinary services and compensation therefor in the administration of estates concerns the fiduciary alone and does not concern the matter of counsel fees, and counsel in proper cases are entitled to reasonable compensation for services performed whether or not fiduciary services are ordinary or extraordinary in nature and such fees when approved or allowed become a part of the expenses of the administration of the estate or trust: *In re Haggerty*, 70 OLA 463, 128 NE(2d) 680 (PC).

51. An executor who refused to obey the order of court to file an account, although served with five citations, should not receive an allowance for extra services: *Cairns v. Hedges*, 2 CC 103, 1 CD 387.

55. In Ohio reasonable attorney fees should be allowed as a part of the expenses of administration of a decedent's estate: *In re Jacoby*, 79 OLA 247, 155 NE(2d) 282 (PC).

Compensation by will

56. Legacies to sons in excess of what they would have inherited, with a direction that in consideration thereof, no fees, commissions or charges for administering the estate shall be paid to them, disentitle them to commissions under this and the preceding sections: *In re Dellenbaugh*, 17 CC 302, 9 CD 380 [affirmed, without report, 62 OS 658].

57. The phrase "testamentary expenses," embraces all those expenses that arise out of the protection and defense of a will and where a testatrix provides that "testamentary expenses" be paid out of her estate, at-

torneys' fees incurred by an executor in defending an action involving the ownership of shares of stock in the estate are chargeable against the residuary estate even though such shares were specifically devised and such defense benefits only one legatee: *In re Jacoby*, 79 OLA 247, 155 NE(2d) 282 (PC).

58. Where tax dispute arose involving non-probate property not primarily within the control of the executrix, attorneys' fees incurred in defense of claim are the primary responsibility of the beneficiary even though, except for the defense, the executrix would have been personally liable for having transferred property out of estate without payment of tax liability. *In re McKittrick*, 15 OO(2d) 274, 172 NE (2d) 197 (PC).

59. The provisions of 26 U.S. Code § 2053 relating to deductions from the value of the gross estate for the purpose of determining the federal estate tax, make state law controlling: *Union Commerce Bank v. Commissioner of Internal Revenue*, 31 OO(2d) 252, 339 F(2d) 163.

60. Under Ohio law the probate court may properly allow as an expense of administration reasonable fees paid by an executrix to attorneys for their successful defense of a will contest, and such fees are deductible for federal estate tax purposes: *Cadden v. Welch*, 19 OO(2d) 355, 298 F(2d) 343.

§ 2113.37 Allowance for tombstone and cemetery lot. (GC § 10509-178)

The probate court in settlement of an executor's or administrator's account may allow as a credit to the executor or administrator a just amount expended by him for a tombstone or monument for the deceased and a just amount paid by him to a cemetery association or corporation as a perpetual fund for caring for and preserving the lot on which the deceased is buried. It is not incumbent on an executor or administrator to procure a tombstone or monument or to pay any sum into such fund.

HISTORY: GC § 10509-178; 114 v 320 (440). Eff 10-1-53. Analogous to former GC § 10832.

Research Aids

Allowance for tombstone and cemetery lot:

O-Jur2d: Executors and Administrators § 240

Am-Jur2d: Executors and Administrators § 322

ALR

Tombstone or monument as a proper charge against estate of decedent. 121 ALR 1103.

Law Review

Honorary trust doctrine; application of the rule against perpetuities (Case note). 10 CinLRev 116.

CASE NOTES AND OAG

1. It was lawful for the probate court, at its discretion, to allow the administrator, in his settlement, any just and reasonable "amount expended" for a monument; but the administrator was not allowed to interfere with the heirs of the intestate in erecting one: *Curtis v. National Bank*, 39 OS 579.

2. The court has no authority to order the administrator to buy a monument, nor to fix a sum as a maximum to be expended by him for that purpose: *In re Ferguson*, 81 OS 58, 89 NE 1070 [affirming 6 NP(NS) 417, 18 OD 374].

2.1 Under the provisions of this section, the allowance, as an administrative expense, of a "just amount" to be expended by the executor or administrator as a perpetual fund for caring for and preserving the cemetery lot in which the deceased is buried is entirely a permissive matter which is within the sound discretion of the probate court: *In re Nitschke*, 114 App 507, 20 OO(2d) 1, 183 NE(2d) 449.

2.2 An order of the probate court allowing, as an administrative expense, payment in full of a testator's bequest to a cemetery association for the perpetual care of his cemetery lot is not a "just amount" authorized by this section, and constitutes an abuse of discretion, where the assets of the estate are insufficient to pay all specific bequests in full, and such allowance would operate to reduce specific bequests rather than to reduce the general estate; and where, by a proportionate abatement and distribution affecting all specific bequests, payment of a part of the cemetery lot bequest would insure perpetual care for the decedent's lot, and payment of the cemetery association bequest in full would create a preference for that bequest over other specific bequests, not permitted by the terms of the will or by law: *In re Nitschke*, 114 App 507, 20 OO(2d) 1, 183 NE(2d) 449.

3. Dependent upon the facts and circumstances in a particular case, the expenditure of a reasonable sum for a monument or marker for a deceased seventeen year old son in senior high school at the time of his death, caused by the wrongful act of a third person, may be considered as a necessary funeral expense: *Caswell v. Harry Miller Excavating Co.*, 47 OO(2d) 307, 246 NE(2d) 921 (CP).

4. An administrator may expend a reasonable amount for markers to fix the corners of a cemetery lot: *In re Lones*, 57 Bull 122.

5. While the probate court cannot order the administrator to construct a monument, and it cannot ascertain in advance the amount to be expended therefor, the court may determine whether the amount expended was reasonable or not, after the administrator has exercised the discretion which is vested in him by this section: *In re Lones*, 57 Bull 122.

7. A bequest to a public or private cemetery association for the purpose of maintaining the testator's burial lot is allowable as a deduction from the gross estate by way of expenses of administration, if the amount is not unreasonable, having regard to all the circumstances: 1921 OAG vol.1, p.70.

[SPOUSE TAKING AT APPRAISED VALUE]

§ 2113.38 Purchase of property by surviving spouse.

A surviving spouse even though acting as executor or administrator, may purchase the following property, if left by the decedent, and if not specifically devised or bequeathed:

(A) The mansion house, including the parcel of land on which such house is situated and lots or farm land adjacent to the house and used in conjunction with it as the home of the decedent, and the household goods contained in the house, at the appraised value as fixed by the appraisers;

(B) Securities listed on an approved stock exchange, as defined in division (E) of section 1707.02 of the Revised Code, at the market price at the time of purchase;

(C) Any other real or personal property of the decedent not exceeding, with the mansion house and land used in conjunction with it, and the household goods the spouse elects to purchase, one third of the gross appraised value of the estate, at the appraised value as fixed by the appraisers.

A spouse desiring to exercise this right of purchase with respect to personal property shall file in the probate court an application setting forth an accurate description of the personal property, and the election of the spouse to purchase it at the appraised or market value, as the case may be. No notice is required for the court to hear the application, insofar as it appertains to household goods contained in the mansion house or securities listed on an approved stock exchange. If the application includes other personal property, the court shall cause a notice of the time and place of the hearing of the application with respect to such other personal property to be given to the executor or administrator, the heirs or beneficiaries interested in the estate, and to such other interested persons as the court determines.

A spouse desiring to exercise this right of purchase with respect to an interest in real estate shall file in the court a petition containing an accurate description of the real estate, and naming as parties defendant the executor or administrator, the persons to whom the real estate passes by inheritance or residuary devise, and all mortgagees and other lien holders whose claims affect the real estate or any part of it. Spouses of parties defendant need not be made parties defendant. The petition shall set forth the election of the surviving spouse to purchase the interest in real estate at the appraised value, and shall contain a prayer accordingly. A summons shall thereupon be issued and served on the defendants, in the same manner as provided for service of summons in actions to sell real estate to pay debts. No hearing on the application or petition shall be held until the inventory is approved.

On the hearing of the application or petition, the finding of the court shall be in favor of the surviving spouse, unless it appears that the appraisal was made as a result of collusion or fraud, or that it is so manifestly inadequate that a sale at that price would unconscionably prejudice the rights of the parties in interest or creditors. The action of the court shall not be held to prejudice the rights of lien holders.

Upon a finding in favor of the surviving spouse, the court shall make an entry fixing the terms of payment to the executor or administrator for the property, having regard for the rights of creditors of the estate, and ordering the executor or administrator, or a commissioner who may be appointed and authorized for the purpose, to transfer and convey the property to the spouse upon compliance with the terms fixed by the court. If the

court, having regard for the amount of property to be purchased, its appraised value, and the distribution to be made of the proceeds arising from the sale, finds that the original bond given by the executor or administrator is sufficient, the court may dispense with the giving of additional bonds. If the court finds that the original bond is insufficient, as a condition to transfer and conveyance, the court shall require the executor or administrator to execute an additional bond in an amount as the court may fix, with proper surety, conditioned and payable as provided in section 2127.27 of the Revised Code. This section does not prevent the court from ordering transfer and conveyance without bond in cases where the will of a testator provides that the executor need not give bond. The executor or administrator, or a commissioner, shall thereupon execute and deliver to the spouse a proper bill of sale or deed, as the case may be, for the property, and make a return to the court.

The death of the surviving spouse prior to the filing of the court's entry fixing the terms of payment for property elected to be purchased shall nullify the election. The property, whether real or personal, shall thereafter be free of the right granted in this section.

The application or petition provided for in this section shall not be filed prior to filing the inventory, nor later than one month after the approval of the inventory required by section 2115.02 of the Revised Code. Failure to file an application or petition within that time nullifies the election with respect to the property required to be included, and the property, whether real or personal, shall thereafter be free of the right granted in this section.

HISTORY: GC § 10509-89; 114 v 320 (420); 116 v 385 (396); 119 v 394 (406); 123 v 460; 125 v 903 (975) (EF 10-1-53); 132 v S 398 (EF 4-29-68); 136 v S 145. EF 1-1-76.

Analogous to former GC § 10697.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.38 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2113.53.2 which refers to this section.

Comparative Legislation

Widow's rights of selection from inventoried property:

Ill.—Rev Stat, ch 3, § 24-7

Ind.—Burns' Stat, § 29-1-4-1

Ky.—KRS, § 391.030

Mich.—MCLA, § 702.69

Pa.—Purdon's Stat, Tit. 20, § 2508

Fla.—FSA, § 732.402

Forms

1 A&H Probate FORM 2113.38a et seq.

Outline of Procedure

Election of spouse to take property. Leyshon No. 69, 69-1; A&H Nos. 41, 42

Research Aids

Effect of death of surviving spouse:

O-Jur2d: Abatement; Survival and Revival § 47;
Executors and Administrators § 209

Am-Jur2d: Executors and Administrators §§ 337,
338.

Right of surviving spouse to specified property:

O-Jur2d: Executors and Administrators § 209

Am-Jur2d: Executors and Administrators § 324 et
seq.

ALR

Particular articles within statute giving to surviving spouse or children certain specific items of personal property of deceased. 158 ALR 313.

When is widow put to her election between provision made for her by her husband's will, and her dower, homestead, or community right. 171 ALR 649.

Revocation of election to take under or against will. 71 ALR2d 942.

Law Reviews

Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

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See Staff Note to Civil Rule 73(D), Civil Rules volume of Page's Ohio Revised Code.

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65 OLA 121, 113 NE(2d) 780.

1.2 Where, in the administration of an estate, a motion to vacate and set aside an order previously entered approving and confirming an inventory filed therein is timely filed by the surviving spouse, although not within one month after such order approving such inventory, and is subsequently found to be well taken, and an order is thereupon entered that such previously approved inventory be modified by the deletion therefrom of certain personal property and by increasing the amount of the widow's year's allowance, such order of modification does not constitute a vacation of the previous order of approval so as to reinstate in such surviving spouse the right of election to purchase the mansion house for the one-month period, provided in this section, from the date of such order of modification: In re Hrabnicky, 167 OS 507, 5 OO(2d) 181, 149 NE(2d) 909.

1.3 Where a valid judgment entry has been made in favor of the petition of a surviving spouse to purchase an interest in real estate pursuant to this section and fixing the terms of payment therefor, the subsequent death of that spouse will not nullify the right to purchase on those terms: Witteman v. Dunkle, 21 OS(2d) 3, 50 OO(2d) 2, 254 NE(2d) 345 [affirming In re Witteman, 15 OApp(2d) 126, 44 OO(2d) 255, 239 NE(2d) 107].

2. This section does not entitle a surviving spouse to purchase, at the appraised value, the entire lot on which the mansion house is situated, where there are located on the same lot two other buildings which are rented and used for business purposes, not in conjunction with the mansion house, but limits such spouse to the purchase, at the appraised value, of only that portion of the lot which is not occupied by such other two buildings: In re Burgoon, 80 App 465, 36 OO 200, 76 NE(2d) 310.

3. In the administration of a decedent's estate, where, pursuant to this section, the surviving spouse elects to purchase the mansion house at its appraised value and such election is denied by the probate court on the ground that the lot containing the mansion house also contained a business building and the lot was appraised as a whole, such surviving spouse is entitled, on motion, to have the appraisal set aside and a reappraisalment made to remove such bar to his election, even though the surviving spouse, as administrator, had effected the appraisal: In re Burgoon, 81 App 370, 37 OO 210, 79 NE(2d) 682.

3.1 A surviving spouse has the right, under this section which provides that a surviving spouse may purchase "the mansion house, including the parcel of land on which such house is situated and lots or farm land adjacent thereto and used in conjunction therewith as the home of the decedent," to purchase, at the appraised value, an entire farm, where such farm land and the buildings thereon were used in conjunction with the mansion house in establishing and maintaining a home for the decedent and his family: In re Clark, 102 App 200, 2 OO(2d) 185, 141 NE(2d) 890 [affirming 74 OLA 460, 141 NE(2d) 259].

3.2 The provision of this section that the probate court "shall make the entry fixing the terms of payment" for property selected to be purchased by a surviving spouse, does not authorize the court to require the surviving spouse to pay more than the appraised value for the property: In re Fouts, 103 App 313, 3 OO(2d) 353, 145 NE(2d) 440.

3.3 The appraisalment of property of a decedent is made as of the time of such decedent's death, and a surviving spouse electing to purchase at the appraised value under this section, takes such property as evaluated as of the date of death. Anything which transpires after the date of such death, which affects the value of the property, is not to be considered in

1. Under former GC § 10697 (see now RC §§ 2113.38, 2113.40) the right of the widow to take personal property at the appraisalment is not limited to the time of making the appraisalment, but she may, at any time within the three months allowed the administrator for selling the same, exercise this right, until the property is put up for sale; and her right is not affected by any changes that may, in the meantime, have taken place in the market value of the property: Overturf v. Wear, 26 OS 538.

1.1 A specific legacy is a bequest of some particular thing or portion of a testator's estate which is so described by the will as to distinguish it from other articles of the same general nature in the estate: In re Mellott, 162 OS 113, 54 OO 53, 121 NE(2d) 7 [reversing Court of Appeals and reinstating judgment of Probate Court, 50 OO 517,

making such valuation: *In re Fouts*, 103 App 313, 3 OO(2d) 353, 145 NE(2d) 440.

3.4 The words and phrases describing the real property subject to purchase by the surviving spouse under this section, may, under proper circumstances, contemplate a larger amount of property than that which would ordinarily fall within the limits of the curtilage of common law: *Nagel v. Wilcox*, 104 App 534, 5 OO(2d) 267, 150 NE(2d) 667.

3.5 Under this section providing that a surviving spouse may purchase "the mansion house, including the parcel of land on which such house is situated and lots or farm land adjacent thereto and used in conjunction therewith as the home of the decedent," such spouse may purchase at the appraised value the interest of the decedent in a farm which had been owned in common by the spouse and the decedent, jointly operated by them as a farm, and used by them as their residence, with all the parts of the farm being combined to make up the "farm home," and not as a business or commercial enterprise so as to deprive the spouse of such right, even though both husband and wife had outside employment: *Young v. Young*, 106 App 206, 6 OO(2d) 458, 154 NE(2d) 19.

3.6 The authority of a surviving spouse to elect to purchase property "not specifically devised or bequeathed," as provided by this section, applies to general, as opposed to a specific legacy, as determined by usual principles of testamentary law: *In re Witteman*, 15 OApp(2d) 126, 44 OO(2d) 255, 239 NE(2d) 107 [affirmed, *Witteman v. Dunkle*, 21 OS(2d) 3, 50 OO(2d) 2, 254 NE(2d) 345].

4. The probate court has jurisdiction under the provisions of GC § 10501-53 (RC § 2101.24) to determine whether a surviving spouse is estopped by a contract from electing to take the mansion house at the appraised value as fixed by the appraisers in a proceeding instituted under this section: *Passoni v. Breehl*, 29 OO 220, 14 OSupp 100 (PC).

5. When the surviving spouse of a decedent files a petition to purchase real estate under this section, and dies before the action is completed or conveyance made, such right of action abates and the estate of the first decedent will be administered as if no petition to purchase by the surviving spouse had been filed: *Jewell v. Chiles*, 37 OO 33 (PC).

6. The exercise of the absolute right in a surviving spouse to purchase the mansion house at the appraised value, under this section, deprives the common pleas court of any jurisdiction in partition: *Strawser v. Stanton*, 47 OO 255, 103 NE(2d) 797 (CP).

7. When the election to purchase is made prior to the approval of the inventory, it satisfies the requirement of this section: *Strawser v. Stanton*, 47 OO 255, 103 NE(2d) 797 (CP).

8. The surviving spouse is entitled to purchase the mansion house at the appraised value and either deduct from the purchase price the amount of the mortgage or pay the full purchase price and require the fiduciary to pay the amount of the unpaid mortgage: *McAdams v. Bolsinger*, 57 OO 338, 129 NE(2d) 878 (PC).

9. The provision of this section, giving a widow the exclusive privilege of purchasing at the appraised value any items listed in the inventory upon the filing of a proper application within one month of the approval of the inventory, is mandatory as to the time element: *Palmer v. Smith*, 28 OLA 673.

10. Where a nonresident widow could not assert a right to purchase certain stock of her decedent at its appraised value under the law of the state of domicile, such law being substantive in nature, the

probate court is without jurisdiction to approve the election under this section by virtue of which the widow sought to purchase such stock: *In re McCombs*, 52 OLA 353 (PC).

11. Where the only asset in an estate was the home and the land on which it was located in the village of Donnelsville, Clark county, Ohio and testatrix's will stated "I give and devise all real estate located in the village of Donnelsville, Clark county, Ohio, that I may own at the time of my decease to my beloved husband . . . for and during the period of his lifetime, and at his death to my daughter. . . the same to be hers absolutely, and in fee simple," then the testatrix did specifically devise her home real estate to her husband for and during his lifetime, with a remainder in fee simple to her daughter: *In re Reed*, 65 OLA 129, 112 NE(2d) 403, 114 NE(2d) 314.

12. The right of election under this section, being a personal right, in the absence of express statutory authority, the guardian of an incompetent person cannot make such election, and such election must be made by or under the direction of a court having chancery jurisdiction over the person or estate of the incompetent, and this power in the court is an inherent power, independent of statute: *Dorfmeier v. Dorfmeier*, 69 OLA 15, 123 NE(2d) 681 (PC).

13. Relief to which a widow would otherwise be entitled under GC §§ 10503-4, 10509-54 (RC §§ 2105.06, 2115.13) and this section, will not be decreed where by contract she has agreed not to claim any other part of the estate than that given her by the contract: *In re Schubert*, 32 NP(NS) 169.

[SALE AUTHORIZED BY WILL]

§ 2113.39 Sale of property under authority of will. (GC § 10509-227)

If a qualified executor, administrator, or testamentary trustee is authorized by will or devise to sell any class of personal property whatsoever or real estate, no order shall be required from the probate court to enable him to act in pursuance of the power vested in him. A power to sell authorizes a sale for any purpose deemed by such executor, administrator, or testamentary trustee to be for the best interest of the estate, unless the power is expressly limited by such will.

HISTORY: GC § 10509-227; 114 v 320 (451); 122 v 497, § 1. Eff 10-1-53. Analogous to former GC § 10812.

Cross-References to Related Sections

Registration of title to land which was conveyed under a testamentary power, RC § 5309.46.

See RC § 2113.53.2 which refers to this section.

Comparative Legislation

Sale under power in will:

Cal.—Probate Code, § 757

Ill.—Rev Stat, ch 3, § 20-15

Ind.—Burns' Stat, § 29-1-15-2

Ky.—KRS, § 395.220

N.Y.—SCPA, § 1901

Pa.—Purdon's Stat, Tit. 20, § 3354

Fla.—FSA, § 733.613

Forms

1 A&H Probate FORM 2113.39a et seq.

Research Aids

Express power given by will:

O-Jur2d: Executors and Administrators § 512

Am-Jur2d: Executors and Administrators § 437 et seq.

Purposes for which sale may be made:

O-Jur2d: Executors and Administrators § 516

Testamentary trustee:

O-Jur2d: Trusts § 180, 181

Law Reviews

See explanatory article in 4 OBar 411.

Does the executor in Ohio take an estate or a power? Does the power survive? Article by Charles C. White of the Cleveland bar. 15 CinLRev 1.

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Scope and construction of power

1. Power to sell lands does not authorize an exchange or barter, but a sale for money only: *Taylor v. Galloway*, 1 O 232; *Fleischman v. Shoemaker*, 2 CC 152, 1 CD 415; *Cleveland v. State Bank*, 16 OS 236.

2. A will giving power to an executor to sell lands will be so construed as to carry out the intentions of the testator: *Williams v. Veach*, 17 O 171.

3. Power given to executors to sell land ceases to exist when the estate is settled or all claims against it are presumptively satisfied by lapse of time: *Ward v. Barrows*, 2 OS 242.

4. Discretionary power to sell lands given by will cannot be delegated: *Cleveland, P. & A. R. Co. v. Hutchins*, 37 OS 282; *Allen v. Globe Ins. Co.*, 19 Bull 198.

5. Where, under a testamentary power to sell lands the executor, in bad faith, sells them for less than their true value, he should be charged with the loss on exception to his account in the probate court: *Brown v. Reed*, 56 OS 264, 46 NE 982 [affirming *Reed v. Brown*, 10 CC 44, 6 CD 15].

6. This section as amended in 1947 which extended the permissive right to sell to executors and administrators when authorized by will or devise or to a testamentary trustee cannot be given retroactive effect: *Payer v. Black*, 58 OLA 421 (App).

7. Executors authorized by will to sell lands must

take out letters of administration before being empowered to sell: *In re Crawford*, 21 CC 554, 11 CD 605 [affirmed, 68 OS 58].

8. The power to sell lands and distribute the proceeds in accordance with the will is a power that may be inferred from the expression in the will, "firmly believing they (the executors) will carry out the directions of my will," in the absence of express power thereunto: *Schaupp v. Jones*, 3 CC(NS) 176, 13 CD 649.

9. Where a will directs the executors to have an appraisal made of all the property belonging to the estate at a certain date and gives to any devisee the right to take any one parcel of property, not exceeding his share in the estate, at its appraised value, the executors cannot at a date subsequent to that fixed in the will, contract to sell a certain parcel to a third person, under a power given to them by will, without first having the appraisal made and offering the property to the devisees: *Bailey Co. v. Bradley*, 23 CC(NS) 59, 34 CD 102.

12. It seems that if an executor is sole legatee and he makes sale in a defective proceeding, the sale will be considered valid and he will be required to account for the proceeds to a creditor: *Hocking Valley R. Co. v. White*, 87 OS 413, 101 NE 354.

13. No title is vested in executors by a naked power to sell and convey to pay debts if necessary, but the title is in the heirs at law until the power is executed: *Mimmons v. Westfall*, 33 OS 213, 223.

14. Where the will gave the widow power to sell, if necessary to maintain herself and children, and she exercised the power, reciting in the deed that it was necessary to sell the same to provide maintenance for herself and children, the burden is upon attacking parties to show that it was not necessary: *Haun v. Block*, 9 CC(NS) 328, 19 CD 460.

15. A testator, whose estate consisted of a single tract of land, occupied as a homestead, and some personal property, devised and bequeathed to his wife one-half of all his real and personal estate, and the other half to his brothers and sisters, and the children of a deceased sister naming each, and specifying the proportion or share of each. He appointed an executor, and authorized and empowered him to sell and convey "all said real estate to the purchaser or purchasers thereof, if necessary for the purpose of distributing" it "among the devisees and legatees aforesaid." Held, that this was a devise in fee, to each of the devisees by name, of an undivided estate in land, in the proportions specified, and not a bequest of the proceeds of said land: *Hoyt v. Day*, 32 OS 101.

18. A trust created by a testator to continue until title finally vests in testator's grandchildren, running through the lives of three classes of persons, is a trust connected with the office and not exclusively with the person named as trustee in the will, hence the powers and duties conferred on the trustee, including the power to convey land by good and sufficient title, is a power running through the life of the trust, to be exercised successively by the person or persons upon whom execution of the trust for the time being devolves: *Clark v. Neil*, 19 NP(NS) 449, 27 OD 328.

19. Where the executor is given power to sell to pay debts, the purchaser need not inquire as to debts unless the time between the death and sale is so long that it may be presumed that the debts are paid. Seven years will not raise such a presumption: *Smith v. McIntire*, 37 CCA 177, 95 Fed 585, 13 OFD 14.

20. Where a power of sale is clearly given, but the will does not provide who is to exercise it, the omission may be supplied by construction. Thus if the context of the will shows that the executors are to

receive and expend the proceeds of the sale, it is held that the power of sale is given to them: *Collier v. Grimesey*, 36 OS 17.

21. The attachment of the share of the devisee does not defeat the right of the executor to sell: *Smyth v. Anderson*, 31 OS 144.

22. Neither does the sale of a share by a devisee defeat the right of the executor to sell: *Hoyt v. Day*, 32 OS 101.

23. An action for partition of an estate which came to the plaintiff by devise, when commenced more than one year after the appointment of the executor of the testator's estate, prevails over a purported sale by the executor under a power in the will when the latter's agreement to sell was executed after the filing of the action: *Kufel v. Chopcinski*, 58 OO(2d) 97, 29 OMisc 61, 278 NE(2d) 60 (CP) (1971).

Who may exercise power

28. Power given to executors to sell land may be executed by one executor, if only one accepts the office under the will: *Taylor v. Galloway*, 1 O 232.

29. Power to sell, without any trust attached, cannot be executed by an administrator with the will annexed: *Wills v. Cowper*, 2 O 124; but see case note 32, below.

30. Administrators de bonis non with will annexed have same power to sell at private sale granted by will to executors: *In re Hanna*, 29 NP(NS) 338.

31. One executor cannot purchase land of his co-executors, but such a sale may be confirmed by the subsequent assent and ratification of the heirs: *Mitchell v. Dunlap*, 10 O 117.

32. If the proceeds are to be paid over to a trustee, and the executors all resign, an administrator with the will annexed may execute the power to sell: *Elstner v. Fife*, 32 OS 358.

33. If a will confers upon the executor the power to sell realty, and such power is personal, the administrator with a will annexed does not possess such power. If on the other hand, the will shows that such power is annexed to the office and is a part of the trust, it passes to the administrator with a will annexed: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

[SALE OF PERSONAL PROPERTY]

§ 2113.40 Sale of personal property. (GC § 10509-90)

At any time after the appointment of an executor or administrator, the probate court, when satisfied that it would be for the best interests of the estate, may authorize such executor or administrator to sell at public or private sale, at a fixed price or for the best price obtainable, and for cash or on such terms as the court may determine, any part or all of the personal property belonging to the estate, except:

(A) Such property as the surviving spouse desires to take at the appraised value;

(B) Property specifically bequeathed, when sale of such property is not necessary for the payment of debts, provided that such property may be sold with the consent of the person entitled thereto, including executors, administrators, guardians, and trustees;

(C) Property as to which distribution in kind has been demanded prior to the sale by the sur-

living spouse or other beneficiary entitled to such distribution in kind;

(D) Property which the court directs shall not be sold pursuant to a wish expressed by the decedent in his will; but at any later period, on application of a party interested, the court may, and for good cause shall, require such sale to be made.

In case of sale before expiration of the time within which the surviving spouse may elect to take at the appraised value, not less than ten days' notice of such sale shall be given to the surviving spouse, unless such surviving spouse consents to such sale or waives notice thereof. Such notice shall not be required as to perishable property.

The court may permit the itemized list of personal property being sold to be incorporated in documents and records relating to the sale, by reference to other documents and records which have been filed in the court. Provided that a court order shall not be required to permit the public sale of personal goods and chattels.

HISTORY: GC § 10509-90; 114 v 320 (421). Eff 10-1-53. Analogous to former GC §§ 10697, 10704.

Cross-References to Related Sections

Sale by state of escheated property RC § 109.41.

See RC § 2113.41 which refers to this section.

Comparative Legislation

Sale of personal property:

Cal.—Probate Code, § 756.5

Ill.—Rev Stat, ch 3, § 19-1

Ind.—Burns' Stat, § 29-1-15-8

Ky.—KRS, § 395.200

Mich.—MCLA, § 709.1

N.Y.—SCPA, § 1412

Pa.—Purdon's Stat, Tit. 20, § 3351

Fla.—FSA, § 733.608

Forms

1 A&H Probate FORM 2113.40a et seq.

1 A&H Probate FORM 2113.42a et seq: Report of sale.

Outline of Procedure

86 Sale of personal property. Leyshon No. 106; A&H No. 86

Research Aids

Authorization to sell personally:

O-Jur2d: Executors and Administrators §§ 383, 385

Am-Jur2d: Executors and Administrators § 341; 343, 351 et seq.

ALR

86 Rights, duties, and liability of corporation in connection with transfer of stock of decedent. 7 ALR2d 1240.

Law Review

See explanatory article in 4 OBar 411.

CASE NOTES AND OAG INDEX

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1. Executors were required to sell stock at highest price obtainable: *Dombey v. Rindsfoos*, 105 App 335, 6 OO(2d) 123, 151 NE(2d) 563.

1.1 Even though a fiduciary is without power of sale, he is still not relieved from his duty to manage the estate with due care and prudence, and if the circumstances are such that it becomes imprudent to retain a certain security or other item of property, the fiduciary must apply to the court for permission to sell it: *Union Commerce Bank v. Kusse*, 49 OO(2d) 413, 21 OMisc 217, 251 NE(2d) 884 (1969).

1.2 Executors did not have the power to sell the personal property which was specifically bequeathed until they exhausted all the other assets of the estate: *In re Boughton*, 81 OLA 589, 163 NE(2d) 423 (PC).

DECISIONS UNDER FORMER GC §§ 10697 and 10794

2. Lease of lands for ninety-nine years, renewable forever, is a chattel that, upon the owner's decease, passes to his executor or administrator as any other chattel interest: *Murdock v. Ratcliff*, 7 O(pt.I) 119.

2.1 Executor must sell the personal property belonging to the estate, except promissory notes and other rights in action which can be collected: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

3. At common law an executor or administrator has power to sell the assets of the estate, including notes and mortgages, without an order of court: *Jelke v. Goldsmith*, 52 OS 499, 40 NE 167, 49 AmSt 730.

4. An administrator has no power to sell or transfer notes secured by mortgage which belonged to deceased at time of his death: *Miller v. Stark*, 61 OS 413, 56 NE 11.

6. An executor may pass title to a stock certificate which stands in the name of his decedent and which the latter has indorsed in blank, within the meaning of GC § 8673-1 (RC § 1705.04) et seq, without indorsing it himself: *Stoltz v. Carroll*, 99 OS 289, 124 NE 226.

7. Under a will giving to an executor and trustee power to sell and lease real estate belonging to the testatrix, suspension of that power for the time being, pending a contest of the will, did not preclude the trustee from entering into an agreement for the sale or lease of property, contingent upon the validity of the said will being established where the contracting purchaser knew of the existence of proceedings involving the validity of the will; and the termination of such a suit in a judgment upholding the will leaves the trustee clothed with all the power and authority conferred by the will as and from the date of his appointment: *Bernheim v. Stark*, 9 App 40, 29 OCA 17, 30 CD 452 [motion for an order directing court of appeals to certify its records overruled, 16 OLR 344, 63 Bull 438].

9. An executor and trustee, having authority under the will to sell or lease property, is at liberty to enter into an agreement whereby purchaser is to pay for the property in part and take a lease for a period of years with a privilege of purchase for the amount remaining due under the agreement, interest on said

amount to be paid at a stipulated rate during the term of the lease: *Bernheim v. Stark*, 9 App 40, 29 OCA 17, 30 CD 452 [motion to certify record overruled, 16 OLR 344, 63 Bull 438].

11. A provision in a will whereby testator gives all of his personal property, together with certain real property to his wife, shows that he does not intend that his debts shall be paid out of the personal property: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

13. The probate court has authority to order the sale of securities in danger of depreciation, and the reinvestment of the proceeds therefrom: *Guthrie v. Cincinnati Gas &c. Co.*, 2 NP(NS) 117, 15 OD 23.

14. In the absence of fraud or negligence, former GC § 10697 (see now RC §§ 2113.38, 2113.40) does not impose a personal liability upon executors of an estate for failure to sell, within a period of three months of their appointment, corporate stocks, owned by the estate, sufficient to pay debts and legacies, no absolute duty upon fiduciaries being imposed by such section: *Richter v. Anderson*, 56 App 291, 9 OO 385, 10 NE(2d) 789.

15. Omission by the probate court to fix the lowest price at which corporate stock belonging to the estate of a decedent may be sold at private sale, does not invalidate a sale made in all other respects in conformity with the statute, without collusion or fraud and at the market price: *Burch v. Cincinnati Trust Co.*, 14 CC(NS) 346, 23 CD 358 [affirming 12 NP (NS) 86, 22 OD 6].

16. A buyer of stock from an executor need not take it or pay for it without proof of the official character of the seller, and that the court has fixed the price at which the sale can be made: *Humphries v. Loomis*, 18 CC(NS) 529, 33 CD 186 [affirmed, without opinion, 88 OS 566].

§ 2113.41 Public sale. (GC § 10509-91)

Public sales of personal property mentioned in section 2113.40 of the Revised Code shall be at public auction and, unless otherwise directed by the probate court, after notice of such sale has been given:

(A) By advertisement appearing at least three times in a newspaper of general circulation in the county during a period of fifteen days next preceding such sale;

(B) By advertisement posted not less than fifteen days next preceding such sale in at least five public places in the township or municipal corporation where such sale is to take place;

(C) By both such forms of advertisement.

Such advertisement published or posted shall specify generally the property to be sold and the date, place, and terms of sale. The executor or administrator, if he deems it for the best interests of the estate may employ an auctioneer or clerk, or both, to conduct such sale, and their reasonable fees and charges shall be deducted from the proceeds of the sale. The court for good cause may extend the time for sale.

HISTORY: GC § 10509-91; 114 v 320 (421); 125 v 903 (976). Eff 10-1-53. Analogous to former GC §§ 10700, 10708, 10709.

Forms

- 1 A&H Probate FORM 2113.41a et seq.
1 A&H Probate FORM 2113.42a et seq: Report of sale.

Research Aids

- Public sale:
O-Jur2d: Executors and Administrators § 387
Am-Jur2d: Executors and Administrators §§ 343, 378 et seq.

CASE NOTES AND OAG**DECISIONS UNDER FORMER GC § 10700**

1. An executor who disposes of personal property without complying with the provisions of this section with reference to the advertisement and sale thereof, who acts in good faith, and, as he believes, for the best interests of the estate in so doing, and who applies the proceeds of such sale to the payment of the debts due from the estate, is entitled to credit for such payment in selling the estate: *Hunter v. Yocum*, 18 NP(NS) 14, 27 OD 31.

3. The estate is not liable for the fraudulent representations of the administrator whereby the sale was induced, nor for his warranty: *Lockwood v. Gilson*, 12 OS 526; *Dunlap v. Robinson*, 12 OS 531.

4. But the administrator may, by certain acts of his, make himself liable: *Fisher v. Fisher*, 15 CC(NS) 273, 23 CD 325.

5. General Code § 10506-49 (RC § 2109.44), as effective January 1, 1932, prohibited fiduciaries, which of course included an executor or administrator, from buying from or selling to themselves. This is merely declaratory of the common law: *Barrington v. Alexander*, 6 OS 198; *Sheldon v. Newton*, 3 OS 494; *Piatt v. Longworth*, 27 OS 196; *Caldwell v. Caldwell*, 45 OS 512, 15 NE 297.

§ 2113.42 Report of sale. (GC § 10509-92)

Within thirty days after any public or private sale of the personal property of an estate, the executor or administrator shall make report thereof to the probate court. Such report shall include proof of proper notice of such sale, if at public auction, and, if a clerk was employed for such sale shall be accompanied by a sale bill signed by such clerk. The report of sale shall be sworn to by the executor or administrator.

HISTORY: GC § 10509-92; 114 v 320 (422). Eff 10-1-53. Analogous to former GC §§ 10710, 10711.

Comment

See RC § 2109.45 with reference to affidavit which is necessary before the confirmation of a private sale by executor, administrator, guardian, assignee, or trustee.

Forms

- 1 A&H Probate FORM 2113.42a et seq.

Outline of Procedure

Sale of personal property. Leyshon No. 106; A&H No. 86

Research Aids

- Report of sale:
O-Jur2d: Executors and Administrators § 390

§ 2113.43 Credit. (GC § 10509-93)

In all sales of the personal property of an

estate the probate court may authorize the executor or administrator to sell on credit, the unpaid purchase price to be secured by notes or bonds with two or more sureties and approved by the executor or administrator. An executor or administrator shall not be responsible for loss due to the insolvency of the purchaser of any of such property if it appears that such executor or administrator acted with caution in extending credit pursuant to the authority of the court and has diligently tried to collect such notes and bonds.

HISTORY: GC § 10509-93; 114 v 320 (422). Eff 10-1-53. Analogous to former GC §§ 10705, 10706, 10707.

Forms

- 1 A&H Probate FORM 2113.42a et seq: Report of sale.

Research Aids

- Terms of sale:
O-Jur2d: Executors and Administrators §§ 385, 388
Am-Jur2d: Executors and Administrators § 343

CASE NOTES AND OAG

1. At a sale of personalty on credit, the administrator cannot arbitrarily reject notes tendered to him, if the sureties thereon have all the statutory qualifications; but if his decision as to such qualifications is made in good faith and with due caution, it should stand: *Hamilton v. Bonham*, 20 CC 252, 10 CD 834 [reversed on another point, *Bonham v. Hamilton*, 66 OS 82].

2. If an administrator disposes of the personal property of the state without proper security for its payment, he is guilty of a breach of official duty, and for any damage or loss thereby occasioned to the estate he and his sureties are liable: *White v. Moe*, 19 OS 37.

§ 2113.44 Sale of notes secured by mortgage. (GC § 10509-94)

An executor or administrator, without court order, may sell and transfer, without recourse, any promissory notes secured by mortgage and the mortgage securing such notes at not less than the face value thereof with accrued interest.

HISTORY: GC § 10509-94; 114 v 320 (422). Eff 10-1-53. Analogous to par. 4 of former GC § 10697.

Research Aids

- Choses in action:
O-Jur2d: Executors and Administrators § 384
Am-Jr2d: Executors and Administrators § 341;
Mortgages § 1380

[MORTGAGED PREMISES]**§ 2113.45 Mortgaged premises to be considered personal assets; possession. (GC §§ 10509-68, 10509-69)**

When a mortgagee of real estate, or an assignee of such mortgagee, dies without foreclosing the mortgage, the mortgaged premises and the debts secured thereby shall be considered personal assets in the hands of the executor or administrator of such mortgagee or assignee, and be adminis-

tered and accounted for as such.

If a mortgagee or assignee did not obtain possession of the mortgaged premises in his lifetime, his executor or administrator may take possession by open and peaceable entry or by action, as the deceased might have done if living.

HISTORY: GC §§ 10509-68, 10509-69; 114 v 320 (416, 417). Eff 10-1-53. Analogous to former GC §§ 10692, 10693.

Research Aids

Mortgages:

O-Jur2d: Executors and Administrators § 146

Possession:

O-Jur2d: Executors and Administrators § 193

CASE NOTES AND OAG

1. It is the administrator's duty to collect a note and mortgage due the estate and he cannot accept conveyance of realty in satisfaction thereof; and he cannot credit his account with expenses of transaction nor list the realty conveyed as part of the estate: *In re Tredway*, 29 App 265, 163 NE 223.

2. In action in ejectment on the mortgage, this section specifically authorizes an administrator to bring such an action: *Taylor v. Quinn*, 68 App 164, 22 OO 292. 39 NE(2d) 627.

3. Where a mortgagee of realty dies without bringing foreclosure proceedings, his interest in the mortgaged property is a personal asset of his estate under GC § 10509-68 (RC § 2113.45), and an heir cannot maintain ejectment for possession of the mortgaged property: *Stafford v. Collins*, 16 OLA 621.

§ 2113.46 Who may discharge mortgage. (GC § 10509-70)

In case of the redemption of a mortgage belonging to the estate of a decedent, the money paid thereon must be received by the executor or administrator and thereupon he shall release and discharge the mortgage. Until such redemption, the executor or administrator, if possession has been taken by him or by the decedent, shall be seized of the mortgaged premises in trust for the same persons who would be entitled to the money if the premises had been redeemed.

HISTORY: GC § 10509-70; 114 v 320 (417). Eff 10-1-53. Analogous to former GC § 10694.

Research Aids

Redemption and discharge of mortgage:

O-Jur2d: Executors and Administrators § 194

Am-Jur2d: Mortgages § 1342

See case notes under RC § 2113.45.

§ 2113.47 Foreclosure of mortgage. (GC § 10509-71)

A mortgage belonging to an estate may be foreclosed by the executor or administrator.

HISTORY: GC § 10509-71; 114 v 320 (417). Eff 10-1-53. Analogous to former GC § 10695.

Research Aids

Foreclosure of mortgage:

O-Jur2d: Executors and Administrators § 195; Mortgages § 332

Am-Jur2d: Executors and Administrators § 729

ALR

Treating as personal property, for purposes of administration, real property acquired by executor or administrator upon foreclosure or other enforcement of mortgage or other lien against it in favor of decedent. 110 ALR 1397.

Purchase by executor or administrator of claims against estate. 128 ALR 917.

CASE NOTES AND OAG

1. This section gives the executor capacity to sue on the note: *Carter v. Holmes*, 77 App 330, 33 OO 120, 67 NE(2d) 115.

[ALTERATION, CANCELLATION AND COMPLETION OF LAND CONTRACTS]

§ 2113.48 Action to complete contract to sell land. (GC § 10509-224)

When a person who has entered into a written contract for the sale and conveyance of an interest in real estate dies before its completion, his executor or administrator when not required to otherwise dispose of such contract, may, with the consent of the purchaser, obtain authority to complete such contract by filing an application therefor in the probate court of the county in which he was appointed. Notice of the time of hearing on such application shall be given to the surviving spouse and heirs, if the decedent died intestate, and to the surviving spouse, and devisees or legatees having an interest in such contract, if the decedent died testate. If the court is satisfied that it would be for the best interests of the estate, it may authorize the executor or administrator to complete said contract and to execute and deliver to the purchaser such instruments as are required to make the order of the court effective.

HISTORY: GC § 10509-224; 114 v 320 (450); 123 v 460 (464), § 1. Eff 10-1-53. Analogous to former GC § 11922.

Comment

This section and RC § 2113.49 relate only to contracts entered into by the owner of real estate who dies before the contract is completed. A distinction is made in the procedure between completion of such a contract and alteration or cancellation of such a contract.

This section relates to completion only. The purchaser under the contract may have the right to pay the balance due or has paid the entire contract price and is entitled to a deed. This section provides that an application shall be filed by the personal representative with the consent of the purchaser for authority to complete the contract and give a deed. All parties in interest are notified of the time and place of the hearing. If a party in interest objects for any reason to the contract being completed he has his remedy in the common pleas court or by obtaining leave of the probate court by being made a party-defendant and filing therein his pleading and submitting the matter to the jurisdiction of the probate court.

Generally, all parties in interest want the contract completed and a simple procedure is provided.

Revised Code § 2113.49 relates to alterations or

cancellations. An adversary proceeding is required. The parties-defendant depend on whether the decedent died testate or intestate. The action may be brought in the probate or common pleas court of the county where the executor or administrator was appointed or in the county where the real estate or any part thereof is situated.

The phrase in these two sections "when not required to otherwise dispose of such contract" refers to situations where the contract was specifically bequeathed, or it is necessary to sell same to pay debts or where the provisions of RC § 2107.33 are applicable, etc.

Cross-References to Related Sections

Conveyance by surviving joint owner, RC § 5303.18 et seq.

Debts due decedent, compromise of, RC § 2117.05.
Land contracts, completion by guardians, RC § 2111.19.

See RC § 2111.19 which refers to RC § 2113.48 et seq.

Forms

1 A&H Probate FORM 2113.48a et seq.

Research Aids

Completion of contract to sell land:
O-Jur2d: Executors and Administrators § 198

ALR

Doctrine of equitable conversion in relation to taxation. 112 ALR 23.

Law Reviews

Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

Land contracts in decedents' estates. Address by Judge Kenneth T. Stevens of Chillicothe. 23 OBar (No. 23) 492.

CASE NOTES AND OAG

1. In an action in the common pleas court by vendee to compel conveyance by the heirs of the vendor, it is necessary to make the administrator a party: *Massie v. Donaldson*, 8 O 377.

2. The probate court by virtue of GC § 10509-224 (RC § 2113.48) et seq, was given jurisdiction to direct the completion of written contracts made by a decedent when the other party to the contract consents: *Kramer v. Gaskill*, 39 OLA 310 (App).

3. The petition of the devisees to rescind a contract and to return notes, without showing ownership and without an offer to return the money paid, is defective: *Stang v. Newberger*, 6 NP 60, 8 OD 80.

§ 2113.49 Court may order alteration or cancellation of contract.

When a person who has entered into a written contract for the sale and conveyance of an interest in real estate dies before its completion, his executor or administrator, when not required to otherwise dispose of the contract, may file a petition for the alteration or cancellation of the contract, in the probate court of the county in which he was appointed, or in which the real estate or any part of it is situated. If the decedent died intestate, the surviving spouse and heirs, and if the decedent died testate, the surviving spouse, and

devisees or legatees having an interest in the contract, when not plaintiffs, shall, together with the purchaser, be made parties defendant.

If, upon hearing, the court is satisfied that it is for the best interests of the estate, it may, with the consent of the purchaser, authorize the executor or administrator to agree to the alteration or cancellation of the contract, and to execute and deliver to the purchaser the instruments required to make the order of the court effective. Before making such an order, the court shall cause to be secured, to and for the benefit of the estate of the deceased, its just part of the consideration of the contract. The instruments executed and delivered pursuant to such an order shall recite the order, and be as binding on the heirs and other parties in interest, as if made by the deceased in his lifetime.

HISTORY: GC § 10509-225; 114 v 320 (450); 123 v 460; 136 v S 145. Eff 1-1-76.

Analogous to former GC § 11923.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.49 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

See comment under RC § 2113.48.

Forms

1 A&H Probate FORM 2113.49a et seq.

Outline of Procedure

Land contracts, alteration, cancellation, completion. Leyshon No. 82, 82-1, 82-2; A&H No. 57, 58, 59

Research Aids

Alteration or cancellation of contract:

O-Jur2d: Executors and Administrators § 200

Conversion:

O-Jur2d: Conversion in Equity § 11

Law Reviews

Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

Land contracts in decedents' estates. Address by Judge Kenneth T. Stevens of Chillicothe. 23 OBar (No. 23) 492.

Ohio Rules

Civil Rule 73(B) eliminates the choice of venue provisions in this section and makes it mandatory to bring the action in the Probate Division, Court of Common Pleas. See Staff Note to Rule 73(B), Civil Rules volume to Page's Ohio Revised Code.

CASE NOTES AND OAG

1. A guardian made defendant is not disqualified from purchasing the realty from a master commissioner appointed to make such sale under former GC § 11923: *Bachman v. Bachman*, 27 NP(NS) 129.

2. The statute dealing with the right of an administratrix to cancel an incomplete contract for the sale of real estate entered into before the death of the decedent does not permit of an adversary proceeding since she can, under the statute, act only if the other party agrees: *Bracken v. Wagner*, 74 OLA 85 (App).

§ 2113.50 Completion of decedent's contract to buy land. (GC § 10509-226)

When a person who has entered into a written contract for the purchase of an interest in real estate dies before a conveyance thereof to him, his executor or administrator, or surviving spouse, or any heir, or any devisee or legatee having an interest in such contract, may file an application for authority to complete such contract in the probate court of the county in which the executor or administrator was appointed. Notice of the time of the hearing on such application shall be given to the surviving spouse and heirs, if the decedent died intestate, and to the surviving spouse, and devisees or legatees having an interest in such contract, if the decedent died testate, to the executor or administrator, if not the applicant, and to all other persons having an interest in such real estate. If the court is satisfied that it would be for the best interests of the estate it may, with the consent of the vendor, authorize the executor or administrator to complete the contract, pay to the vendor the amount due on the contract, and authorize a conveyance of the interest in the real estate to the persons entitled thereto. If, however, the court finds that the condition of the estate at the time of the hearing does not warrant the payment out of the estate of the amount due under the contract, it may authorize the persons entitled to the interest of the decedent in the contract to pay to the vendor the amount due on the contract. The real estate so conveyed shall thereafter be chargeable with the debts of the estate to the extent of the equitable interest of the estate therein, and may be sold in land sale proceedings, except that in the event of such sale, the persons to whom the real estate shall have been conveyed shall have a prior lien on the proceeds as against the estate to the extent of any portion of the purchase price paid by them.

The executor or administrator, or surviving spouse, or any heir, or any devisee or legatee having an interest in such a contract, may file a petition for the alteration or cancellation of the contract in the probate court of the county in which the executor or administrator was appointed. If the decedent died intestate, the surviving spouse and heirs, and if the decedent died testate, the surviving spouse, and devisees or legatees having an interest in such contract, and the executor or administrator, when not the plaintiff, together with the vendor, and all other persons having an interest in the real estate which is subject to the contract, shall be made parties defendant. If the court is satisfied that it would be for the best interests of the estate, the court, with the consent of the vendor, may authorize the executor or administrator to agree to the alteration or cancellation of the contract and to

execute and deliver such deeds or other instruments to the vendor as are required to make the order of the court effective. Such deeds or other instruments as are executed and delivered pursuant to such order shall recite the order and be as binding on the parties to the suit as if made by the deceased in his lifetime.

HISTORY: GC § 10509-226; 114 v 320 (450); 125 v 411 (414). Eff 10-16-53. Analogous to former GC § 11924.

Cross-References to Related Sections

Land sales, real estate subject to, RC § 2127.07.
Parties, petition, notice, etc., RC § 2113.48.
Sale by executor or administrator, necessary parties, RC § 2127.12.
Sale, order of, when equitable estate included, RC § 2127.30.
Service of summons, RC § 2127.14.

Forms

1 A&H Probate FORM 2113.50a et seq.

Research Aids

Contract to buy land:
O-Jur2d: Executors and Administrators § 198;
Vendor and Purchaser § 106
Am-Jur2d: Vendor and Purchaser § 321

Law Reviews

Land contracts in decedents' estates. Address by Judge Kenneth T. Stevens of Chillicothe. 23 OBar (No. 23) 492.
Probate code amendments. Francis J. Eberly. 14 OSLJ 368.

[DISTRIBUTION]

§ 2113.51 Property may be delivered to legatee. (GC § 10509-180)

The property of an estate which is specifically bequeathed may be delivered over to the legatee entitled thereto. Such legatee must secure its redelivery on demand to the executor or administrator. Otherwise, such property must remain in the hands of the executor or administrator to be distributed or sold, as required by law and the condition of the estate.

HISTORY: GC § 10509-180; 114 v 320 (441). Eff 10-1-53. Analogous to former GC § 10699.

Comparative Legislation

Distribution:
Cal.—Probate Code, § 1020
Ill.—Rev Stat, ch 3, § 24-3
Ind.—Burns' Stat, § 29-1-17-1
Ky.—KRS, § 395.190
Mich.—MCLA, § 707.1
N.Y.—SCPA, § 2215
Pa.—Purdon's Stat, Tit. 20, § 3531
Fla.—FSA, § 733.801

Research Aids

Specific legacies:
O-Jur2d: Executors and Administrators § 355
Am-Jur2d: Executors and Administrators § 554 et seq

ALR

Payment or delivery of legacy or distributive share before decree of distribution as defense to action

by legatee or distributee against personal representative or surety on his bond. 121 ALR 1069. Construction and effect of statute providing that testator's agreement for sale or transfer of property disposed of by previous will made does not adeem disposition. 62 ALR2d 958.

Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed. 18 ALR2d 1384.

Testamentary devise or bequest conditioned upon beneficiary's supporting or rendering services to named person as providing for condition subsequent or precedent. 25 ALR3d 762.

CASE NOTES AND OAG

1. An administrator has no statutory authority to require heirs to give bond on a final distribution on general order of the probate court for distribution, but if he determines the heirs at his peril and makes an early distribution on a general order of the court, provided the proffered account is accepted by the heirs, there exists a binding contract, and when accepted by the heirs and distribution is made, it precludes further objections or exceptions to the account: *Shilling v. Ross*, 16 OLA 458.

§ 2113.52 Devisee or heir takes subject to unpaid taxes. (GC § 10509-122b)

A devisee taking real estate under a devise in a will, unless the will otherwise provides, or an heir taking real estate under the statute of descent, shall take the same subject to all taxes, penalties, and assessments which are a lien against such real estate.

HISTORY: GC § 10509-122b; 119 v 394 (423), § 7; 125 v 903 (977). Eff 10-1-53.

Research Aids

Taxes and assessments:

O-Jur2d: Executors and Administrators § 279;
Taxation § 429

Law Review

Ohio real estate tax liens and collections: their federal tax consequences. R. T. Boehm. 27 CinLRv 372.

§ 2113.53 Payment of legacies and distributions.

At any time after the appointment of an executor or administrator, the executor or administrator may distribute to the beneficiaries entitled thereto under the will, if there is no action pending to set aside the will, or to the heirs entitled thereto by law, in cash or in kind, any part or all of the assets of the estate. Each beneficiary or heir is liable to return the assets, or the proceeds therefrom, should they be necessary to satisfy the share of a surviving spouse who elects to take against the will or to satisfy any claims against the estate. If any executor or administrator distributes any part of the assets of the estate before the expiration of the time for the election of a surviving spouse or before the expiration of the time for the filing of claims, he is personally liable to any surviving spouse who subsequently elects to take against the will or to any claimant who subse-

quently establishes his claim against the estate. The executor or administrator shall be liable only to the extent that the sum of the remaining assets of the estate and the assets returned by the beneficiaries or heirs are insufficient to satisfy the share of the surviving spouse and to satisfy the claims against the estate. The executor or administrator shall not be liable in any case for an amount greater than the value of the estate that existed at the time that the distribution of assets was made and that was subject to the spouse's share or to the claims.

Any executor or administrator may provide for the payment of rejected claims or claims in suit by setting aside a sufficient amount of the assets of the estate for paying the claims. The assets shall be set aside for the payment of the claims in a manner approved by the probate court. Each claimant for whom assets are to be set aside shall be given notice, in the manner as the court shall order, of the hearing upon the application to set aside assets and shall have the right to be fully heard as to the nature and amount of the assets to be set aside for payment of his claim as to all other conditions in connection therewith. In any case where the executor or administrator may set aside assets as provided in this section, the court, upon its own motion or upon application of the executor or administrator, as a condition precedent to any distribution, may require any beneficiary or heir to give a bond to the state with surety approved and in an amount fixed by the court, conditioned to secure the return of the assets to be distributed, or the proceeds therefrom or as much thereof as may be necessary to satisfy the claims that may be recovered against the estate, and to indemnify the executor or administrator against loss and damage on account of such distribution. The bond may be in addition to the assets to be set aside or partially or wholly in lieu thereof, as the court shall determine.

HISTORY: GC § 10509-181; 114 v 320 (441); 119 v 394 (414); 133 v S 185 (Eff 1-1-71); 136 v S 145. Eff 1-1-76.

GC § 10509-181 (119 v 394) not analogous to GC § 10509-181 [114 v 320 (441)]. For a section analogous to 114 v 320 (441) see RC § 2113.55. See former GC § 10841.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.53 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

This section and RC § 2113.54 prescribe the general plan for distribution of the assets to legatees and distributees, the remaining sections, between RC §§ 2113.51 and 2113.60, inclusive, being adjective thereto.

This section provides for voluntary distributions. The executor or administrator may make partial or complete distribution after the expiration of six months following his appointment, if he can comply

with the conditions precedent which are set forth in the statute. No order of distribution is required. He simply distributes the assets to the person entitled thereto, and reports the distribution in his account.

[For additional comment, see Addams and Horsford's Ohio Probate Practice, Davies' Revision.]

Cross-References to Related Sections

See RC §§ 2113.54, 2113.56 which refer to this section.

Forms

1 A&H Probate FORM 2113.53a et seq.

1 A&H Probate FORM 2113.55a et seq: Distribution in kind.

Outline of Procedure

Setting aside of assets for rejected claims or claims in suit. Leyshon No. 65-1; A&H No. 37

Research Aids

Distribution:

O-Jur2d: Executors and Administrators § 362-365; 371, 372

Am-Jur2d: Executors and Administrators § 550 et seq

Provision for debts:

O-Jur2d: Executors and Administrators § 352

ALR

Right or duty of executor or administrator to require security from life tenant. 138 ALR 443.

Right to partial distribution of estate or distribution of particular assets, prior to final closing. 18 ALR3d 1173.

Time within which personal representative must commence action for refund of legacy or distribution. 29 ALR2d 1248.

Law Review

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

See also case note 1 under RC § 2113.55.

1. The title to personalty passes to the executor as trustee; and after payment of debts, he may deliver the rest of such property to those entitled to it under the will; and final account and order of distribution before the delivery are not necessary: *Central Nat. Bank, Sav. &c. Co. v. Gilchrist*, 23 App 87, 154 NE 811.

3. In administering distribution statute, Ohio probate court assumes no responsibility and makes no finding that persons whose assent to receive assets of estate executor has procured or proposes to procure, are entitled thereto: *Brown v. Routzahn*, 58 F(2d) 329.

4. Probate court order directing executor to transfer personal estate to testamentary trustees held not void though it went further than was proper, as it authorized executors to distribute in kind: *Brown v. Routzahn*, 58 F(2d) 329.

5. This section authorizes an executor to make distribution, particularly where, at the date of distribution, there are no claims for debts not due and payable, no claims rejected within two months, and no claims in suit: *In re Robbins*, 28 OO(2d) 399, 200 NE(2d) 735 (PC).

6. While this section requires each legatee or distributee to return the assets received by him, or the proceeds therefrom, "should they be necessary to pay any such rejected claim or claims in suit," the statute refers only to rejected claims and claims in

suit and has nothing to do with claims which are still contingent: *In re Robbins*, 28 OO(2d) 399, 200 NE(2d) 735 (PC).

7. When an executor distributes the assets of the estate to himself as legatee without waiting until one month has expired after the approval of the inventory, as provided by this section he is guilty of having conveyed the assets improperly and the probate court will hear the matter upon complaint of a creditor under RC § 2109.50: *In re Walden*, 34 OO(2d) 149, 214 NE(2d) 271 (PC).

8. Where a will, after devising and bequeathing all decedent's property to his wife, provided that if the wife did not survive him, or died in a common accident or catastrophe with him, or entered on her duties as executrix and failed to complete administration of the estate, the property was to go to another, the provision relating to the wife's failure to complete administration of the estate created a terminable interest to which the marital deduction was not applicable: *Kidd v. United States*, 61 OO(2d) 120, 334 FSupp 631.

[§ 2113.53.1] § 2113.531 Interest on general legacies.

General legacies shall bear no interest unless specifically provided in the will.

HISTORY: 127 v 381, § 1. **EF** 9-4-57.

Research Aids

Interest:

O-Jur2d: Executors and Administrators § 357

[§ 2113.53.2] § 2113.532 Transfer of automobile title.

(A) A surviving spouse is entitled to receive one automobile from the estate of a deceased spouse if owned by the deceased spouse at the time of death and not otherwise disposed of by testamentary disposition. The automobile shall not be considered an estate asset, but shall be included and stated in the estate inventory. In the event the deceased spouse owned more than one automobile, not otherwise disposed of by a testamentary disposition, the surviving spouse shall make a selection. Transfer of title shall be effected pursuant to section 4505.10 of the Revised Code.

(B) The executor or administrator, with the approval of the probate court, may transfer title to an automobile owned by the decedent:

(1) To the surviving spouse, when the automobile is purchased by the surviving spouse pursuant to section 2113.38 of the Revised Code;

(2) To a distributee;

(3) To a purchaser.

(C) The executor or administrator may transfer title to an automobile owned by the decedent without the approval of the probate court:

(1) To a legatee entitled to the automobile under the terms of the will;

(2) To a distributee if the distribution of the automobile is made without court order pursuant to section 2113.55 of the Revised Code;

(3) To a purchaser if the sale of the automo-

bile is made pursuant to section 2113.39 of the Revised Code.

HISTORY: 133 v S 185 (Ef 1-1-71); 136 v S 145 (Ef 1-1-76); 136 v S 466. Ef 5-26-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.53.2 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2113.53.2 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Forms

1 A&H Probate FORM 2113.53.2a et seq.

Research Aids

Surviving spouse's right to automobile:

O-Jur2d: Executors and Administrators §§ 208.5, 209, 212, 225, 350, 355, 366, 383, 512, 516

§ 2113.54 Distribution upon application of legatee or distributee.

When five months have expired after the appointment of an executor or administrator and the surviving spouse has made an election, a legatee or distributee may apply to the probate court for an order requiring the executor or administrator to distribute the assets of the estate, either in whole or in part, in cash or in kind. Upon notice to the executor or administrator, the court shall inquire into the condition of the estate, and if all claims have either been paid or adequate provision has been or can be made for their payment, the court shall make such order with reference to distribution of the estate as the condition of the estate and the protection of all parties interested therein may demand. The order of the court shall provide that assets be set aside for the payment of claims rejected within two months or in suit and each claimant for whom assets are to be set aside shall be entitled to be fully heard as to the nature and amount of the assets to be set aside for payment of his claim, and as to all other conditions in connection therewith. Each legatee or distributee receiving distribution from the estate shall be liable to return the assets distributed to him, or the proceeds therefrom, should they be necessary to pay such claims. The court, upon its own motion or upon application of the executor or administrator, as a condition precedent to any distribution, may require any legatee or distributee to give bond to the state with surety approved and in an amount fixed by the court, conditioned as provided in section 2113.53 of the Revised Code or as may be directed by the court. Such bond may be in addition to the assets to be set aside or partially or wholly in lieu thereof, as the court shall determine.

HISTORY: GC § 10509-182; 114 v 320 (441); 119 v 394 (415); 125 v 903 (977) (Ef 10-1-53); 33 v S 185 (Ef 1-1-71); 136 v S 145. Ef 1-1-76.

GC § 10509-182 (119 v 394 [415]) not analogous to GC § 10509-182 (114 v 320 [441]).

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2113.54 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

This section provides for "involuntary distributions," i.e., distributions made pursuant to an order of the court, upon application of a legatee or distributee.

The application must be made after the expiration of nine months following the appointment of the executor or administrator. While the executor or administrator may voluntarily distribute the assets to legatees or distributees at the end of six months, he cannot be compelled to do so. He is allowed nine months in which to complete the administration without interference from outside sources. The period of nine months for completing the administration is uniform. Compare RC §§ 2107.39, 2113.25, 2117.12, 2117.30. Liberal provision has been made for the extension of the period in proper cases.

[For additional comment, see Addams and Horsford's Ohio Probate Practice, Davies' Revision.]

Cross-References to Related Sections

See RC § 2113.56 which refers to this section.

Forms

1 A&H Probate FORM 2113.54a et seq.

1 A&H Probate FORM 2113.53a et seq: Indemnity bond of legatee or distributee.

1 A&H Probate FORM 2113.55a et seq: Distribution in kind.

Outline of Procedure

Requirement by legatee or distributee. Leyshon No. 67; A&H No. 39

Research Aids

Distribution:

O-Jur2d: Executors and Administrators §§ 364, 372

Am-Jur2d: Executors and Administrators § 550 et seq

CASE NOTES AND OAG

1. This section construed and applied in *Campbell v. Lloyd*, 162 OS 203, 55 OO 102, 122 NE(2d) 695.

§ 2113.55 Distribution in kind. (GC § 10509-183)

Before making distribution in kind of property which is not specifically bequeathed, an executor or administrator shall obtain the approval of the probate court or the consent of all of the legatees or distributees whose interests may be affected by such distribution. A distribution in kind may be made to any beneficiary, including an executor, administrator, trustee, guardian, and the surviving spouse.

HISTORY: GC § 10509-183; 114 v 320 (441); 119 v 394 (416), § 1. Ef 10-1-53. GC § 10509-183 (119 v 394 [416]) not analogous to GC § 10509-183 (114 v 320 [441]). See former GC § 10830.

Comment

If the executor or administrator wishes to make a

distribution in kind of property which is not specifically bequeathed, he must obtain the approval of the probate court or the consent of all legatees or distributees. This represents an exception to RC § 2113.53, which permits the executor or administrator to make distribution without an order of the court. Where property is distributed in kind among several legatees or distributees, it is frequently necessary to determine the value at which each item of property shall be distributed. For this reason, the executor or administrator should be required to submit the proposed plan of distribution to the probate court, unless all of the legatees or distributees are in agreement and consent to the plan of distribution.

Cross-References to Related Sections

See RC §§ 2113.53.2, 2113.56 which refer to this section.

Comparative Legislation

Distribution, bond to refund:

Ill.—Rev Stat, ch 3, § 24-6

Ind.—Burns' Stat, § 29-1-17-10

Ky.—KRS, § 395.130

N.Y.—SCPA, § 2216

Pa.—Purdon's Stat, Tit. 20, § 3171

Forms

1 A&H Probate FORM 2113.55a et seq.

Outline of Procedure

Distribution in kind. Leyshon No. 66; A&H No. 38

Research Aids

Distribution in kind:

O-Jur2d: Executors and Administrators § 366

Am-Jur2d: Executors and Administrators § 557

ALR

Fiduciary's compensation on estate assets distributed in kind. 32 ALR2d 778.

CASE NOTES AND OAG

1. Effect of specific bequest of stock where widow elected to take against the will: *Winters National Bank & Trust Co. v. Riffe*, 2 OS(2d) 72, 31 OO(2d) 56, 206 NE(2d) 212.

1.1 Where distribution in kind is made of a promissory note, an asset of an estate, before the time has elapsed within which creditors' claims may be filed with the executrix, and no indemnifying bond is given by the distributee as provided in this section, the distribution in kind is premature and ineffective to transfer the note and mortgage: *Sager v. Breisach*, 61 App 413, 15 OO 266, 22 NE(2d) 644.

2. An order which is made by the probate court directing the administrator to distribute certain assets in kind is not binding upon beneficiaries who were not parties to such proceeding: *Harbeson v. Mellinger*, 2 App 75, 18 CC(NS) 504, 25 CD 195.

3. Where under a will the residuary legatees were the beneficial owners of an estate, legal title to which was in a corporate trustee and the sale of the interest of the testatrix was not necessary to the administration of her estate, assuming that under the will title to the testatrix's beneficial interest passed to her executor, a subtrust was created by the will and the executor would hold the interest for the sole purpose of distributing it to the residuary legatees, and the residuary legatees, being sui juris, may terminate the trust when the active duties of the trust have been performed and take the property in specie and this rule is recognized by this section: *Central Trust Co. v. McCarthy*, 40 OLA 526 (App).

4. Where distribution of securities to plaintiff, under a will, was held illegal by probate court (former GC § 10839 [see now RC § 2113.53]), and he was required to return such securities and all dividends to estate, he was entitled to recover federal income taxes paid: *Ford v. Nauts*, 25 F(2d) 1015.

5. One to whom a note is indorsed by the administratrix of the estate of a deceased payee, may maintain suit thereon, though no order of distribution in kind was obtained from the probate court at the time, where it appears that all the debts of the estate had been paid and the distribution of the note was afterwards reported to the probate court and approved by it: *Meister v. Feuerstein*, 19 CC(NS) 460, 32 CD 525 [but see, contra: *Puder v. Agler*, 242 Fed 95].

§ 2113.56 Executor or administrator not liable. (GC § 10509-183a)

An executor or administrator is not liable for any distribution made in compliance with sections 2113.53, 2113.54, and 2113.55 of the Revised Code, except that an order of distribution made pursuant to any of such sections may be vacated as provided in section 2109.35 of the Revised Code relating to accounts.

HISTORY: GC § 10509-183a; 119 v 394 (424), § 8; 121 v 270 (277), § 1. **EFF** 10-1-53.

Comment

If the executor or administrator complies with the three preceding sections, he is not subject to liability. However, this section must be read in conjunction with the provision of RC § 2113.53 to the effect that the distribution authorized therein be made "to the legatees entitled thereto under the will . . . or to the distributees entitled thereto by law." In other words, the executor or administrator may make distribution under RC § 2113.53 without an order of the court, but he must distribute the assets to the parties properly entitled thereto if he wishes to obtain the immunity afforded by this section.

Research Aids

Liability for wrongful distribution:

O-Jur2d: Executors and Administrators § 360

Am-Jur2d: Executors and Administrators § 585

Vacation of order:

O-Jur2d: Fiduciaries §§ 307, 308

§ 2113.57 Distribution after settlement. (GC § 10509-184)

If upon hearing and settlement of an executor's or administrator's account, a balance due the estate remains in the hands of the executor or administrator, the court may order distribution to be made by him.

HISTORY: GC § 10509-184; 114 v 320 (441). **EFF** 10-1-53. Analogous to former GC § 10836.

Cross-References to Related Sections

Failure of fiduciary to make distribution, RC § 2109.59.

Forms

1 A&H Probate FORM 2113.57a et seq.

Outline of Procedure

Distribution, in general. Leyshon No. 65; A&H No. 36

Research Aids

Distribution after settlement:

O-Jur2d: Fiduciaries § 295**Am-Jur2d:** Executors and Administrators § 550 et seq**CASE NOTES AND OAG**

1. When the court makes an order of distribution under this section, the time specified in GC § 10509-199 (see now RC § 2109.59) within which the executor or administrator must pay to persons interested in such order, begins to run. The court's order shall be only to distribute according to law or the will, and may not specify to whom or in what amount: *Swearingin v. Morris*, 14 OS 432; *Cox v. John*, 32 OS 532; *Armstrong v. Grandin*, 30 OS 374; *First Nat. Bank v. Beebe*, 62 OS 41, 56 NE 485; *In re Ullman*, 9 NP (NS) 12, 19 OD 803.

2. General Code §§ 10509-199 to 10509-207 (see now RC §§ 2109.59, 2109.60) govern actions to ascertain the share of any person interested in the order of distribution and enforcement of payment against the administrator or executor and his sureties: *Henry v. Doyle*, 82 OS 113, 91 NE 990.

§ 2113.58 Protection of remainderman's interest in personal property. (GC § 10509-185)

When by a last will and testament the use or income of personal property is given to a person for a term of years or for life and some other person has an interest in such property as remainderman, the probate court, unless such last will and testament otherwise provides, may deliver such personal property to the person having the limited estate, with or without bond, as the court may determine; or the court may order that such property be held by the executor or some other trustee, with or without bond, for the benefit of the person having the limited estate. If bond is required of the person having the limited estate, or of the trustee, it may be increased or decreased, and if bond is not required in the first instance it may be required by the court at any time prior to the termination of the limited estate.

HISTORY: GC § 10509-185; 114 v 320 (442). **EFF** 10-1-53.**Research Aids**

Protection of remainderman's interest in personal property:

O-Jur2d: Executors and Administrators § 374; Estates § 163; Trusts § 32**CASE NOTES AND OAG**

1. Where a will expresses an intention that possession of the residue of the testator's personal estate should be delivered to those to whom he has given only life interests therein and does not provide for the taking of security therefor, such expressed intention may be given effect; and the executor under such will may lawfully distribute such residue to those having such life interests therein without requiring any security from them: *In re Sexton*, 163 OS 124, 56 OO 178, 125 NE(2d) 880.

2. Where the assets of an estate have (in accordance with the terms of a will) been distributed to life tenants, the estate has been closed and the final account has been settled and determined, and the life tenants die, in the absence of a motion, filed in accordance with RC §

2109.35, to vacate the order of the probate court, such court lacks jurisdiction to entertain an application by the remaindermen to commit securities formerly in the estate to a trustee: *State ex rel Beedle v. Kiracofe*, 176 OS 149, 27 OO(2d) 25, 198 NE(2d) 61.

3. The probate court has the power under this section, in the exercise of sound discretion (notwithstanding the provisions of a will), in order to protect the rights and the interests of remaindermen, to refuse distribution of life-estate assets to the life tenant and to direct delivery thereof to a trustee for management and payment of income therefrom to the life tenant during his life and payment of the remainder to the remaindermen upon the death of the life tenant, where the testator bequeathed **personal property to one person for life and the remainder to others "in fee,"** and directed that the assets in which a life estate was so bequeathed shall be delivered to the life tenant and not to any trustee for the benefit of the life tenant: *In re Miller*, 160 OS 529, 52 OO 437, 117 NE(2d) 598.

4. This section, the purpose of which is to protect the interests of remaindermen under wills, contains two distinct remedies, either of which the court, in a proper case, may apply; the provisions of that section do not operate as a limitation on the plenary jurisdiction conferred on the probate court by Const., Art. IV, § 8, and GC § 10501-53 (RC § 2101.24): *In re Miller*, 95 App 457, 54 OO 98, 121 NE(2d) 26.

6. That portion of this section, which provides, *inter alia*, "or the court may in its discretion order that such property be held by the executor or some other trustee, with or without bond, for the benefit of the person having the limited estate . . .," applies specifically to cases in which, upon hearing, it is made to appear that the property is in danger of being lost: *In re Miller*, 95 App 457, 54 OO 98, 121 NE(2d) 26.

7. Under this section, affording protection to a remainderman's interest in personal property, the probate court may, at its discretion and after distribution to the person having a life estate in such property, require from such person a bond at any time prior to the termination of such life estate: *In re Kyle*, 106 App 502, 7 OO(2d) 229, 155 NE(2d) 498.

8. A will naming the executor and giving him absolute control of the settlement of the estate with power to sell realty does not give him power to act as trustee of a trust created by the will, and the probate court, under authority of this section, may appoint a trustee: *Moses v. Zook*, 18 OLA 373.

§ 2113.59 Lien on share of beneficiary. (GC § 10509-186)

When a beneficiary of an estate is indebted to such estate, the amount of the indebtedness if due, or the present worth of the indebtedness if not due, may be set off by the executor or administrator against any testate or intestate share of the estate to which such beneficiary is entitled.

HISTORY: GC § 10509-186; 114 v 320 (442). **EFF** 10-1-53.**Comment**

General Code § 10509-186 was an entirely new section, effective January 1, 1932. That part of the section which provides that when a beneficiary of an estate is indebted to such estate, the amount of the indebtedness as due may be set off by the executor or administrator against any testate or intestate share of the estate to which such beneficiary is entitled, is merely declaratory of the common law. See *Skinner v. Lehman*, 6 O 430; *Keever v. Hunter*, 62 OS

616, 57 NE 454; *Lambright v. Lambright*, 74 OS 198, 78 NE 265; *Tobias v. Richardson*, 5 CC(NS) 74, 15 CD 81 [affirmed, without opinion, *Tobias v. Richardson*, 72 OS 626, 76 NE 1133; *Lockwood v. Whitlesey*, 23 CC(NS) 241, 34 CD 219; *In re Ellis*, 5 NP 207, 5 OD 330. See also *Martin v. Martin*, 56 OS 333, 46 NE 981].

The provision allowing computation of the present worth of a beneficiary's indebtedness if not yet due, was new and enables the executor or administrator to terminate the administration before such due date.

Research Aids

Right of retainer and set-off:

O-Jur2d: Executors and Administrators § 367 et seq

Am-Jur2d: Executors and Administrators § 567 et seq

ALR

Right of retainer in respect of indebtedness of heir, legatee or distributee. 110 ALR 1384, 164 ALR 717.

CASE NOTES AND OAG

See now, however, RC § 2105.05.2.

1. If testator devises to his sons A and B in fee, subject to C's life estate, with a gift over to the children of either who may die before C, a debt due from A to testator cannot be deducted from the share of A's children, if A dies before C: *Rings v. Borton*, 108 OS 280, 140 NE 515.

2. The indebtedness of a beneficiary of an estate to such estate, referred to in this section, embraces only legally enforceable indebtedness and does not include debts of the beneficiary to the estate which were barred by the statute of limitations at the time of the death of the creditor whose estate is being settled: *Summers v. Connolly*, 159 OS 396, 50 OO 352, 112 NE(2d) 391.

4. An indebtedness due the decedent from the surviving spouse is a set-off under this section against any sum awarded to the surviving spouse as exempt from administration under GC § 10509-54 (RC § 2115-13), and the probate court has the exclusive original jurisdiction to control the executor as to his duty in that respect: *Saluppo v. Santangelo*, 71 App 185, 26 OO 10, 48 NE(2d) 903.

5. Under this section, that portion of the share of a beneficiary of the estate which is represented by such beneficiary's indebtedness to the estate is extinguished as of the date of decedent's death: *Russell v. Rexroad*, 16 OO 209 (PC).

6. A debt barred by limitations cannot be deducted: *Harrod v. Carter*, 3 CC 479, 2 CD 274.

7. A debt due from heir to ancestor has priority over a mortgage given by such heir to another creditor: *Woodruff v. Woodruff*, 3 CC(NS) 616, 13 CD 408 [reversing in part *Woodruff v. Snowden*, 7 NP 520, 10 OD 123].

8. When the distributive share of a debtor heir is less than the amount which he owes to the estate, an action to quiet title may be maintained by the other heirs to the real estate, to remove any cloud upon the title through the claim of the debtor heir or anyone claiming under him: *Lockwood v. Whitlesey*, 23 CC(NS) 241, 34 CD 219.

10. Under a provision in a will requiring the executor to reject all claims presented by testator's children and providing that if one of such children should recover upon a claim against the estate, such claim should be deducted from his share, the amount recovered by an assignee of one of such children must be deducted from the share of the assignor: *Scheets*

v. Hunter, 56 OS 761, 49 NE 1116, sub nomine, *Sheets v. Hunter*, 37 Bull 283.

§ 2113.60 Refused legacy or bequest. (GC § 10509-187)

Unless a different intention appears from the will, a bequest or legacy which has been refused shall go into the residue, if there is a residuary clause. If there is no residuary clause, such bequest or legacy shall descend as intestate property.

HISTORY: GC § 10509-187; 114 v 320 (442). Eff 10-1-53.

Comment

General Code § 10509-187 was an entirely new section, effective January 1, 1932. Before its enactment, a legacy or bequest which the legatee or devisee refused to accept was treated as a lapsed legacy, and was disposed of in the manner which the statute now specifically provides. See Page on Wills, § 1240.

Forms

1 A&H Probate FORM 2113.60a et seq.

Research Aids

Devolution of refused legacy or bequest:

O-Jur2d: Descent and Distribution § 67; Wills § 864

Am-Jur2d: Wills § 1687 et seq

ALR

Renounced legacy or devise as falling within residuary clause; renounced residuary gift passing as intestate property. 155 ALR 1420.

Time of ascertainment of class to whom court will distribute property in pursuance of unexecuted power in trust. 115 ALR 1468.

Funds remaining at termination of trust or annuity, as falling into the residue for purpose of making up deficiency in particular bequests in preference to claims of residuary beneficiaries. 118 ALR 352.

Law Review

Disclaimers as a postmortem estate planning device. Editorial. 37 CinLRv 567.

CASE NOTES AND OAG

1. This section recognizes the right of a beneficiary to refuse a bequest of a legacy and prescribes the result that in the absence of a residuary clause in the will, the bequest or legacy descends as intestate property: *In re Krakoff*, 18 OO(2d) 116, 179 NE(2d) 566 (PC).

2. A renunciation of bequests in a will causes the property to go into the residue, if there is a residuary clause. If there is no residuary clause, such bequest descends as intestate property: *Abram v. Wilson*, 37 OO(2d) 288, 8 OMisc 420, 220 NE(2d) 739 (PC).

3. Effect of renunciation re federal tax lien on legatee's property: *United States v. McCrackin*, 85 OLA 143, 189 FSupp 632.

[CERTIFICATE OF TRANSFER]

§ 2113.61 Application for certificate of transfer; duty of court.

(A) When real estate passes by the laws of intestate succession or under a will, the administrator or executor shall, prior to the filing of

his final account, file in the probate court an application requesting of the court a certificate of transfer as to such real estate. Real estate sold by an executor or administrator or land registered under sections 5309.01 to 5309.98, inclusive, and 5310.01 to 5310.21, inclusive, of the Revised Code, are excepted from the above requirement. Also excepted are cases in which an order has been made relieving an estate from administration, wherein the order directing transfer of real estate to the person entitled thereto may be substituted for the certificate of transfer.

(B) Such application shall be verified on oath by the person filing it, or by some person who knows the facts therein stated, and shall contain:

(1) The name, place of residence at death, and date of death of the decedent;

(2) Whether such decedent died testate or intestate;

(3) The fact and date of the filing and probate of the will and of the appointment of an administrator or executor;

(4) A description of each parcel of real estate situated in Ohio owned by the decedent at the time of his death;

(5) In so far as they can be ascertained, the names, ages, places of residence, and relationship to the decedent of the persons to whom each such parcel of real estate passed by descent or devise;

(6) A statement that all the known debts of decedent's estate have been paid or secured to be paid, or that sufficient other assets are in hand to complete the payment thereof;

(7) Such other pertinent information as the court requires.

(C) The court shall issue a certificate of transfer for record in each county in Ohio where real estate so passing is situated which shall recite:

(1) The name and date of death of the decedent;

(2) Whether such decedent died testate or intestate and, if testate, the volume and page of the record of the will;

(3) The volume and page of the probate court record of the administration of the estate;

(4) The names and places of residence of the devisees, the interests to them passing, the names and places of residence of the persons inheriting, and the interest by each inherited, in each such parcel of real estate;

(5) A description of each such parcel of real estate;

(6) Such other information as in the opinion of the court should be included.

(D) If no administration has been had on an estate and if no administration is contemplated, or if the executor or administrator has failed to file such application before being discharged, such application for a certificate to transfer real

estate, including real estate devised or inherited before September 2, 1935, may be filed by an heir or devisee, or a successor in interest, in the court where the testator's will is probated, or, in the case of intestate estates, in the court where administration was had. If no administration was had, such application may be filed in the court of the county in which such decedent was resident at the time of his death.

A foreign executor or administrator, when no ancillary administration proceedings have been had or are being had in Ohio, may, in accordance with this section, file such application in the court in any county of this state in which real estate of the decedent is located.

When a person who has entered into a written contract for the sale and conveyance of an interest in real estate dies before its completion, the interest of the decedent in such contract and the record title to the real estate therein described may be transferred to the persons, legatees, devisees, or heirs at law entitled to the interest of the decedent therein, in the same manner as provided in this section and sections 2113.62 and 2113.63 of the Revised Code, for the transfer of real estate. The application and certificate for such transfer shall also recite that the real estate therein described is subject to such written contract for the sale and conveyance thereof.

HISTORY: GC § 10509-102; 114 v 320 (424); 116 v 385 (397), § 1; 123 v 460 (463), § 1; 130 v 616, § 1. *Eff* 8-9-63.

Analogous to former GC § 10526.

Comment

The analogous section to GC § 10509-102 was former GC § 10526 which, however, applied only to a devise of real estate. The foregoing section, it will be noted, applies not only to a devise of real estate, but also to real estate which passes according to the law of intestate succession. It will be noted that the application for transfer is made the last step before filing the final account.

General Code § 10509-102 was amended in 1935.

The comment by the probate code committee of the Ohio state bar association with reference to the amendment to this section was as follows:

"The time for filing the application has been changed owing to the fact that, in actual practice, it is often impossible to determine whether real estate will have been sold to pay debts until the estate is otherwise fully liquidated.

"The information from which the court is to determine the interests to be transferred, especially in cases where complete and regular administration is not had, should all be contained in a verified application. Title does not originate in the certificate, to be sure, but the lay public will depend on it to an extent that its accuracy should be reasonably safeguarded.

"Under the present section it was never thought advisable by the majority of the committee to repeal the existing provision for the 'time honored' affidavit of inheritance. That course would be more feasible under the present revision and is greatly desired by probate courts and taxing authorities in the interest

of preventing estates from slipping by without application for determination of inheritance tax being made.

"The last paragraph of the present section can well be omitted altogether since it is covered specifically in GC § 10511-21." (RC § 2129.19)

Following are comments on the 1949 amendment to GC § 10509-102:

By deleting the phrase "to pay debts" and substituting the phrase "by an executor or administrator" the exception will include a sale to pay debts and also a sale with the consent or at the request of all persons entitled to share in the estate upon distribution where a sale is brought about by virtue of the provision of GC § 10510-5 (RC § 2127.04).

The last paragraph added to this section provides for a certificate of transfer to be issued where a person has entered into a written contract to sell an interest in the real estate and dies before conveyance to the purchaser. The certificate will transfer the interest of the decedent in such contract to the persons entitled to receive same and also authorize the transfer of the record title to the real estate to the same persons.

In order to determine the persons entitled to receive, the principles of equitable conversion must be considered and also the provisions of GC § 10504-48 (RC § 2107.33), where the decedent died testate.

The amendment makes no change in the substantive law. It merely provides a procedure where none is now provided by the Code.

[For additional comment, see Addams & Hosford's Ohio Probate Practice, Davies' Revision.]

Cross-References to Related Sections

Registration of title to registered land which was conveyed under a testamentary power, RC § 5309.46.

Transfer of partnership property from deceased partner, RC § 1779.05.

Transfer of interest of decedent spouse, RC § 5302.17.

See RC §§ 2105.06.2, 2105.06.3, 2113.31.1, 2113.62, 2113.63, 2129.19 which refer to this section.

Forms

1 A&H Probate FORM 2113.61a et seq.

1 A&H Probate FORM 2113.03a et seq: Release from administration; transfer of assets.

Outline of Procedure

Transfer of real property. Leyshon No. 107; A&H No. 87

Research Aids

Ancillary administrator:

O-Jur2d: Executors and Administrators § 573

Application for certificate of transfer:

O-Jur2d: Executors and Administrators § 553

Certificate of transfer of real estate:

O-Jur2d: Executors and Administrators § 196

Law Reviews

See explanatory article in 4 OBar 411.

Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

CASE NOTES AND OAG

See also case notes under RC § 2113.03.

1. The enactment of this section renders inoperative that part of GC § 2768 (RC § 317.22) which is

inconsistent with this section: 1931 OAG No.3842.

3. Where real property of a deceased person passes by the laws of descent and no administration of the estate is had in the probate court, the title to real property may still be transferred under GC § 2768 (RC § 317.22): 1935 OAG No.4793.

5. A probate court is without authority to require a certificate of transfer to be returned to his court by the county recorder, or any other person, for the purpose of being filed with the other papers in the case. Such certificate of transfer should be and is the property of the grantee or grantees therein, whether the transfer is made under the intestate laws of this state or by devise: 1938 OAG No.1897.

6. No duty rests upon the county recorder to accept for filing or recording certificates of transfer from the probate court, until the necessary fees provided by GC § 2778 (RC § 317.32) have been paid by the executor or administrator of the estate or by the grantee or grantees in such conveyance: 1938 OAG No.1897.

7. When a certificate of transfer has been furnished by the probate court to an executor or administrator of an estate, or to the grantee or grantees listed in such certificate, it is the duty of the administrator or executor, or grantee or grantees, to present such certificate to the county auditor, and under the provisions of GC § 2768 (RC § 317.22) have the same indorsed "transferred" or "transfer not necessary," and pay the proper fees therefor, before such certificate is presented to the office of county recorder to be filed for record: 1938 OAG No.1897.

8. A certificate of transfer issued by the probate court is not subject to the newly enacted real property transfer fee imposed by RC § 319.54: 1968 OAG No. 68-068.

§ 2113.62 Record by county recorder. (GC § 10509-103)

Upon receipt of the certificate provided for in section 2113.61 of the Revised Code, the county recorder shall record it in the books provided for the recording of deeds and index such records in the name of the decedent as grantor and the person to whom the real estate passes as grantee in the index provided for the record of deeds.

HISTORY: GC § 10509-103; 114 v 320 (424). **EFF** 10-1-53. Analogous to former GC § 10527.

Comment

The analogous section to GC § 10509-103 was former GC § 10527, with changes necessary to make the present section applicable to intestate as well as testate property.

Cross-References to Related Sections

See RC § 2113.61 which refers to this section.

Research Aids

Certificate of transfer of realty:

O-Jur2d: Executors and Administrators § 196

§ 2113.63 Fees. (GC § 10509-104)

For recording and indexing the certificate provided for in section 2113.61 of the Revised Code, the county recorder shall be paid in fees provided by section 317.32 of the Revised Code for the recording and indexing of deeds, and the pro-

bate court shall be allowed the fees provided by division (A) (71) of section 2101.16 of the Revised Code for similar certificates. The probate judge shall tax and collect, as other costs of administering the estate, the fees of the recorder and the court.

HISTORY: GC § 10509-104; 114 v 320 (424); 133 v H 1. Eff 3-18-69.

Analogous to former GC § 10528.

Comment

The analogous section to GC § 10509-104 was former GC § 10528, with such changes as are necessary to harmonize with the two next preceding sections. It will be noted that all three sections are applicable to intestate as well as testate property.

Cross-References to Related Sections

See RC § 2113.61 which refers to this section.

Research Aids

Certificate of transfer of realty:

O-Jur2d: Executors and Administrators § 196

[UNCLAIMED MONEY]

§ 2113.64 Investment of unclaimed money. (GC § 10509-194)

If a sum of money directed by a decree or order of the probate court to be distributed to heirs, next of kin, or legatees, or owing from an estate to a creditor thereof, remains for six months unclaimed, the court may order it turned into the county treasury as provided in section 2113.65 of the Revised Code, or may order the executor or administrator to invest it as the court directs for a period not to exceed one year, to accumulate for the benefit of the persons entitled thereto. Such investment shall be made in the name of the probate judge of the court for the time being and shall be subject to the order of the judge and his successors in office.

HISTORY: GC § 10509-194; 114 v 320 (443); 123 v 460 (464), § 1. Eff 10-1-53. Analogous to former GC § 10843.

Cross-References to Related Sections

Funds of unknown or nonresident, trustee, RC § 2109.57 et seq.

Investments by fiduciaries, RC § 2109.37.

See RC §§ 2113.31.1, 2113.65 to 2113.68 which refer to this section.

See RC § 2113.68 which refers to § 2113.64 et seq.

Comparative Legislation

Unclaimed money, investment:

Cal.—Probate Code, § 1062

Ill.—Rev Stat, ch 3, § 24-20

Ind.—Burns' Stat, § 29-1-17-12

Mich.—MCLA, § 704.55

N.Y.—SCPA, § 2223

Fla.—FSA, § 733.816

Forms

1 A&H Probate FORM 2113.64a et seq.

1 A&H Probate FORM 2113.67a et seq: Transfer of unclaimed money.

Research Aids

Investment of unclaimed money:

O-Jur2d: Executors and Administrators § 376

CASE NOTES AND OAG

1. An executor who has a beneficial private interest under a bequest which is unclaimed for two years, must use all reasonable diligence, with all the knowledge and means of knowledge at his command, to locate the beneficiary and to give notice to him. Failure to use such diligence is fraud, for which the legatee may maintain an action in conversion against the executor to recover the legacy: *Morris v. Mull*, 110 OS 623, 144 NE 436, 39 ALR 323.

2. Under an earlier law it was held that interest would be charged against the administrator on funds which he was ready to distribute, but could not because the heirs were unknown; it was his duty to invest the money for them. "May" in the old statute meant "must." The statute now uses "shall" instead of "may": *In re Thornton*, 7 NP 335, 5 OD 151.

3. Funds held by a county treasurer pursuant to RC §§ 5723.11, 2109.57 and 2113.64 must be disposed of pursuant to instructions contained therein and are not available for diversion to other uses: 1972 OAG No.72-122.

§ 2113.65 Disposition of investment.

The person investing unclaimed money under section 2113.64 of the Revised Code shall file in the probate court a memorandum thereof, with the original certificates or evidences of title representing such investment, which shall be allowed as a sufficient voucher for such payment under the order or decree. If the amount is unclaimed at the end of the period of such investment, it shall be turned into the county treasury and credited to the general fund, without liability for interest thereon. The receipt of the county treasurer taken for it and filed is a sufficient voucher.

HISTORY: GC § 10509-195; 114 v 320 (444); 123 v 460 (464), § 1. Eff 10-1-53. Analogous to former GC § 10844.

Cross-References to Related Sections

See RC §§ 2113.64, 2113.66, 2113.68 which refer to this section.

Forms

1 A&H Probate FORM 2113.64a et seq: Unclaimed money.

Research Aids

Disposition of investment:

O-Jur2d: Executors and Administrators § 376

§ 2113.66 Statute of limitations no defense. (GC § 10509-196)

The statute of limitations shall not be set up as a defense or bar to an action against an executor or administrator who fails or neglects to comply with the requirements of sections 2113.64 and 2113.65 of the Revised Code.

HISTORY: GC § 10509-196; 114 v 320 (444). Eff 10-1-53. Analogous to former GC § 10845.

Research Aids

Statute of limitations no defense for noncompliance with statutory duties re unclaimed money:
O-Jur2d: Executors and Administrators § 376

CASE NOTES AND OAG

1. A cause of action against an administrator by a distributee does not accrue until demand made upon the administrator by the distributee, and if an administrator fails to comply, the statute of limitations cannot be set up as a defense, either by the administrator or the sureties on the bond, as they may assert no defenses which are by statute wholly removed from their principal: *Irwin v. King*, 10 OLA 614.

§ 2113.67 Money paid to owner.

When a person entitled to the money invested or turned into the county treasury under section 2113.64 of the Revised Code satisfies the probate court of his right to receive it, the court shall order it to be paid over and transferred to him. In case it has been turned into the treasury, the county auditor shall give to him a warrant therefor upon the certificate of the probate judge.

HISTORY: GC § 10509-197; 114 v 320 (444). Eff 10-1-53. Analogous to former GC § 10846.

Forms

1 A&H Probate FORM 2113.67a et seq.

Research Aids

Unclaimed money paid to owner:
O-Jur2d: Executors and Administrators § 376

§ 2113.68 Responsibility for safekeeping of evidences of title.

The probate judge with whom the certificates or evidences of title required by section 2113.65 of the Revised Code are deposited and each succeeding judge to whom they come, and his sureties, shall be responsible for their safekeeping and application, as provided in sections 2113.64 to 2113.67, inclusive, of the Revised Code.

HISTORY: GC § 10509-198; 114 v 320 (444). Eff 10-1-53. Analogous to former GC § 10847.

Research Aids

Unclaimed money:
O-Jur2d: Executors and Administrators § 376

[NEWLY DISCOVERED ASSETS]

§ 2113.69 Newly discovered assets.

When newly discovered assets come into the hands of an executor or administrator after the filing of the original inventory required by section 2115.02 of the Revised Code, he shall administer, account for, and distribute such assets in like manner as if received prior to the filing of such inventory. Within thirty days, he shall file in the probate court an itemized report of such assets, with an estimate of the value thereof,

but shall not be required to make an inventory or appraisal of the same unless ordered to do so by the court, either upon its own motion or upon the application of any interested party.

HISTORY: GC § 10509-147; 114 v 320 (434); 119 v 394 (414), § 1. Eff 10-1-53. Analogous to former GC § 10747.

Comment

General Code § 10509-147, as amended in 1941, combined the provisions which formerly appeared in GC §§ 10509-73 and 10509-147, and conforms to the general policy limiting the presentation of claims to nine months. It applies to assets coming into the hands of the executor or administrator after the filing of the original inventory, rather than after the expiration of nine months, as provided in former GC § 10509-147. No inventory or appraisal is required unless ordered by the court. The executor or administrator simply files an itemized report, with his own estimate of value. Such assets are to be administered in the same manner as assets originally received by the executor or administrator, and therefore the provisions of the former statute creating a separate right of action against such assets are no longer necessary.

Forms

1 A&H Probate FORM 2113.69a et seq.

Research Aids

Newly discovered assets:
O-Jur2d: Executors and Administrators § 105
Am-Jur2d: Executors and Administrators § 124

CASE NOTES AND OAG

1. Where an administrator, having completely administered the assets of his deceased, is alleged to have concealed a will of such deceased, such alleged concealment does not constitute newly discovered assets within the meaning of this section so as to authorize the probate court to appoint an administrator de bonis non: *In re Cassell*, 53 OLA 65, 83 NE(2d) 72 (PC).

2. Where, at the time of appointment of the administrator, an estate is totally without assets, and no inventory is filed until twenty-two months thereafter, at which time certain bonds are received by the administrator as a result of a legal action in another county, an action by a creditor of the estate, commenced within two months of the filing of such inventory, may be maintained under favor of this section, allowing additional time in the case of new assets: *Carrier v. Morrissey*, 32 NP(NS) 362.

3. Under GC § 10747 (RC § 2113.69) a trust fund created by a decedent for care and services, and which went back into the estate because of failure of decedent to complete the trust, was considered new assets where it appeared that the demand was made upon the trustee for the fund soon after death of the decedent, but the trustee insisted on testing the validity of the trust and by reason of dilatory action on his part and that of the administrator a decision adverse to the claim of the beneficiary was not entered for almost three years after the death of the decedent: *Gemin v. Salisbury*, 22 NP(NS) 321, 31 OD 157 [affirmed by court of appeals].

[FOREIGN EXECUTORS AND ADMINISTRATORS]

§ 2113.70 Suit against foreign executors and administrators. (GC § 10509-160)

An executor or administrator appointed in any

other state or country, or his legal representatives, may be prosecuted in any appropriate court in this state in his capacity of executor or administrator.

HISTORY: GC § 10509-160; 114 v 320 (437); 125 v 903 (977). Eff 10-1-53. Analogous to former GC § 10763.

Cross-References to Related Sections

See RC § 2113.74 which refers to RC § 2113.70 et seq.

Comparative Legislation

Foreign executors:

- Cal.—Probate Code, § 361
- Ill.—Rev Stat, ch 3, § 22-1
- Ind.—Burns' Stat, § 29-1-10-18
- Ky.—KRS, § 395.170
- Mich.—MCLA, § 704.27
- N.Y.—SCPA, § 1601
- Pa.—Purdon's Stat, Tit. 20, § 4101
- Fla.—FSA, § 733.304

Research Aids

Suit against foreign representatives:

- O-Jur2d: Executors and Administrators § 555 et seq.
- Am-Jur2d: Executors and Administrators § 778

CASE NOTES AND OAG

1. A probate court in this state has, although the will has been probated therein, no right to review accounts of an executor, appointed in another state, over property situated in this state: *In re Crawford*, 68 OS 58, 67 NE 156 [affirming 21 CC 554, 11 CD 605].

2. By the administration law of Ohio, foreign executors and administrators may sue and be sued in this state like those appointed in Ohio, thereby in most cases making it unnecessary that any ancillary administration should be instituted. Administration may, however, be granted in all cases where property is found here to be administered: *Swearingen v. Morris*, 14 OS 424.

4. Foreign executors having debts owing them here as executors are liable to action here on a rejected claim if service can be made on them: *Williams v. Welton*, 28 OS 451 [for another opinion in this case, see *Welton v. Williams*, 28 OS 472].

5. An action lies here against executors appointed in another state and living there, but served with summons here, although there are no assets in this state: *Craig v. Railroad*, 2 NP 64, 3 OD 146. (There is a contrary decision by the New York court of appeals: *Helme v. Buckelew*, 229 NY 365, 128 NE 216].

6. Foreign executors are subject to suit in the same manner they are permitted to sue, and constructive service may be had in an attachment suit against a nonresident executor, where the property of the decedent which is attached is within the state: *American Steel & Co. v. Meyers*, 11 NP(NS) 652, 22 OD 733.

7. A judgment recovered against a domiciliary administrator in Alabama cannot be made the basis of right of action by the judgment creditor against the ancillary administrator of the same estate in Ohio, since there is no privity of estate between the two administrators: *Albrecht v. Hoffman*, 16 NP(NS) 285, 24 OD 19.

8. A foreign administrator cannot be compelled to appear in any of our courts unless as above stated he brings himself within the jurisdiction of the local court, but he may do so voluntarily: *Lampton v. Nichols*, 13 DecRep 765, 2 CSCR 55.

9. If a foreign administrator appears in court and

proceeds to trial without objection he cannot then be heard that the court has no jurisdiction to hear and determine the cause: *Hamilton v. Taylor*, 13 DecRep 975, 2 CSCR 402.

§ 2113.71 Jurisdiction. (GC § 10509-161)

The several probate courts, courts of common pleas and superior courts have the same authority over foreign executors and administrators as if they were appointed in this state.

HISTORY: GC § 10509-161; 114 v 320 (437); 125 v 903 (978). Eff 10-1-53. Analogous to former GC § 10765.

Research Aids

Jurisdiction of Ohio courts:

- O-Jur2d: Executors and Administrators § 557
- Am-Jur2d: Executors and Administrators § 778

Law Review

Judicial jurisdiction over foreign executors and administrators. Editorial. 20 OSLJ 558.

CASE NOTES AND OAG

1. The decedent had had his life insured with a Pennsylvania company for ten thousand dollars, payable on its face to his wife. After his death the wife had possession of the policy and entered suit thereon in the common pleas court of Philadelphia, and made the administrator of the deceased a party to that action. The administrator did not appear, nor do anything which voluntarily brought him within the jurisdiction of the Philadelphia court, so that a personal service might be had on him. The Philadelphia court therefore rendered a judgment in favor of the wife and paid her the claim. Under the laws of Ohio, a part of this policy would have belonged to the creditors of the deceased; and in a suit by the administrator against the widow for such portion of the money paid to her by the insurance company, it was held that the court of Pennsylvania could not determine a right against the administrator in Ohio and that the administrator was not bound by the Philadelphia suit: *Cross v. Armstrong*, 44 OS 613, 10 NE 160.

2. A motion to quash service will be sustained in an action for wrongful death, arising from an automobile accident which occurred in Ohio, where the defendant administrator was appointed in Illinois and served while visiting in Ohio, but no property of the estate was to be found in Ohio: *Feldman v. Gross*, 49 OO 415, 106 FSupp 308.

3. General Code § 10509-161 (RC § 2113.71) is merely a declaration of the common law rule permitting suits to be maintained against foreign executors and administrators to the extent of the decedent's property located within the state: *Feldman v. Gross*, 49 OO 415, 106 FSupp 308.

§ 2113.72 Proceedings against foreign executor or administrator. (GC § 10509-162)

Any court of common pleas may compel a foreign administrator or executor residing in this state, or having assets or property herein, to account at the suit of an heir, distributee, or legatee, who is resident in this state, and make distribution of the amount found in his hands to the respective heirs, distributees, or legatees according to the law of the state granting such letters. When suits are pending or there are unsettled demands against such estate, the court

also may require a refunding bond to be given to such executor or administrator by the heirs, distributees, or legatees entitled thereto in case the amount paid is needed to pay debts of the estate.

HISTORY: GC § 10509-162; 114 v 320 (437). **Eff** 10-1-53. Analogous to former GC § 10766.

Forms

1 A&H Probate FORM 2113.72a et seq.

Research Aids

Accounting:

O-Jur2d: Executors and Administrators § 545

Compelling distribution:

O-Jur2d: Executors and Administrators § 559

CASE NOTES AND OAG

1. Under a similar New York statute, a New Jersey executor who was domiciled in the District of Columbia could not be sued in New York where there were no assets of the decedent, and service of process upon him in New York state was void: *Helme v. Buckelew*, 229 NY 365, 128 NE 216.

2. When a married woman died domiciled in this state and her husband obtains letters in Pennsylvania, suit cannot be maintained in this state by an heir while the matter remains unsettled in the Pennsylvania court: *Adams v. Adams*, 7 OS 84.

3. Where the wife dies and subsequently the husband removes to another state and dies, not having removed money from an Ohio bank, which his wife had deposited there before her death, the heir of the husband has the right to demand that funds received by the husband's administrator, appointed in a foreign state, be returned to Ohio so as to descend under the Ohio law: *Bird v. Duggan*, 10 OLA 421.

§ 2113.73 Security for distributees and indemnification for sureties. (GC § 10509-163)

When a foreign administrator or executor has wasted, misapplied, or converted assets of an estate, or has insufficient property to discharge his liability on account of the trust, or his sureties are irresponsible, distributees, heirs, or legatees, in any court of common pleas or probate court may compel him to secure the amounts respectively due to them and any of his sureties may require indemnity on account of their liability as bail.

HISTORY: GC § 10509-163; 114 v 320 (437). **Eff** 10-1-53. Analogous to former GC § 10767.

Forms

1 A&H Probate FORM 2113.73a et seq.

Research Aids

Security required in certain cases:

O-Jur2d: Executors and Administrators § 558

§ 2113.74 Other remedies. (GC § 10509-164)

The several provisional remedies and proceedings authorized by sections 2113.70 to 2113.73, inclusive, of the Revised Code, against a foreign executor or administrator also apply to the per-

son and property of a foreign administrator or executor. The probate court or the court of common pleas may make any order or decree touching his property and effects, or the assets of such estate, necessary for the security of those interested therein.

HISTORY: GC § 10509-164; 114 v 320 (438). **Eff** 10-1-53. Analogous to former GC § 10768.

Comment

This section is a continuation of the matters referred to in RC § 2113.72, and specifically confers on the court ample power to protect a resident distributee, heir or legatee, and seems to apply further, that if he has given surety, the court may order him to protect such surety. Neither RC § 2113.72 nor RC § 2113.73 give any rights to creditors. A creditor must work out his right through RC §§ 2113.70 and 2113.71.

Research Aids

Proceedings apply to person and property of foreign representatives:

O-Jur2d: Executors and Administrators § 557

§ 2113.75 Foreign executor or administrator may prosecute suit in this state. (GC § 10509-165)

An executor or administrator appointed in any other state or country may commence and prosecute an action or proceeding in any court in this state, in his capacity as executor or administrator, in like manner and under like restrictions as a nonresident is permitted to sue.

HISTORY: GC § 10509-165; 114 v 320 (438). **Eff** 10-1-53. Analogous to former GC § 10769.

Research Aids

Actions by foreign representatives:

O-Jur2d: Executors and Administrators § 551;

Death §§ 169, 295; Conflict of Laws §§ 57, 109

Am-Jur2d: Executors and Administrators § 774 et seq.

ALR

Time and manner of taking advantage of failure to qualify in state, in action commenced or continued by foreign executor or administrator. 108 ALR 1282.

CASE NOTES AND OAG

1. Payment by an Ohio debtor to an administrator appointed by another state than Ohio, prior to the appointment of an administrator in Ohio, is a satisfaction of the debt: *Crawford v. Foreign Christian Missionary Soc.*, 10 NP(NS) 676, 22 OD 804.

2. In one case where plaintiff's intestate resided in Tennessee, where he died, and had on deposit money in this state, and administration was first granted in Tennessee and afterwards in this state, the parties with whom he had made the deposit promised to pay the same to the Tennessee administrator, without notice that one had been appointed in this state. The local administrator brought suit, and it was held that he could not recover, because, by the law of Ohio, a foreign administrator has authority to collect debts and the liability attached at the time of making the promise: *Weizell v. Cincinnati Sav. Inst.*, 1 DecRep 54, 1 WLJ 393.

3. Executor, resident out of the state, never hav-

ing given bond here, not entitled to appeal, without giving appeal bond with security: *Work v. Massie*, 6 O 503.

4. A foreign trust company, appointed and qualified to act as executor under the will of a foreign testator, may sue in the courts of this state, where the will includes real property situated here: *Union Sav. Bank & Trust Co. v. Baltimore & O. S. R. Co.*, 6 NP(NS) 454, 53 Bull 180.

6. Foreign administrator not restricted in Ohio to suits to recover the assets of the deceased but may bring an action to recover damages for the death of his intestate, occurring outside of the state: *Cincinnati, H. & D. R. Co. v. Thiebaud*, 114 Fed 918, 52 CCA 538, 12 OFD 254.

7. The procuring of an alien consul to act as the administrator of a deceased resident of Ohio does not, in an action against other residents of Ohio, present such a case of diverse citizenship as to give jurisdiction to a federal court. The appointment of such alien consul will be regarded as having been procured collusively and fraudulently if the testimony discloses that the sole purpose in having the said consul named as administrator was to give the federal court jurisdiction of the action for wrongful death thereafter brought by him: *Cerri v. Telephone Co.*, 219 Fed 285, 13 OLR 425.

8. Under former GC § 10769 (see now RC § 2113.75) a Michigan administrator may maintain an action in the federal court in Ohio for a wrongful death in Illinois, though the Illinois statute does not permit actions in that state for a death outside the state, and former GC § 10770 (before amendment of 103 v 116) (see now RC § 2125.01) allows actions for death in a foreign state only in cases where such foreign state allows in its courts the enforcement of the Ohio statute: *St. Bernard v. Shane*, 220 Fed 852, 135 CCA 399 [reversing and remanding 201 Fed 453, 11 OLR 43].

9. Under Ohio law foreign personal representatives may maintain wrongful death actions in Ohio courts: *Glenn v. Trans World Airlines, Inc.*, 22 OO(2d) 431, 210 FSupp 31.

§ 2113.81 Money and property to be held in trust for safe keeping for nonresidents of the United States.

Where it appears that a legatee or a distributee, or a beneficiary of a trust not residing within the United States or its territories will not have the benefit or use or control of the money or other property due him from an estate, because of circumstances prevailing at the place of residence of such legatee, distributee, or a beneficiary of a trust, the probate court may direct that such money be paid into the county treasury to be held in trust or the probate court may direct that such money or other property be delivered to a trustee which trustee shall have the same powers and duties provided in section 2119.03 of the Revised Code for such legatee, distributee, beneficiary of a trust or such persons who may thereafter be entitled thereto. Such money or other property held in trust by such county treasurer or trustee shall be paid out by order of the probate judge in accordance with section 2113.82 of the Revised Code.

The county treasury shall not be liable for interest on such money held in trust.

HISTORY: 126 v 946, § 1. Eff 10-6-55.

Cross-References to Related Sections

See RC § 2113.82 which refers to this section.

Comparative Legislation

Foreign beneficiary:

Ill.—Rev Stat, ch 3, § 22-2

Mich.—MCLA, § 704.55a

N.Y.—SCPA, § 2217

Pa.—Purdon's Stat, Tit. 20, § 4111

Forms

1 A&H Probate FORM 2113.81a et seq.

Research Aids

Legacy held in trust for certain nonresidents:

O-Jur2d: Executors and Administrators § 377;

Fiduciaries § 24; Trusts § 32.

Am-Jur2d: Executors and Administrators § 558

Law Reviews

Legatees behind the iron curtain. Carl H. Fulda. 16 OSLJ 496.

Beneficiaries behind the iron curtain. 7 West RLRev 179.

CASE NOTES AND OAC

1. Statutes preventing payments abroad are unconstitutional, as an entry into national foreign policy: *Zschernig v. Miller*, 389 US 429, 19 LEd(2d) 683.

2. Where it appears that distributees residing in an iron curtain or communistic country will not have the benefit or use or control of money or other property due from an estate being administered in Ohio, the probate court is authorized by this section to direct that such money be held in trust for the benefit of such distributees: *First Nat. Bank v. Fishman*, 35 OO(2d) 64, 217 NE(2d) 60 (PC).

3. A probate court has no authority to determine that distributee not residing within the United States or its territories "will not have the benefit or use or control of the money or other property due him from an estate, because of circumstances prevailing at the place of residence of such distributee," as provided in this section: *First Nat. Bank v. Fishman*, 43 OO(2d) 384, 16 OMisc 185, 239 NE(2d) 270 (PC).

4. This section, which requires the probate court to determine whether or not the foreign legatee will have the benefit, use, or control of the money left him "because of circumstances prevailing at the place of residence of such legatee," is directed at an inquiry into the operations of the foreign government and into the political, economic, and social conditions prevailing in the foreign country and, therefore, is unconstitutional: *Mora v. Battin*, 49 OO(2d) 133, 303 FSupp 660.

§ 2113.82 Payments of money or property by county treasurer or trustee.

When a person entitled to money or other property invested or turned into the county treasurer or to a trustee under section 2113.81 of the Revised Code satisfies the probate court

of his right to receive it, the court shall order the county treasurer or the trustee to pay it over to such person.

HISTORY: 126 v 946, § 1. **EF** 10-6-55.

Research Aids

Distribution of legacy held in trust for nonresidents:

O-Jur2d: Executors and Administrators § 377;
Fiduciaries § 24; Trusts § 32.

Law Review

Beneficiaries behind the iron curtain. 7 West
RLRev 179.

CASE NOTES AND OAG

1. It is not error for a court, in construing a will—wherein the testator gives the residue of his estate to certain named domestic legatees as contingent beneficiaries in the event the legacies bequeathed to certain persons resident of Czechoslovakia, or their lineal descendants, cannot, at the time of testator's death or within one year thereafter, "for any reason, be delivered to any or all of" them—to find that such legacies should be paid to the contingent domestic heirs rather than to the primary foreign heirs, where the evidence shows that an effective delivery of the legacies could not be made to the benefit of such foreign heirs at the time of testator's death, or within one year thereafter, because of economic and political conditions then in existence in Czechoslovakia: *Queen v. Gastan*, 5 OApp(2d) 278, 34 OO(2d) 439, 215 NE(2d) 408.

CHAPTER 2115: EXECUTORS AND ADMINISTRATORS—INVENTORY

Section

- 2115.01 "Inventory" defined.
- 2115.02 Inventory; separate schedule.
- 2115.03 Proceedings on refusal to file.
- 2115.04 Notice of inventory.
- 2115.05 Who shall make inventory.
- 2115.06 Appraisers; compensation; fees may be charged against the estate.
- 2115.07 Oath and duties of appraisers.
- 2115.08 [Repealed.]
- 2115.09 Inventory contents.
- 2115.10 Emblems are assets.
- 2115.11 Discharge of a debt in a will.
- 2115.12 Naming of person executor does not discharge debt.
- 2115.13, 2115.14 [Repealed.]
- 2115.15 Signing, certifying, and return of inventory.
- 2115.16 Hearing on inventory.
- 2115.17 Real estate appraisal conclusive.

§ 2115.01 "Inventory" defined. (GC § 10509-40)

As used in Chapters 2113. to 2125., inclusive, of the Revised Code, "inventory" includes appraisement.

HISTORY: GC § 10509-40; 114 v 320 (411). **EFF** 10-1-53. Analogous to former GC § 10637.

Cross-References to Related Sections

See RC § 2131.02 which refers to this chapter.

Comparative Legislation

Inventory:

- Cal.—Probate Code, § 600
- Ill.—Rev Stat, ch 3, § 14-1
- Ind.—Burns' Stat, § 29-1-12-1
- Ky.—KRS, § 395.250
- Mich.—MCLA, § 707.2
- N.Y.—SCPA, § 2003
- Pa.—Purdon's Stat, Tit. 20, § 3301
- Fla.—FSA, § 733.604

Forms

- 1 A&H Probate FORM 2115.02a et seq: Inventory.

Research Aids

Inventory defined:

- O-Jur2d: Executors and Administrators § 101
- Am-Jur2d: Executors and Administrators §§ 209, 210

CASE NOTES AND OAG

1. An appraisement is a part of the inventory, and the provisions of former GC § 10639 (see now RC § 2115.16), which authorizes exceptions to an inventory, and former GC § 10640 (analogous GC § 10509-60 repealed, 118 v 78), which allows an appeal from such finding, authorize exceptions to an appraisement and an appeal therefrom: *Sprinkle v. Odell*, 22 CC (NS) 480, 33 CD 685 [affirmed, without opinion, *Sprinkle v. Sprinkle*, 78 OS 404; for a later opinion in same case, see *Sprinkle v. Odell*, 22 CC(NS) 233, 33 CD 540].

§ 2115.02 Inventory; separate schedule.

Within one month after the date of his appointment, unless the probate court grants an extension of time for good cause shown, every

executor or administrator shall make and return on oath into court a true inventory of the real estate of the deceased located in this state, and the chattels, moneys, rights, and credits of the deceased that are to be administered and that have come to his possession or knowledge. The inventory is to be based on values as of the date of death of the decedent. If his predecessors have done so, a fiduciary need not return and file an inventory, unless, in the opinion of the court, it is necessary.

With the inventory, the executor or administrator shall file a separate schedule describing any legal or equitable interest owned by the decedent in real estate located outside of the state which has come to his knowledge.

Any assets, the value of which is readily ascertainable without the exercise of judgment on the part of an appraiser, shall not be appraised. The value of these assets shall be shown in the inventory and verified by the administrator or executor, and he shall provide evidence of value as the court requires.

HISTORY: GC § 10509-41; 114 v 320 (411); 116 v 385; 133 v S 185 (**EFF** 1-1-71); 136 v S 145. **EFF** 1-1-76.

Analogous to former GC §§ 10638, 10641.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2115.02 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Application for determination of inheritance taxes, RC § 5731.36.

Debt paid in will, must be included in inventory, RC § 2115.11.

Newly discovered assets, RC § 2113.69.

Oath as to inventory, RC § 2115.15.

Real estate appraisement, conclusive, RC § 2115.17.

Residuary legatee not required to return inventory, RC § 2109.10.

What included in inventory, RC § 2115.09 et seq.

See RC §§ 2109.07, 2109.09, 2109.24, 2109.58, 2113.31, 2113.38, 2113.69, 2115.03 to 2115.07, 2115.09, 2115.10, 2115.12, 2115.15 to 2115.17, 2117.19, 2127.22 which refer to this section.

Forms

- 1 A&H Probate FORM 2115.02a et seq.

1 A&H Probate FORM 2115.06a et seq: Appointment of appraisers.

1 A&H Probate FORM 2115.07a et seq: Oath, duties of appraisers.

Outline of Procedure

Inventory, making, filing, and exceptions thereto. Leyshon No. 79; A&H No. 53

Research Aids

Contents of inventory:

- O-Jur2d: Executors and Administrators § 104
- Am-Jur2d: Executors and Administrators § 210

Dispensing with appraisement:

O-Jur2d: Executors and Administrators § 108

Duty of successor fiduciary to file inventory:

O-Jur2d: Executors and Administrators § 536

Duty to make and file:

O-Jur2d: Executors and Administrators § 102

Am-Jur2d: Executors and Administrators § 209 et seq.

Removal for failure to file inventory:

O-Jur2d: Fiduciaries § 323

Am-Jur2d: Executors and Administrators § 111

Separate schedule for real estate located outside of state:

O-Jur2d: Executors and Administrators § 104

Time of inventory valuation:

O-Jur2d: Executors and Administrators § 107

Law Review

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

CASE NOTES AND OAG

1. Under the mandatory provisions of this section and GC § 10509-52 (RC § 2115.09) the executor must include in the inventory a statement of all debts and accounts belonging to the deceased and known to the executor, irrespective of any opinion that the testator may have had as to the value or collectibility of a debt or account: In re Doppes, 21 OO 181 (CP).

2. An agreement between the heirs of a decedent, by which one of them agrees to pay the debts of the estate in consideration of receiving all the personal property, does not operate to dispense with the absolute duty imposed upon the administrator by this section to make and return a true inventory of all the property of the decedent which has come to his possession or knowledge: In re Specht, 34 OLA 201, 36 NE(2d) 865.

3. At the death of one of the owners of a joint and survivorship bank account, it is not property of the deceased such as should be included in the inventory filed in his estate under RC § 2115.02: In re Cecere, 46 OO(2d) 134, 17 OMisc 101, 242 NE(2d) 701 (PC), Guerra v. Guerra, 54 OO(2d) 14, 25 OMisc 1, 265 NE(2d) 818 (PC).

§ 2115.03 Proceedings on refusal to file inventory. (GC §§ 10509-62, 10509-63, 10509-64, 10509-65)

If an executor or administrator neglects or refuses to return an inventory as provided by section 2115.02 of the Revised Code, the probate court shall issue an order requiring him, at an early day therein named, to return an inventory.

After personal service of such order by a person authorized to make the service, if such executor or administrator, by the day appointed, does not return such inventory under oath or fails to obtain further time from the court to return it, or if such order cannot be served personally by reason of his absconding or concealing himself, the court may remove such executor or administrator and new letters shall be granted.

Such letters shall supersede all former letters testamentary or of administration, deprive the former executor or administrator of all power, authority, or control over the estate of the deceased, and entitle the person appointed to take,

demand, and receive the effects of such deceased wherever they are found.

In every case of the revocation of such letters, the bond given by the former executor or administrator must be prosecuted and a recovery had thereon to the full extent of any injury sustained by the estate of the deceased, by such executor's or administrator's acts or omissions, and to the full value of all property of the deceased, received and not administered by him.

HISTORY: GC §§ 10509-62, 10509-63, 10509-64, 10509-65; 114 v 320 (415, 416). Eff 10-1-53. Analogous to former GC §§ 10668, 10669, 10670, 10671.

Cross-References to Related Sections

Proceedings against former executor or administrator, RC § 2113.22.

Forms

1 A&H Probate FORM 2115.03a et seq.

Outline of Procedure

Inventory, requiring fiduciary to file. Leyshon No. 80; A&H No. 54

Research Aids

Action on fiduciary's bond:

O-Jur2d: Fiduciaries § 224

Am-Jur2d: Executors and Administrators § 781 et seq.

Grounds for removal:

O-Jur2d: Executors and Administrators, § 82; Fiduciaries § 323

Am-Jur2d: Executors and Administrators § 111

Proceedings to compel filing:

O-Jur2d: Executors and Administrators § 111

Am-Jur2d: Executors and Administrators § 212

Recovery of assets by successor fiduciary:

O-Jur2d: Executors and Administrators §§ 535, 613

Am-Jur2d: Executors and Administrators § 622

CASE NOTES AND OAG

1. An administratrix may not be deprived of the compensation due to her under the provisions of RC § 2113.35 for her services for mere delay in making and returning the inventory of the estate, when she has not been given an order requiring her, at an early date therein named, to return same, as prescribed by this section, or has not been notified by the court of the expiration of the time to file such inventory, as prescribed by RC § 2109.24: In re Burkett, 16 OApp(2d) 45, 45 OO(2d) 133, 241 NE(2d) 787 (1968).

2. A motion for citation and attachment proceedings against an administrator will lie under former GC § 10825 (see now RC § 2109.32) and this section, until more than ten years have elapsed from the date of hearing of the last account filed by such administrator: Gilbert v. Marsh, 4 NP 338, 7 OD 230.

§ 2115.04 Notice of inventory. (GC § 10509-45)

Not less than five days previous thereto, a written notice stating the time and place of making the inventory required by section 2115.02 of the Revised Code, must be served by the executor or administrator on the surviving spouse, but such notice may be waived in writing by such surviving spouse.

HISTORY: GC § 10509-45; 114 v 320 (412). **EFF** 10-1-53. Analogous to former GC § 10648.

Cross-References to Related Sections

See RC § 2115.05 which refers to this section.

Forms

1 A&H Probate FORM 2115.04a et seq.

Research Aids

Notice of inventory:

O-Jur2d: Executors and Administrators § 101

CASE NOTES AND OAC

1. The statute (1 Curwen, 708) which has been repealed and re-enacted with changes (75 v 854), provided that the executor or administrator should give notice of the time and place of making an inventory and appraisalment of the personal property: *Heck v. Heck*, 34 OS 369.

2. The only notice required of the time and place of making an inventory is upon the surviving spouse, if any, provided by this section. No notice to any other person is required: *Scott v. Mofford*, 64 App 457, 18 OO 197, 28 NE(2d) 947.

§ 2115.05 Who shall make inventory. (GC § 10509-44)

After giving the notice required in section 2115.04 of the Revised Code, the executor or administrator, with the aid of the appraiser, if an appraisalment is to be made, shall make the inventory required by section 2115.02 of the Revised Code.

HISTORY: GC § 10509-44; 114 v 320 (412); 133 v S 185. **EFF** 1-1-71.

Analogous to former GC § 10647.

The effective date is set by section 3 of the act.

SECTION 3. (133 v S 185) Sections 1 and 2 of this act shall take effect on January 1, 1971. This act does not affect the administration of the estates of persons who die before January 1, 1971, and the estates of such persons shall be administered as if this act had not been passed and approved.

Forms

1 A&H Probate FORM 2115.02a et seq: Inventory.

Research Aids

Who shall make inventory:

O-Jur2d: Executors and Administrators § 102

Am-Jur2d: Executors and Administrators § 209

§ 2115.06 Appraisers; compensation; fees may be charged against the estate.

The real estate and personal property comprised in the inventory required by section 2115.02 of the Revised Code, unless an appraisalment thereof has been dispensed with by an order of the probate court, shall be appraised by one suitable disinterested person appointed by the executor or administrator, subject to the approval of the court and sworn to a faithful discharge of his trust. The executor or administrator, subject to the approval of the court, may appoint separate

appraisers of property located in any other county and appoint separate appraisers for each asset.

If appraisers fail to attend to the performance of their duty, the executor or administrator, subject to the approval of the probate judge may appoint others to supply the place of such delinquents.

Each appraiser shall be paid such amount for his services as determined by the executor or administrator, subject to the approval of the probate judge, taking into consideration his training, qualifications, experience, time reasonably required, and the value of the property appraised. The amount of such fees may be charged against the estate as part of the cost of the proceeding.

HISTORY: GC §§ 10509-42, 10509-43, 10509-58; 114 v 320 (415); 125 v 52 (**EFF** 10-2-53); 133 v S 185 (**EFF** 1-1-71); 136 v S 145 (**EFF** 1-1-76); 136 v S 466. **EFF** 5-26-76.

Analogous to former GC §§ 10644, 10645, 10666, 10668.

See provisions, § 3 of SB 145 (136 v __) following RC § 2101.01.

For text of RC § 2115.06 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

For text of RC § 2115.06 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B, herein.

Comment

The question whether or not an inventory shall be filed, ought to be determined at the time the letters are issued, if that is possible, for it is a usual practice to designate the names of the appraisers in the entry making the appointment; and also designate them in the letters of appointment.

The court, in appointing the appraisers, usually gives consideration to the suggestions of the administrator or executor. But care should be taken to ascertain that the persons appointed are satisfactory to the heirs and widow, as well as to the executor or administrator, for they are all interested parties.

Where personal property only is to be appraised, and such personality is located in another county, there seems to be no reason for appointing appraisers other than those who are to appraise the personality in the county where administration is commenced. But where real estate in another county is to be appraised, it probably would be well to name appraisers who live in the vicinity of the property, and who should be more familiar with its value. The expense incurred for additional appraisers should always be considered.

Experience has demonstrated in many instances this amount to be an inadequate compensation. If the appraisalment is only a few moments' work you may get competent men to attend to it. But if it is a day's work, difficulty will be experienced in getting any person to perform the duties, unless he does it as a matter of accommodation; and this should not be, for the statute expressly provides that the appraiser should be a disinterested person; that is, one who is entirely free from any influence from either the heir, widow, legatee or administrator. The difficulty in leaving the matter entirely to the discretion of the court is that very often appraisers will ask a larger sum than the estate ought to be taxed with. If the administrator cannot procure competent men for the amount allowed by statute he ought to procure the consent of the heirs to pay them an additional sum

or else give them such a sum as he thinks just, and assume the responsibility that it may ultimately be allowed to him in his account.

Cross-References to Related Sections

See RC § 2113.03 which refers to this section.

Forms

1 A&H Probate FORM 2115.06a et seq.

1 A&H Probate FORM 2115.07a et seq: Oath, duties of appraisers.

Research Aids

Appraisal:

O-Jur2d: Executors and Administrators §§ 107, 108

Am-Jur2d: Executors and Administrators § 215

Law Reviews

Procedure of probate court. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 7) 109.

CASE NOTES AND OAG

1. Executor or administrator should be given notice of proceedings to appoint new appraisers, and of the act of such appraisers in making allowance to the widow for a year's support: *Heck v. Heck*, 34 OS 369.

2. This section does not of itself give the court authority to dispense with an appraisement, but presupposes circumstances under which the court is so authorized by law: *In re Mayo*, 31 NP(NS) 394.

3. A deputy of the probate court has no right to obtain appraiser's fees as compensation for his services as appraiser, as such services are incompatible with his duties as deputy to the court: 1938 OAG No.2873.

§ 2115.07 Oaths and duties of appraisers. (GC §§ 10509-46, 10509-47)

Before proceeding to the execution of their duty, the appraisers of a decedent's estate must take and subscribe to an oath, to be inserted in or annexed to the inventory required by section 2115.02 of the Revised Code, before an officer authorized to administer oaths, that they will truly, honestly, and impartially appraise the estate and property exhibited to them, and perform the other duties required in the premises according to the best of their knowledge and ability. In the absence of such officer, the administrator or executor may administer the oath.

In the presence of the surviving spouse, next of kin, legatees, or creditors of the testator or intestate, or such of them as attend, the appraisers shall proceed to estimate and appraise the property and estate. Each item must be set down separately, with its value in dollars and cents in distinct figures opposite such item.

HISTORY: GC §§ 10509-46, 10509-47; 114 v 320 (412). Eff 10-1-53. Analogous to former GC §§ 10649, 10650.

Forms

1 A&H Probate FORM 2115.07a et seq.

Research Aids

Form of inventory:

O-Jur2d: Executors and Administrators §§ 103, 107
Oath taken by appraisers:

O-Jur2d: Executors and Administrators § 107

CASE NOTES AND OAG

1. The requirement of GC § 10509-47 (RC § 2115-07), providing that in the inventory of estate property "each article or item must be set down separately" with its value, is mandatory and neither the appraisers nor the probate court has discretion to group articles in one general classification: *In re McConney*, 72 App 286, 27 OO 121, 51 NE(2d) 239.

§ 2115.08 Repealed, 133 v S 185, § 2 [GC § 10509-48; 114 v 320 (413)]. Eff 1-1-71.

§ 2115.09 Inventory contents. (GC §§ 10509-51, 10509-52, 10509-53)

The inventory required by section 2115.02 of the Revised Code shall contain a particular statement of all securities for the payment of money which belong to the deceased and are known to such executor or administrator. Such inventory shall specify the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon with their dates, the serial numbers or other identifying data as to each security, and the sum which, in the judgment of the appraisers, can be collected on each claim.

Such inventory must contain a statement of all debts and accounts belonging to the deceased which are known to such executor or administrator and specify the name of the debtor, the date, the balance or thing due, and the value or sum which can be collected thereon, in the judgment of the appraisers.

Such inventory must contain an account of all moneys which belong to the deceased and have come to the hands of the executor or administrator. If none has come to his hands, the fact must be stated in the inventory.

HISTORY: GC §§ 10509-51, 10509-52, 10509-53; 114 v 320 (413). Eff 10-1-53. Analogous to former GC §§ 10651, 10652, 10653.

Forms

1 A&H Probate FORM 2115.02a et seq: Inventory.

Research Aids

Contents of inventory:

O-Jur2d: Executors and Administrators § 104

Am-Jur2d: Executors and Administrators § 210

CASE NOTES AND OAG

1. Notes delivered to an executor to indemnify the estate against the liability of the testator as surety are not assets of the estate; nor is money collected on them: *Arbuckle v. Tracy*, 15 O 432.

2. There is no statutory provision in Ohio which requires or authorizes the filing with the probate court of an application by an administrator to determine the nature of a claim allegedly due an estate and, upon finding the amount due, with interest, on such claim, to determine whether such amount should be included as an asset of such estate upon the filing of an amended inventory and appraisal; nor is there any statutory authority vested in the

court to make any order based upon such an application, unless such application can be construed as a petition for a declaratory judgment: *In re Uhl*, 98 App 145, 57 OO 212, 128 NE(2d) 142.

3. The right of a widow to a year's allowance in the estate of her deceased husband vests immediately upon death, becomes a preferred and secured debt of his estate, and, when it has not been paid to the widow during her lifetime, such allowance survives as an asset of her estate and is includible in the inventory of her estate as a debt due from the estate of her deceased husband: *In re Wreede*, 106 App 324, 7 OO(2d) 75, 154 NE(2d) 756.

4. Under the mandatory provisions of GC § 10509-41 [RC § 2115.02] and this section, the executor must include in the inventory a statement of all debts and accounts belonging to the deceased and known to the executor, irrespective of any opinion that the testator may have had as to the value or collectibility of a debt or account: *In re Doppes*, 21 OO 181.

§ 2115.10 Emblements are assets. (GC §§ 10509-49, 10509-50)

The emblements raised by labor, whether severed or not from the land of the deceased at the time of his death, are assets in the hands of the executor or administrator and shall be included in the inventory required by section 2115.02 of the Revised Code.

The executor or administrator, or the person to whom he sells such emblements, at all reasonable times may enter upon the lands to cultivate, sever, and gather them.

HISTORY: GC §§ 10509-49, 10509-50; 114 v 320 (413). **EF** 10-1-53. Analogous to former GC §§ 10642, 10643.

Forms

1 A&H Probate FORM 2115.02a et seq: Inventory.

Research Aids

Emblements to be included in inventory:

O-Jur2d: Crops § 5; Estates § 83; Executors and Administrators §§ 104, 158.

Am-Jur2d: Crops § 3 et seq.

ALR

Rights in respect of crops as between estate of life tenant and remainderman. 125 ALR 280.

Rights as between the life tenant and remainderman in respect of property, estates, or securities of a wasting, consumable, or perishable nature. 170 ALR 133.

Law Reviews

Real estate taxes in Ohio are charges ad rem only. Article by Ansel B. Curtiss of the Cleveland bar. 10 CinLRev 1.

CASE NOTES AND OAG

1. The administrator of the estate of a tenant for life is entitled to the "annual crops raised by labor" as assets of the estate of deceased, whether severed or not at his death: *Noble v. Tyler*, 61 OS 432, 56 NE 191, 48 LRA 735.

2. Growing grapes are emblements: *Mason v. Lemon*, 3 NP 116, 4 OD 322 [affirmed, without opinion, 56 OS 793, 49 NE 1113].

3. Of course the executor's or administrator's right to the crops extends only to such as were planted be-

fore the death of the deceased. The selling of the real estate by an administrator thereafter to pay debts would make no difference as to crops that might have been planted subsequently thereon, for under our law the purchaser at a judicial sale acquires no right to the landlord's share of a tenant's growing crop: *Albin v. Riegel*, 40 OS 339; *Seybolt v. Burtner*, 1 DecRep 225, 4 WLJ 551. In such cases the heirs would receive such crops: *Milliken v. Wellive*, 37 OS 468.

4. The rights of widow, whose estate was created by testator's will, are limited to those conferred by will, without limitation by statute relating to emblements (GC §§ 10509-49, 10509-50 [RC § 2115.10]): *Snyder v. Heffner*, 33 App 379, 169 NE 460.

§ 2115.11 Discharge of a debt in a will. (GC § 10509-66)

The discharge, or bequest, in a will, of a debt or demand of a testator against an executor named therein, or against any other person, is not valid as against the decedent's creditors, but is only a specific bequest of such debt or demand. The amount thereof must be included in the inventory of the credits and effects of the deceased and, if necessary, such amount must be applied in the payment of his debts. If not necessary for that purpose, such amount shall be paid in the same manner and proportion as other specific legacies.

HISTORY: GC § 10509-66; 114 v 320 (416). **EF** 10-1-53. Analogous to former GC § 10690.

Research Aids

Discharge of debts in a will:

O-Jur2d: Executors and Administrators §§ 104, 137

Am-Jur2d: Executors and Administrators § 204

CASE NOTES AND OAG

1. Where a devisee died before the testator, it is likewise held that a debt due from the devisee to the estate must be deducted: *Baker v. Carpenter*, 69 OS 15, 68 NE 577.

2. A debt due an estate by a son is superior to a mortgage given by him, and will be deducted from his legacy, unless his interest in the lands comes by way of specific devise: *Woodruff v. Woodruff*, 3 CC (NS) 616, 13 CD 408.

§ 2115.12 Naming of person executor does not discharge debt. (GC § 10509-67)

The naming of a person as executor in a will shall not operate as a discharge or bequest of a just claim which the testator had against such executor. Such claim shall be included among the assets of the deceased in the inventory required by section 2115.02 of the Revised Code. The executor shall be liable for it as for so much money in his hands at the time such debt or demand becomes due, and must apply and distribute it as part of the personal estate of the deceased.

HISTORY: GC § 10509-67; 114 v 320 (416); 116 v PtII 255, § 1; 119 v 394 (405), § 1. **EF** 10-1-53. Analogous to former GC § 10691.

Comment

Under GC § 10509-67, as it existed prior to 1936, it was the established law that a surety became responsible for debts owing to the estate by an executor or administrator at the time of his appointment. In 1936, this section was amended to provide that the surety of an executor should not be held responsible for any such debt, except to the extent that the debt is made uncollectible by act of the executor after his appointment. The 1941 revision had a two-fold effect. (a) It extended the 1936 amendment to the sureties of all fiduciaries. (b) It removed the provision from the chapter on Executors and Administrators, and incorporated it in the chapter on Fiduciaries, where it was designated as GC § 10506-7a, now RC § 2109.17.

Research Aids

Debts of executor or administrator to estate:

O-Jur2d: Executors and Administrators §§ 104, 137 et seq.

Am-Jur2d: Executors and Administrators § 204 et seq.

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1. Where debtor is appointed administrator or executor to creditor, debt becomes asset in his hands, and his sureties are liable for his failure to administer and distribute it: *United States Fidelity &c. Co. v. Jones*, 22 App 345, 153 NE 281.

2. Judgment approving executor's final account estopped heirs from asserting executor's indebtedness by reason of having received advancements: *Bank v. Seip*, 43 App 440, 183 NE 448.

3. This section, requiring that claims which testator has against his executor shall be included among the credits of the estate, is not applicable to a joint and several note of four co-makers, whereupon the executor appears only as a surety: *Alderfer v. Hammond*, 18 OLA 540.

4. When the obligor on a bond becomes administrator of the obligee, the bond is suspended, and the debt becomes assets in the hands of the debtor as administrator: *Bigelow v. Bigelow*, 4 O 138.

5. A mortgagee, by making his debtor his executor, does not extinguish the mortgage; and because the executor is bound to make an effort to collect the debts, and because he cannot bring suit against himself, he is treated as having the money already in his hands; but a remedy exists upon the mortgage, independent of the right to sue at law; and the legal fiction that he has the money due from him already in his hands, will not permit the defeat of the security, which the prudence of the testator provided in addition to the sureties on his bond: *Miller v. Donaldson*, 17 O 264.

6. Appointment of a debtor of the estate as executor or administrator does not extinguish the debt

which he owed to the estate of the decedent; but it becomes assets in his hands for which judgment may be had against him by proceedings instituted by an administrator de bonis non: *Tracy v. Card*, 2 OS 431; *Hall v. Pratt*, 5 O 72; *Bigelow v. Bigelow*, 4 O 138.

7. Where a debtor is appointed administrator of the estate of his creditor, the debt becomes assets in his hands; and on exceptions to his final account, claiming that he has failed to charge himself with such debt, the probate court may hear evidence and determine the validity of such claim and the amount of such debt: *In re Raab*, 16 OS 273.

8. The principle that the appointment of a debtor as administrator converts the debt into assets in his hands to be accounted for, does not apply to one who is only conditionally liable to the estate. The appointment as administrator de bonis non, with the will annexed, of one who was surety on the bond of the previous executor, does not make a debt due the estate from such executor assets in the hands of such administrator by reason of his suretyship: *Shields v. O'Dell*, 27 OS 398.

9. The indebtedness of an executor to his testator is assets with which he is chargeable, as so much money in his hands; and the sureties on his bond are liable for his failure to administer and distribute same according to law and the will, even though he was insolvent during the continuance of his administratorship: *McGaughey v. Jacoby*, 54 OS 487, 44 NE 231; *McCoy v. Allen*, 9 CC 607, 6 CD 659 [reversed, *Allen v. McCoy*, 57 OS 641, on authority of *McGaughey v. Jacoby*, 54 OS 487].

10. A surety will not be discharged from liability on his bond by fraud of executor in procuring execution of such bond where the beneficiaries of the estate are innocent of the fraud: *McGaughey v. Jacoby*, 54 OS 487, 44 NE 231.

11. Administrator is chargeable with all debts which he owes individually and unconditionally to the estate. This includes a debt which he owes as principal, and which is evidenced by his note, signed also by another person who is in fact only surety. But it does not include debts owing to the estate by a firm of which he is a member: *James v. West*, 67 OS 28, 65 NE 156.

12. Where the executor of a will was indebted to his testator, and died while in office, without having inventoried the amount of said indebtedness and before an account was due or filed, the indebtedness was money in the hands of the executor for which his administrator must account: *Jones v. Willis*, 72 OS 189, 74 NE 166; see also *Holcomb v. Willis*, 72 OS 684, 76 NE 1126.

13. The fact that the executor is jointly obligated on a mortgage with the estate is not sufficient to constitute a ground for the removal of the executor: *In re Fiebig*, 61 App 40, 14 OO 216, 22 NE(2d) 288.

14. By its terms the provisions of this section are applicable only to the liability of a person named as executor, for claims owing by him to his testator, and are therefore inapplicable to the liability of an administrator for claims owing by him to his decedent: *In re Deal*, 70 App 503, 25 OO 305, 46 NE(2d) 643.

14.1. Under the plenary power conferred upon the probate court incident to the administration of estates it has authority, upon exceptions to an inventory, to revise the appraised value of any security listed in such inventory, but such authority should be exercised after hearing and determined upon the evidence adduced in the light of the provisions of RC §§ 2115.01, 2115.07, 2115.09 and 2115.12: *In re Berman*, 118 App 354, 25 OO(2d) 226, 194 NE(2d) 794.

15. A debt existing in the lifetime of the testator

against one who becomes executor of his last will, is transmuted into money in the hands of such executor by virtue of this section, and no act of the executor can turn it again into the character of a mere demand or obligation: *In re Koons*, 11 OO 389 (PC).

16. Where the surety upon an unpaid promissory note dies and the principal maker thereof is appointed and qualified as administrator of such surety's estate, the debt represented by such note is not chargeable as assets in the hands of the administrator, before the estate has been required to pay the same or it has been presented and allowed as a valid claim against the estate: *Urpman v. Urpman*, 1 App 476, 21 CC(NS) 600, 25 CD 442.

17. An insolvent principal maker of a note, who is named as executor in the will of his surety, and accepts and qualifies as such, and who pays his own notes as they subsequently fall due as claims against the estate, is properly chargeable as for so much money in his hands: *Yahey v. Strunk*, 7 NP(NS) 177, 18 OD 726.

§ 2115.13 Repealed, 136 v S 145, § 2 [GC §§ 10509-54, -55; 114 v 320; 119 v 394; 125 v 903] Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v — following RC § 2101.01).

For text of RC § 2115.13 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Property exempt from inventory:

- Cal.—Probate Code, § 660
- Ky.—KRS, § 391.030
- Mich.—MCLA, § 702.68
- N.Y.—SCPA, § 1310
- Fla.—FSA, § 732.402

ALR

Waiver of right to widow's allowance by post-nuptial agreement. 9 ALR3d 955.

Law Reviews

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

Wills; decedent's estates; year's allowance (Case note). 5 OO 29.

CASE NOTES AND OAG

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Scope

1. The sum allowed to the widow under this section is a charge on the real estate prior only to the claims of unsecured creditors: *Dillman v. Warner*, 54 App 170, 7 OO 492, 20 OLA 459, 6 NE(2d) 757.

1.1 An antenuptial agreement found to be fair, reasonable and by the decedent fully performed for some sixteen years is sufficient to preclude the widow from receiving the exemptions provided by GC § 10509-54 (RC § 2115.13), and is a complete bar to setting them off to her: *Cohen v. Cohen*, 82 App 260, 37 OO 565, 80 NE(2d) 813.

1.2 An allowance for property exempt from administration, under GC § 10509-54 (RC § 2115.13), must be set off to a nonresident surviving spouse in the local estate of a nonresident decedent: *In re Mitchell*, 97 App 443, 56 OO 357, 127 NE(2d) 39; *In re Weatherhead*, 73 OLA 524 (PC); *In re Gould*, 1 OO (2d) 366, 140 NE(2d) 793.

2. The lien of the federal government for unpaid income taxes does not take precedence over the widow's exemption as provided by GC § 10509-54 nor her allowance for a year's support: *In re Shipley*, 22 OO 372 (PC).

3. General Code §§ 10509-54 and 10509-55 (RC § 2115.13) do not provide for an apportionment of the exempted property between the widow and the minor children: *Cowden v. Cowden*, 28 OO 103 (PC).

4. A minor child adopted in infancy is not entitled to share in the exempted estate set aside by the appraisers of the natural father's estate for the support of the decedent's minor children: *Warden v. Warden*, 35 OO 374 (PC).

5. The minor child or children of a decedent are not entitled to have an exemption set off under GC § 10509-54 (RC § 2115.13) in the event there is a surviving spouse: *In re Schneider*, 48 OO 380, 108 NE(2d) 363 (PC).

6. Petitioner, as executrix of her husband's estate, deducted from the gross estate an amount received by her as his widow pursuant to GC § 10509-54 (RC § 2115.13). Held that such amount is includible in the gross estate and is not deductible under § 303(a) (1)(c) of the Revenue Act of 1926 as amended: *In re Faber*, 40 US BTA 1067.

7. This section should in no way be construed as an amendment of the law as provided in former GC § 10654 (see now RC § 2115.13): *Jolley v. Brown*, 15 OLA 636.

8. Property passing by this section does not come to the surviving spouse by intestate succession, i.e., under the statute of descent and distribution, nor do the heirs, devisees or legatees share in any particular in the exempted property: *Tyack v. Tipton*, 65 OLA 397, 115 NE(2d) 29 (App).

8.1 The exemption given a widow under this section is in the nature of a debt and a preferred claim against a deceased husband's estate: *In re Matusoff*, 10 OApp(2d) 113, 39 OO(2d) 187, 226 NE(2d) 140; *In re Fetzer*, 71 OLA 275, 130 NE(2d) 732 (App).

9. Under this section, exempting certain property from administration, a surviving spouse has the privilege of selecting assets to satisfy the claim but is not required to make a selection: *Miller v. United Brethren Church*, 31 NP(NS) 43.

10. It is the duty of the appraisers at the time of taking inventory and appraising assets, to set off to surviving spouse the property or money claimed as a set-off under GC § 10509-54 (RC § 2115.13), and to give the widow her year's allowance as provided in GC § 10509-74 (RC § 2117.20); and this must be done whether decedent died intestate or testate, and, if testate, irrespective of any provisions made for widow in the will: *In re Felman*, 32 NP(NS) 73.

12. The amount of property which a widow may claim as exempt from administration may be computed only with regard to property which actually comprises assets of her husband's estate, and in the computation thereof she may not include joint and survivorship property which passed to her by contract: *In re Williams*, 73 OLA 441, 138 NE(2d) 189 (PC).

13. The property exempt from administration provided by this section and the year's support provided by RC § 2117.20 are not intestate successions but are debts and preferred claims arising as incidents to the marriage and therefore not affected by the simultaneous death statute: *In re Priest*, 79 OLA 444 (PC).

Rights of surviving spouse or children

16. The widow's year's allowance and the allowance given her under GC § 10509-54 (RC § 2115.13) are a debt and preferred claim, respectively, against her deceased husband's estate, deductible before a determination of the share of the estate to be taken by the widow "under the statute of descent and distribution": *Davidson v. Miners &c. Trust Co.*, 129 OS 418, 2 OO 404, 195 NE 845; *Darrow v. Fifth Third Union Trust Co.*, 1 OO(2d) 104, 139 NE(2d) 112 (CP).

17. By virtue of GC § 10509-54 (RC § 2115.13) the administrator of a surviving spouse is entitled to a lien upon the real property of her predeceased spouse for the balance in money over the appraised value of the personal property of such predeceased spouse selected by such surviving spouse in her lifetime, so as to make up the maximum allowance under the statute even though no further selection has been made by such surviving spouse: *Stetson v. Hoyt*, 139 OS 345, 22 OO 390, 40 NE(2d) 128.

18. The rights granted to a surviving spouse by the provisions of GC §§ 10509-54, 10509-55 (RC § 2115.13) and GC § 10509-74 (RC § 2117.20), are expectant interests only, dependent upon the contingency that the property, to which such rights attach, becomes a part of the decedent's estate, which contingency does not occur if decedent has sold or given away the property during his lifetime: *Neville v. Sawicki*, 146 OS 539, 33 OO 19, 67 NE(2d) 323 [affirming 44 OLA 408].

19. The allowance given a surviving spouse under GC § 10509-54 (RC § 2115.13) is in the nature of a debt and a preferred claim against the deceased spouse's estate, and, if a selection of property is not made or money in lieu thereof is not received by the surviving spouse during his lifetime, his personal representative may claim the allowance after the surviving spouse's decease: *Raleigh v. Raleigh*, 153 OS 160, 41 OO 209, 91 NE(2d) 241; see also *Stetson v. Hoyt*, 68 App 366, 23 OO 39, 41 NE(2d) 267 [affirmed, 139 NE(2d) 345].

20. The exemption allowed to a surviving spouse by GC § 10509-54 (RC § 2115.13) must be allowed, if the selection is made, though such spouse later elects to take under a will conditioned that the surviving spouse be barred of all claims: *Scharkofsky v. Landfear*, 50 App 213, 3 OO 48, 197 NE 810 [reversing *Landfear v. Scharkofsky*, 32 NP(NS) 217].

21. General Code § 10509-54 (RC § 2115.13), which

makes provision for a certain amount or percentage of a decedent's estate to be set aside in favor of the surviving spouse, gives such surviving spouse a claim superior to all unsecured claims, including funeral expenses, costs in the probate court, and fees of the executor and his attorneys, notwithstanding GC § 10509-121 (RC § 2117.25) prescribing the order in which debts shall be paid: *In re Bremer*, 67 App 144, 21 OO 150, 36 NE(2d) 48.

22. A minor child not living with the surviving spouse of a decedent is not entitled, under GC § 10509-54 (RC § 2115.13) et seq to an apportionment of the money received by such surviving spouse through her selection of property to be exempt from administration under such sections: *In re Clark*, 70 App 204, 24 OO 555, 43 NE(2d) 621 [affirming 24 OO 544 (PC)].

23. The common pleas court has no original jurisdiction to compel an executor to pay to a surviving spouse a sum awarded as exempt from administration under GC § 10509-54 (RC § 2115.13): *Saluppo v. Santangelo*, 71 App 185, 26 OO 10, 48 NE(2d) 903.

24. A widow is not entitled to have set aside as a fraud upon her rights a conveyance of real estate made by her husband to his children without consideration even though he left no property from which she could receive the exemptions provided for in GC § 10509-54 (RC § 2115.13), or the year's support mentioned in GC § 10509-74 (RC § 2117.20): *Dick v. Bauman*, 73 App 107, 28 OO 176, 55 NE(2d) 137.

25. A finding that testator's surviving spouse is entitled to receive, towards her allowance provided for by GC § 10509-54 (RC § 2115.13), twenty per cent of the additional amount of the cash on hand, is not erroneous: *In re Thoroman*, 76 App 309, 32 OO 16, 62 NE(2d) 530.

25.1. Even though provision is made for a widow by the testator, her husband, such fact will not of itself, in the absence of a statute requiring it, put her to election, but she may claim both the provision made for her by the will and the statutory allowance: *In re Fetzer*, 71 OLA 275, 130 NE(2d) 732 (App).

25.2. Where a widow is deemed by law to have elected to take under her husband's will and has without full knowledge of her rights in the estate and with no clear intention of waiving any right thereunder, elected to take as property exempt from administration certain items of personal property which were specifically bequeathed to her, such election will, upon motion, be set aside: *In re Fetzer*, 71 OLA 275, 130 NE(2d) 732 (App).

26. An unpaid portion of the widow's exemption provided by the provisions of GC § 10509-54 (RC § 2115.13) is a debt and a preferred claim against the estate, within the contemplation of GC § 10510-2 (RC § 2127.02), authorizing an executor or administrator to sell real estate for payment thereof: *McDonald v. McDonald*, 5 OO 132 (PC).

28. Where will of husband, after making certain provisions for his wife, recites that "the foregoing devises and bequests to my said wife . . . shall be in lieu of her dower and all other interest, which she may have in my estate," if wife elects to take under husband's will, such election shall bar her of her year's allowance and money exemption; and where, in such will, household goods are specifically bequeathed to wife, such election shall bar wife of her right under GC § 10509-54 (RC § 2115.13), to select such household goods as property exempt from administration: *Atwood v. Miller*, 24 OO 398 (PC).

30. A mortgage being a secured claim should be paid in preference to the support for the widow for twelve months and also in preference to the exemp-

tion provided by GC § 10509-54 (RC § 2115.13): *In re Freeman*, 31 OO 232, 18 OSupp 6 (PC).

31. The executor of the estate of a surviving spouse is entitled to an order of the probate court requiring an executor of the estate of the other deceased spouse to pay the statutory exemption provided by GC § 10509-54 (RC § 2115.13): *In re Faelchle*, 41 OO 100 (PC).

32. General Code § 10509-54 (RC § 2115.13), in prescribing who should select the chattel property, grants a personal privilege which does not pass to the executor of the surviving spouse: *In re Faelchle*, 41 OO 100 (PC).

34. A surviving spouse may retain money set off to her as exempt from administration whether or not such spouse lives with and provides for the minor child or children of the decedent: *In re Schneider*, 48 OO 380, 108 NE(2d) 363 (PC).

36. All articles set off to the surviving spouse as exempt from administration under GC § 10509-54 (RC § 2115.13) except wearing apparel, ornaments, one bed, bedstead and bedding for it, and not consumed by such spouse, must be forfeited to the minor child or children in the event the surviving spouse ceases to live with and provide for such minor child or children: *In re Schneider*, 48 OO 380, 108 NE(2d) 363 (PC).

39. Under GC § 10509-54 (RC § 2115.13), this preferred claim is made a charge not only on the personal property, but on the real estate as well and is a lien thereon to that extent: *Burroughs v. Raymond*, 50 OO 169, 112 NE(2d) 82 (PC).

40. Judgment lienholders of the surviving spouse whose liens have been noted upon the registered land title certificate, can not have their liens attached to that portion of the exemption payable in money: *Burroughs v. Raymond*, 50 OO 169, 112 NE(2d) 82 (PC).

41. The allowance to minor children for a year's support as provided in GC § 10509-54 (RC § 2115.13) is prior to any claims of the United States against the estate of the decedent: *In re Carl*, 43 OO 52, 94 NE (2d) 239 (PC).

Divorce

48. The fact that a husband and wife separate, and live apart for a number of years, does not destroy the wife's right of exemption as a widow; but until they are divorced, the wife at his death is entitled to a year's support and the articles of personal property mentioned in the statute: *In re McMillan*, 8 CC (NS) 294, 18 CD 645.

Rights of third persons

53. An unpaid seller of furniture was held guilty of laches in failing to raise the issue of ownership at the time of filing the inventory of the buyer's estate in the probate court, thereby being estopped from raising the question as against the widow of the buyer by whom such furniture was chosen as part of her statutory allowance: *Stoner v. Anderson*, 50 App 344, 1 OO 177, 198 NE 186.

55. Under GC § 10509-54 (RC § 2115.13), (the "twenty per cent" section) there was set off to a widow the sum of six hundred forty-one dollars as her separate property, exempt from administration. This amount was claimed by the widow's judgment creditor. The widow then asked allowance to her of five hundred dollars from this sum, in lieu of homestead exemption, under GC § 11738 (RC § 2329.81). The sum set off to the widow was not money due her from a person, partnership or corporation, within the provision of GC § 11738 (RC § 2329.81) that money

so due cannot be held exempt: *Home Finance Co. v. Wright*, 22 OO 302 (CP).

57. The money which a widow is entitled to under the provisions of GC § 10509-54 (RC § 2115.13) is a lien on the property prior to all claims excepting those which are secured claims of the estate or the deceased: *Howett v. Howett*, 25 OLA 150.

58. The statutory set-off of a surviving spouse under GC § 10509-54 (RC § 2115.13), is a preference only over the claims of unsecured creditors: *Geese v. Murphy*, 8 OO 32 (PC).

Bankruptcy

63. Widow of a bankrupt is entitled to certain articles, or their equivalent in money, and allowance for a year's support for herself and children: *In re Parschen*, 13 OFD 443.

Court costs and expenses of administration

70. The sum provided by GC § 10509-54 (RC § 2115.13), to be paid to a surviving spouse in lieu of the specific articles enumerated therein to be set off to such spouse as property exempt from administration, should be paid free from the costs or expenses of administration: *Schmehl v. Schmehl*, 8 OO 104 (App) [reversing 5 OO 244].

Disposition of exempted personal chattels

77. The exception in GC § 10509-55 (RC § 2115.13) has been placed there as a penalty against the widow in case she ceases to provide for the minor children of the decedent; otherwise, she has the right to retain the exempted property: *Cowden v. Cowden*, 28 OO 103 (PC).

78. A minor child of the decedent, who was not a member of the decedent's household and refused to live with the widow and was not dependent upon her for support, is not entitled to claim that the exempted property be set off to him under GC § 10509-55 (RC § 2115.13): *Cowden v. Cowden*, 28 OO 103 (PC).

79. General Code § 10509-55 (RC § 2115.13) provides for a forfeiture and must therefore be strictly construed: *In re Schneider*, 48 OO 380, 108 NE(2d) 363 (PC).

80. General Code § 10509-55 (RC § 2115.13) will not be applied to terminate a surviving spouse's right of enjoyment of chattels that have been set off to such spouse as exempt from administration in the absence of a finding that such spouse has abandoned or deserted the minor child or children of the decedent: *In re Schneider*, 48 OO 380, 108 NE(2d) 363 (PC).

§ 2115.14 Repealed, 136 v S 145, § 2 [GC § 10509-76; 114 v 320]. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v __) following RC § 2101.01.

For text of RC § 2115.14 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 REPEAL]

1. Doubtful whether the allowance to the widow is part of the inventory, since it must be in a separate schedule and returned with the inventory: *In re Rierdon*, 5 NP 516, 5 OD 606.

§ 2115.15 Signing, certifying, and return of inventory. (GC §§ 10509-56, 10509-57)

Upon the completion of the inventory required by section 2115.02 of the Revised Code, such inventory shall be signed by the appraisers at the end thereof and said appraisers shall certify that the inventory is a true and correct appraisal of the property exhibited to them. It is not necessary for the appraisers to sign each schedule thereof. A copy of the inventory shall be retained by the executor or administrator who shall return the original to the probate court.

Before such inventory is received by the court, the executor or administrator shall take and subscribe to an oath or affirmation before an officer authorized to administer oaths stating that the inventory is in all respects just and true and that it contains a true statement of all the estate and property of the deceased which has come to his knowledge, particularly of all money belonging to the deceased, and of all just claims of the deceased against such executor or administrator, or other persons, according to the best of his knowledge. Such oath must be indorsed upon or annexed to the inventory.

HISTORY: GC §§ 10509-56, 10509-57; 114 v 320 (414). EF 10-1-53. Analogous to former GC §§ 10660, 10667.

Forms

1 A&H Probate FORM 2115.02a et seq: Inventory.

Research Aids

Form of inventory:

O-Jur2d: Executors and Administrators § 103 et seq.

§ 2115.16 Hearing on inventory.

Upon the filing of the inventory required by section 2115.02 of the Revised Code, the probate court shall forthwith set a day, not later than one month after the day such inventory was filed, for hearing on the inventory and shall give at least ten days' notice by registered mail or otherwise of the hearing to the executor or administrator and to such of the following as are known to be residents of the state and whose place of residence is known.[:]

- (A) Surviving spouse;
- (B) Next of kin;
- (C) Beneficiaries under the will;
- (D) The attorneys, if known, representing any of the aforementioned persons.

Such notice may be waived in writing by any of the foregoing. For good cause the hearing may be continued for such time as the court deems reasonable. Exceptions to the inventory or to the year's allowance may be filed at any time prior to five days before the date set for the hearing or the date to which such hearing has been continued by any person interested in the estate or in any of the property included in the inventory,

but such time limit for the filing of exceptions shall not apply in case of fraud or concealment of assets. When exceptions are filed notice thereof and time of hearing thereon shall forthwith be given to the executor or administrator and his attorney by registered mail or by personal service, unless such notice is waived. At the hearing the executor or administrator and any witness may be examined under oath. The court must enter its finding on the journal and tax the costs as may be equitable.

HISTORY: GC § 10509-59; 114 v 320 (415); 116 v 385 (395), § 1; 125 v 903 (978); 126 v 392 (397), § 1. EF 3-17-55.

Analogous to former GC § 10639.

This section was amended to the above form to correct a substantive error in the section resulting from the revision of the General Code.

Cross-References to Related Sections

See RC §§ 2105.06.1, 2109.58 which refer to this section.

Comparative Legislation

Hearing on inventory:

Pa.—Purdon's Stat, Tit. 20, § 3511

Forms

1 A&H Probate FORM 2115.16a et seq.

Outline of Procedure

Inventory, making, filing, and exceptions thereto. Leyshon No. 79; A&H No. 53

Research Aids

Hearing and exceptions:

O-Jur2d: Executors and Administrators § 112 et seq.

Am-Jur2d: Executors and Administrators § 214

CASE NOTES AND OAG

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1. The hearing of exceptions to an inventory under RC § 2115.16, is a summary proceeding conducted by the probate court to determine whether those charged with the responsibility therefor have included in a decedent's estate more or less than such decedent owned at the time of his death: In re Gottwald, 164 OS 405, 58 OO 235, 131 NE(2d) 586.

1.1 Incidental to such hearing the probate court can

determine title to personal property included in such inventory, but it is a matter of discretion whether such summary proceeding shall be employed or the executor ordered to pursue other remedies: In re Gottwald, 164 OS 405, 58 OO 235, 131 NE(2d) 586; In re Brady, 21 OO 374, 6 OSupp 284 (PC).

1.2 Under RC § 2115.16, the probate court is not required to conduct an accounting between an executor to the inventory and the executor of a decedent's estate: In re Gottwald, 164 OS 405, 58 OO 235, 131 NE(2d) 586.

1.3 Where an inventory lists a margin account of a decedent with a broker, which account allegedly contains shares of stock claimed to be owned by an executor to the inventory, and where such shares of stock were voluntarily placed in said account by the executor and title to such shares registered in the name of the broker, it is not an abuse of discretion for the probate court upon the hearing of exceptions to the inventory to refuse to conduct an accounting between the executor and the executor of decedent's estate and to permit executor to pursue such other remedies as may be available: In re Gottwald, 164 OS 405, 58 OO 235, 131 NE(2d) 586.

1.4 In a proceeding in the probate court, where an exception to the inventory and appraisal in an estate is filed on the ground that a claim against a certain person should be included in the inventory and appraisal, and an application by the executor of the estate is filed to amend the inventory and appraisal to include such claim against this person, the executor and the executor are parties in the proceeding. The person against whom it is contended such claim should be made has a collateral interest in this proceeding, but he is not a party in such proceeding, where he does not enter his appearance therein and oppose the proposed changes in the inventory: In re Haas, 174 OS 277, 22 OO(2d) 336, 189 NE(2d) 65.

1.5 The determination by the probate court in the summary proceeding provided for by RC § 2115.16 that assets should be included in an estate makes the question of title *res judicata* as between all parties to the proceeding, but the judgment of the probate court may be attacked in a subsequent action by other interested persons who were not parties to the proceeding in probate court: *Cole v. Ottawa Home & Sav. Assn.*, 18 OS(2d) 1, 47 OO(2d) 1, 246 NE(2d) 542.

1.6 The only parties to a hearing on exceptions to an inventory filed in the probate court pursuant to RC § 2115.16 are the executor and the executor, unless other persons voluntarily appear and are allowed by the court to be made parties to the proceeding: *Cole v. Ottawa Home & Sav. Assn.*, 18 OS(2d) 1, 47 OO(2d) 1, 246 NE(2d) 542.

2. Claimants of stock inventoried as assets of estate, are not barred by failure to file exceptions to inventory, as they are not "persons interested" in the estate; they may raise question by direct proceeding: *Brown v. Southern Ohio Sav. Bank & Co.*, 22 App 324, 153 NE 864.

2.1 Where exceptions to inventory raised questions regarding inheritance tax and testator's residence, judgment regarding testator's residence held not erroneous, although no notice was given to state tax commission or county auditor (former GC § 10639 [see now RC § 2115.16]): *Cunningham v. Bessemer Trust Co.*, 39 App 535, 178 NE 217.

3. Inclusion of the real estate in the inventory of the grantor's estate, to which no exception was filed and no actual hearing conducted by the probate court, is not *res judicata*, and does not estop the grantee from asserting title to the real estate: *Scott v. Mofford*, 64 App 457, 18 OO 197, 28 NE(2d) 947.

4. Next of kin, contesting a will by which they will receive nothing from the estate, are "persons interested," within the terms of this section, and have a right to file exceptions to the inventory: In re McConney, 72 App 286, 27 OO 121, 51 NE(2d) 239.

4.1 A hearing on exceptions to an inventory is a summary proceeding in which the probate court may summarily determine whether those charged with the responsibility therefor have included in a decedent's estate more or less than such decedent owned at the time of his death, but it does not have plenary power to determine the collectibility of the debt: In re Wreede, 106 App 324, 7 OO(2d) 75, 154 NE(2d) 756.

4.2 A person who is not included in any of the classes of persons to whom notice of the filing of an inventory, the hearing thereon, the filing of exceptions, or the hearing thereon, is required to be given under this section, and who was never served with such notice but merely appeared as a witness at the hearing on exceptions to the inventory, claiming ownership of certain items of personal property claimed by the executor to belong to the estate, cannot appeal from a judgment of the probate court ordering such property included in the inventory: In re Ager, 111 App 164, 14 OO(2d) 54, 171 NE(2d) 347.

4.3 Under the plenary power conferred upon the probate court incident to the administration of estates it has authority, upon exceptions to an inventory, to revise the appraised value of any security listed in such inventory, but such authority should be exercised after hearing and determined upon the evidence adduced in the light of the provisions of RC §§ 2115.01, 2115.07, 2115.09 and 2115.12: In re Berman, 118 App 354, 25 OO(2d) 226, 194 NE(2d) 794.

4.4 A beneficiary under a will, who is not the executor, can be properly excluded from a courtroom under a ruling ordering a separation of witnesses in a proceeding upon exceptions to an inventory brought pursuant to RC § 2109.58—such beneficiary not being a party to such proceeding: In re Soeder, 7 OApp(2d) 271, 36 OO(2d) 404, 220 NE(2d) 547.

4.5 When an inventory is filed and approved by the probate court without exceptions having been taken it is not *res judicata* to a declaratory judgment action seeking to include other assets in the estate that were not in the approved inventory: *Eger v. Eger*, 39 OApp(2d) 14, 68 OO(2d) 150, 314 NE(2d) 394 (1974).

5. A maker of notes inventoried as assets of an estate is barred from claiming such notes represent an advancement upon filing exceptions to the fiduciary's account, if the maker had actual notice of the hearing on the inventory and was a required party to be given notice of the hearing on the inventory: In re Wallick, 15 OO 192 (PC).

6. This section not only permits persons "interested in the estate" to file exceptions to an inventory, but, in addition thereto, permits persons interested "in any of the property included in the inventory" to file exceptions: In re Milliken, 24 OLA 650.

7. This section, requiring that notice of the filing of an inventory and hearing thereon shall be "by registered mail, or otherwise," [this provision has been omitted from the Revised Code] is sufficiently complied with by constructive notice by insertions in a daily legal newspaper: In re Keller, 32 OLA 624.

7.1 Replevin may not be sought as alternative remedy to this section: *Service Transport Co. v. Matyas*, 63 OLA 236, 244, 108 NE(2d) 741.

7.2 Under this section the probate court has jurisdiction to impress a trust and order an accounting: In re Barnes, 64 OLA 6, 108 NE(2d) 88.

7.3 Executor's right to appeal, discussed: In re Byerly, 74 OLA 586, 141 NE(2d) 771.

8. If exceptions to an appraisal have been made by one of the next of kin within the time limited by statute, and no other exceptions are filed within such time, another of the next of kin cannot adopt such exceptions and make them his own so as to be heard upon such question, in case the person who originally filed such exceptions is estopped by his own conduct from attacking such appraisal: *Sprinkle v. Odell*, 22 CC(NS) 233, 33 CD 540 [for a former opinion in same case, see 22 CC(NS) 480, 33 CD 685, which was affirmed, without opinion, *Sprinkle v. Sprinkle*, 78 OS 404].

9. The inconsistent attitude of an executor in filing exceptions to an appraisal, which he himself has filed as executor, does not prevent the probate court from having jurisdiction to hear and determine such exceptions: *Sprinkle v. Odell*, 22 CC(NS) 480, 33 CD 685 [affirmed, without opinion, *Sprinkle v. Sprinkle*, 78 OS 404; for a later opinion in same case, see *Sprinkle v. Odell*, 22 CC(NS) 233, 33 CD 540].

11. Creditor of heir cannot file exceptions to account: *In re Sturges*, 6 NP(NS) 331, 18 OD 345.

12. The question of whether deceased left a widow is properly raised by exception to the allowance in the inventory: *In re Scott*, 8 NP(NS) 279, 19 OD 577.

13. In a hearing upon exception to an inventory the probate court has jurisdiction to determine the ownership of a joint bank account, standing in the name of deceased and another and included in the inventory, it being alleged in the exceptions that the major portion of such account is not properly in the inventory, being the property of such other person: *In re Ray*, 79 OLA 368 (PC).

14. The fact that the hearing on an inventory and appraisal of which notice was properly given to all those entitled thereto, was not had within one month after the filing of said inventory and appraisal does not invalidate such proceedings because said time limit in this section is not mandatory but directory: *In re Ray*, 79 OLA 368 (PC).

15. An administrator of one estate, even though not a person interested in another estate, may, in his capacity as administrator of his decedent's estate, be interested in property included in the other estate so as to have the right to file exceptions to the inventory thereto: *In re Ray*, 79 OLA 368 (PC).

16. The amount set off to a widow as a year's allowance may be challenged by either exceptions to the inventory under this section or by a petition to review under the provisions of RC § 2117.22: *In re Stump*, 89 OLA 570, 185 NE(2d) 334 (PC).

§ 2115.17 Real estate appraisal conclusive.

When the inventory required by section 2115.-

02 of the Revised Code has been approved by the probate court, the appraisal of the real estate as set forth therein shall be conclusive for all purposes except estate tax, unless a reappraisal is ordered by the court.

HISTORY: GC § 10509-61; 114 v 320 (415); 132 v § 326, § 1. Eff 7-1-68.

See provisions, § 3 of SB 326 (132 v —) following RC § 2107.64.

Cross-References to Related Sections

Notice to tax commissioner giving probable value of decedent's estate—

Estate tax, under, RC § 5731.20.

Research Aids

Effect of approval:

O-Jur2d: Executors and Administrators § 116

Am-Jur2d: Executors and Administrators § 214

Reappraisal:

O-Jur2d: Executors and Administrators § 109

Law Review

See explanatory article in 4 OBar 411.

CASE NOTES AND OAG

1. The only provision on the subject of the legal effect of the inventory is that contained in this section, which makes the appraisal set forth therein conclusive except for inheritance tax purposes, unless the court orders a reappraisal: *Scott v. Mofford*, 64 App 457, 18 OO 197, 28 NE(2d) 947.

2. Under this section when the inventory has been approved by the probate court, the appraisal of the real estate as set forth therein becomes "conclusive for all purposes except inheritance tax, unless a reappraisal is ordered by the court": *In re Fouts*, 103 App 313, 3 OO(2d) 353, 145 NE(2d) 440.

3. The probate court is not precluded from ordering a reappraisal of real estate by the fact that an appraisal has been made and approved: *Walters v. Wannemacher*, 6 OApp(2d) 226, 35 OO(2d) 385, 217 NE(2d) 695.

4. When an inventory has been approved by the court, the appraisal of the real estate contained therein is conclusive for all purposes except inheritance tax and a reappraisal, of the real estate will not be ordered except as otherwise provided by law: *In re Meister*, 34 OO 277, 71 NE(2d) 316 (PC).

CHAPTER 2117: PRESENTMENT OF CLAIMS AGAINST ESTATE

Section [DEBTS DUE EXECUTOR OR ADMINISTRATOR]

- 2117.01 Debts due an executor or administrator.
 - 2117.02 Presentation of claim to probate court.
 - 2117.03 Disinterested person to represent estate.
 - 2117.04 Exceptions.
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- ### [CLAIMS OF CREDITOR]
- 2117.06 Presentation and allowance of creditors claims; property tax assessments; statements and notices required.
 - 2117.07 Presentation of claims after three months.
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- 2117.42 Creditors may proceed against all in one action.

[DEBTS DUE EXECUTOR OR ADMINISTRATOR]

§ 2117.01 Debts due an executor or administrator. (GC § 10509-105)

No part of the assets of a deceased shall be retained by an executor or administrator in satis-

faction of his own claim, until it has been proved to and allowed by the probate court. Such debt is not entitled to preference over others of the same class.

HISTORY: GC § 10509-105; 114 v 320 (425). **EF** 10-1-53. Analogous to former GC § 10727.

Cross-References to Related Sections

See RC §§ 2117.07, 2117.10, 2131.02 which refer to this chapter.

Comparative Legislation

Debts due executor or administrator:

- Cal.—Probate Code, § 700
- Ill.—Rev Stat, ch 3, § 16-1
- Ind.—Burns' Stat, § 29-1-14-1
- Ky.—KRS, § 396.010
- Mich.—MCLA, § 704.33
- N.Y.—SCPA, § 2307
- Pa.—Purdon's Stat, Tit. 20, § 3381
- Fla.—FSA, § 733.617

Research Aids

Debts due executor or administrator:

- O-Jur2d:** Executors and Administrators § 316 et seq.
- Am-Jur2d:** Executors and Administrators § 290

ALR

Asserted right to rescission or cancellation of contract with decedent as claim which must be presented to personal representative. 73 ALR2d 883.

Tort claims as within nonclaim statutes. 22 ALR3d 493.

Treatment of personal claim of executor or administrator antedating the death of decedent. 144 ALR 940.

Law Reviews

Practical considerations in probate practice. Address by Judge Chase M. Davies of Cincinnati. 22 OBar (No. 19) 277.

CASE NOTES AND OAG

1. The rule of common law was, if a person was named executor in a will any debt that he might have owed the decedent was extinguished, on the theory that the executor might be compelled to sue himself in order to collect the debt, and this he could not do. It is a question whether such was ever the rule in Ohio: Tracy v. Card, 2 OS 450.

2. A claim alleged to be due a law firm, in which an executor is a partner, is subject to the mandatory requirements of this section and GC § 10509-106 (RC § 2117.02): Trustees of Masonic Temple Assn. v. Emmons, 49 App 87, 1 OO 286, 195 NE 259.

3. This section and GC § 10509-106 (RC § 2117.02) are mandatory as to how a personal representative's claim against the estate he is administering shall be allowed, and an administrator must follow them in regard to allowing a claim by his co-administrator: Fulton v. Roderick, 55 App 327, 9 OO 69, 9 NE(2d) 876.

4. By virtue of the provisions of const. art. IV, § 8, and RC title XXI [21], a probate court has jurisdiction to pass upon a claim against an estate filed individually by one of the co-administrators of such estate; but such court has no jurisdiction in such proceeding to examine into a claim of such estate against such co-administrator and her husband for moneys allegedly owing the estate on promissory notes: In re Stutz, 1 OApp(2d) 188, 30 OO(2d) 212, 204 NE(2d) 248.

6. An executor or administrator cannot apply the assets of the estate to the payment of his claim against the decedent, until after the same has been presented to and allowed by the probate court: Liggett v. Liggett, 3 NP(NS) 518, 51 Bull. 59; In re Thompson, 23 NP(NS) 544.

8. Even with the consent of the beneficiaries, an executor cannot cancel a note due from him to decedent as satisfaction of a claim from the decedent to him: In re Thompson, 23 NP(NS) 544.

§ 2117.02 Presentation of claim to probate court.

An executor or administrator within three months after the date of his appointment shall present any claim he has against the estate to the probate court for allowance. The claim shall not be paid unless allowed by the court. When an executor or administrator presents a claim amounting to five hundred dollars or more, the court shall fix a day not less than four nor more than six weeks from its presentation, when the testimony touching it shall be heard. The court forthwith shall issue an order directed to the executor or administrator requiring him to give notice in writing to all the heirs, legatees, or devisees of the decedent interested in the estate, and to the creditors named in the order. The notice shall contain a statement of the amount claimed, designate the time fixed for hearing the testimony, and be served upon the persons named in the order at least twenty days before the time for hearing. If any persons mentioned in the order are not residents of the county, service of notice may be made upon them by publication for three consecutive weeks in a newspaper published or circulating in the county, or as the court may direct. All persons named in the order shall be parties to the proceeding, and any other person having an interest in the estate may be made a party.

HISTORY: GC § 10509-106; 114 v 320 (425); 129 v 7; 135 v H 566. (Eff 11-22-73); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10728.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.02 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2117.02a et seq.

Outline of Procedure

Claims due executor or administrator. Leyshon No. 50; A&H No. 20.

Research Aids

Presentation and allowance:

O-Jur2d: Executors and Administrators §§ 317, 318

ALR

Treatment of personal claim of executor or administrator antedating the death of decedent. 144 ALR 940.

Expense of preserving assets before appointment of executor or administrator as entitled to priority. 108 ALR 393.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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See also case notes under RC § 2117.01.

1. Claims against an estate which were not filed within three months of the appointment of an executor or administrator as required by statute were not barred where decedent died before the effective date of the statute: Mott v. Squire, 131 OS 500, 6 OO 163, 3 NE(2d) 404.

2. A person who is appointed administratrix of an estate on the assumption that she is the sole heir at law of the decedent and who is also the only creditor of the estate is not required, as such creditor, to present her claim to the probate court and serve notice thereof on herself as such sole heir, pursuant to this section and GC §§ 10509-107, 10509-108 (RC §§ 2117.03, 2117.04). Under such circumstances it would be a vain thing to do, which the law does not command: Haag v. Meffley, 89 App 471, 46 OO 274, 103 NE(2d) 37.

3. Where the claim of an executor against the estate which he represents is not presented to the probate court and allowed, as required by the mandatory provisions of GC § 10509-106 (RC § 2117.02), such claim cannot be allowed as a deductible debt against the estate in the determination of the inheritance tax: In re Beckman, 91 App 42, 48 OO 236, 107 NE(2d) 538.

4. The provision of this section that an executor or administrator within four months after the date of his appointment shall present any claim which he has against the estate to the probate court for allowance is mandatory and constitutes a statute of limitation: Allen v. Hunter, 1 OApp(2d) 278, 30 OO(2d) 296, 204 NE(2d) 545.

5. The four-month period prescribed by this section for the presentment of claims by an executor or administrator to the probate court for allowance, begins as of the date of the appointment of the executor or administrator, and is not interrupted by the removal of the executor or administrator and the simultaneous appointment of his successor within such four-month period: Allen v. Hunter, 1 OApp(2d) 278, 30 OO(2d) 296, 204 NE(2d) 545.

6. It is the mandatory duty of the probate court to disallow the payment of the claim of a law firm

where the executor, a member of the law firm, failed to present the claim for allowance within four months from the date of his appointment, as provided by this section: In re Crawford, 21 OO(2d) 215, 184 NE(2d) 779 (PC).

7. The claim of an administrator must be filed within three months after his appointment; and when no such presentation has been made, his resignation and the appointment of a successor administrator do not act to revive the claim barred by the statute of limitations: In re Grindle, 23 OO(2d) 442, 182 NE(2d) 887 (PC).

8. The tax commission is properly a party to a hearing on an executor's claim against the estate, since the commission is a "person having an interest in the estate" within the provisions of this section: In re Taylor, 51 OO(2d) 89, 23 OMisc 142, 254 NE(2d) 925 (PC).

9. Where a funeral director, as the executor of an estate, failed to file his claim for burial expenses of the deceased within the time limits set forth in this section and GC § 10509-134 (RC § 2117.07), he may thereafter file such claim for the consideration of the probate court under the authority of GC § 10509-193 (RC § 2113.36): In re Winders, 45 OLA 353 (App).

10. This section, requiring an executor or administrator to present any claim he has against the estate to the probate court within three months after the date of his appointment, is a statute of limitations applicable to an administrator appointed before the effective date of the section but who did not present his claim until more than three months thereafter: In re Grube, 21 OLA 1.

11. The statutes do not require that the state be given notice of an action brought by an executor under this section, to establish a claim against the estate owned by such executor. The listing of a debt in the inventory and appraisal is sufficient notice to the state: In re Matthews, 60 OLA 385, 101 NE(2d) 303 (App).

12. The probate court has exclusive original jurisdiction over the claim of an administrator or executor against his decedent's estate: In re Smith, 67 OLA 409, 120 NE(2d) 632 (PC).

13. In a proceeding for the allowances of a claim of an executor against the estate, a co-executor is not a necessary party: Downing v. Downing, 3 CC(NS) 623, 13 CD 389.

14. In a proceeding by an executor to secure payment of a note held by him, payments on an insurance policy made by decedent after the death of the payee of the note (decedent's wife) to whom he had assigned the policy, and which policy insured to the benefit of the decedent's estate, cannot be set off against the note: Claypool v. Claypool, 4 CC(NS) 577, 15 CD 327 [affirmed, without report, 75 OS 578].

15. As a general rule, the estate of a minor is not liable for past support by the parents, but an exception to the rule occurs where a mother, who has furnished such support, had little or no estate in comparison with the minor, and the support was furnished under conditions which were coercive upon the mother and compelled her to assume a burden not hers alone. And when such claim is presented to the probate court under the above section, there is drawn to the court the chancery jurisdiction necessary to a complete exercise of the jurisdiction specialty conferred by the statute: Spink v. Spink, 7 CC(NS) 89, 18 CD 94.

16. An executor or administrator cannot apply the assets of the estate to the payment of his claim against the decedent, until after the same has been

presented to and allowed by the probate court: Liggett v. Liggett, 3 NP(NS) 518, 51 Bull 59.

17. Under this section, an executor or administrator must present his unsecured claim against the estate to the probate court within three months after the date of his appointment or be forever barred from maintaining an action thereon: Cribbs v. Sturman, 32 NP(NS) 29.

18. Where a widow who is administratrix of her husband's estate pays indebtedness of the estate out of her individual funds, she is subrogated to all the rights of such creditors: In re Patterson, 11 OLR 373, 58 Bull 305.

§ 2117.03 Disinterested person to represent estate. (GC § 10509-107)

At any time after the presentation by an executor or administrator of a claim which he owns against the estate he represents to the probate court for allowance, the court on its own motion, or on motion by any interested party, may appoint an attorney to represent the estate, who shall receive such compensation from the estate as may be fixed by the court. The court shall thereupon require the executor or administrator to make available to such attorney, for use in connection with the proceeding, all documents belonging to the estate relating to the subject matter of such claim.

HISTORY: GC § 10509-107; 114 v 320 (425). Eff 10-1-53.

Research Aids

Court may appoint attorney to represent estate:

O-Jur2d: Executors and Administrators §§ 259, 318

See case note 2 under RC § 2117.02.

§ 2117.04 Exceptions. (GC § 10509-108)

Upon the hearing as to the allowance of an executor's or administrator's claim against the estate he represents, exceptions may be taken to a decision of the probate court upon a matter of law by any person affected thereby. Bills of exception may be taken and allowed, and appeals on law had after a final order or judgment.

HISTORY: GC § 10509-108; 114 v 320 (425). Eff 10-1-53. Analogous to former GC § 10729.

Research Aids

Exceptions:

O-Jur2d: Executors and Administrators § 319

See case note 2 under RC § 2117.02.

§ 2117.05 Compromise and settlement of claims. (GC § 10509-72)

On the application of an executor or administrator for authority to compromise and settle a claim in favor of or against a decedent's estate, the probate court, upon hearing on such application and after reasonable notice has been given to all persons who would be adversely affected thereby as determined by the court, may authorize or direct the executor or administrator to

compromise and settle such claim on such terms as the court deems to be for the best interest of the estate. The court may dispense with the notice of such hearing if it deems notice to be unnecessary. An executor authorized by the will to make such compromise and settlement may but shall not be required to apply to the court for such authority.

HISTORY: GC § 10509-72; 114 v 320 (417); 119 v 394 (405), § 1. Eff 10-1-53. Analogous to former GC § 10696.

Forms

1 A&H Probate FORM 2117.05a et seq.

Outline of Procedure

Compounding of debts. Leyshon No. 58; A&H No. 27.

Research Aids

Compromise of claims against estate:

O-Jur2d: Executors and Administrators §§ 323, 324

Am-Jur2d: Executors and Administrators § 259

Compromise of claims due estate:

O-Jur2d: Executors and Administrators §§ 322, 324

Am-Jur2d: Executors and Administrators § 258

ALR

Power and responsibility of executor or administrator to compromise claim due estate. 72 ALR 2d 191.

CASE NOTES AND OAG

1 The court being satisfied that the interest of the estate will be best subserved by compounding the claim, an entry should be made to that effect. Generally when an administrator seeks authority to compound a claim, he does so with the understanding that the debtor will accept the terms for which he asks authority to make the settlement. If claims cannot be collected they may be compounded or sold: *Weyer v. Watt*, 48 OS 545, 28 NE 670.

2. Where the surety on the bond of a deceased fiduciary has made a settlement with a succeeding fiduciary for certain delinquencies of the deceased fiduciary, the succeeding fiduciary is not precluded from pursuing any remedy available to him on the bond for other and separate delinquencies: *In re Gray*, 162 OS 384, 55 OO 224, 123 NE(2d) 408.

3. This section, providing that when a debtor of a deceased person is unable to pay all his debts, the personal representative with the approval of the probate court, may compound with such debtor, does not contemplate a debt owed by the executor to the estate: *In re Koons*, 11 OO 389 (PC).

4. It is highly questionable whether a fiduciary of a decedent's estate may be a party to any compromise involving successors' rights in the estate: *In re Cantor*, 94 OLA 102, 200 NE(2d) 515.

[CLAIMS OF CREDITORS]

§ 2117.06 Presentation and allowance of creditors claims; property tax assessments; statements and notices required.

All creditors having claims against an estate shall present their claims to the executor or administrator in writing, including claims arising

out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated. All claims shall be presented within three months after the date of the appointment of the executor or administrator except that claims for assessments for personal and intangible property taxes and penalties for which the decedent was personally liable shall be presented by the tax commissioner or his agent within ninety days after the receipt by the clerk of the probate division of the county where the estate is being administered or receipt by the commissioner of the preliminary notice prescribed by section 5731.20 of the Revised Code. Every claim presented shall set forth the claimant's address. In the absence of any prior demand for allowance, the executor or administrator shall allow or reject all claims except tax assessment claims within thirty days after their presentation; provided that failure of the executor or administrator to allow or reject within said time shall not prevent him from doing so thereafter nor shall it prejudice the rights of any claimant. Upon the allowance of a claim the executor or the administrator, on demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date of such allowance. In the event the executor or administrator has actual knowledge of a pending action commenced against the decedent prior to his death in a court of record in this state, such executor or administrator shall file a notice of his appointment in such pending action within ten days after acquiring such knowledge. Where the administrator or executor is other than a natural person, actual knowledge of a pending suit against said decedent shall be limited to the actual knowledge of that person charged with the responsibility of administering said estate. Any person whose claim has been presented, and not thereafter rejected, is a creditor as that term is used in Chapters 2113. to 2125. of the Revised Code. Claims that are contingent need not be presented except as provided in sections 2117.37 to 2117.42 of the Revised Code.

HISTORY: GC § 10509-112; 114 v 320 (426); 119 v 394; 127 v 701 (Eff 9-14-57); 131 v 629 (Eff 11-5-65); 133 v H 363 (Eff 9-12-69); 136 v S 145, Eff 1-1-76.

Analogous to former GC § 10741.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.06 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Estate tax, preliminary notice, RC § 5713.20.

See RC §§ 2107.54, 2117.07, 2129.12 which refer to this section.

Comparative Legislation

Collection of claims against estate:

Cal.—Probate Code, § 700

Ill.—Rev Stat, ch 3, § 18-1

Ind.—Burns' Stat, § 29-1-14-11

Ky.—KRS, § 396.020
 Mich.—MCLA, § 708.11
 N.Y.—SCPA, § 1801
 Pa.—Purdon's Stat, Tit. 20, § 3381
 Fla.—FSA, § 733.608

Outline of Procedure

Claims of creditors, presentation and schedule. Leyshon No. 51, A&H No. 21; Estate tax. Leyshon No. 72-1, A&H No. 46.

Research Aids

Presentation and allowance of creditors' claims:

Generally:

O-Jur2d: Executors and Administrators § 287 et seq.

Am-Jur2d: Executors and Administrators § 270 et seq.

Contingent claims:

O-Jur2d: Executors and Administrators § 299

Am-Jur2d: Executors and Administrators § 283

Form and sufficiency of presentation:

O-Jur2d: Executors and Administrators § 300

Am-Jur2d: Executors and Administrators § 298

Procedure for allowance of claim:

O-Jur2d: Executors and Administrators § 310 et seq.

Am-Jur2d: Executors and Administrators § 297 et seq.

Time for presentation:

O-Jur2d: Executors and Administrators § 302 et seq.

Am-Jur2d: Executors and Administrators § 291 et seq.

ALR

Effect of statement of claim against decedent's estate setting out debts apparently barred by statute of limitations. 119 ALR 426.

Executors and administrators: rent or its equivalent accruing after lessee's death as expense of administration of his estate. 22 ALR3d 814.

Unliquidated claim for damages arising out of tort as a contention claim within statutes relating to presentation of claim against decedent's estate. 125 ALR 871.

Availability of replevin or similar possessory action to one not claiming as heir, legatee, or creditor of decedent's estate, against personal representative. 42 ALR2d 418.

Amendment of claim against decedent's estate after time for filing. 56 ALR2d 627.

Amount of claim filed against decedent's estate as limiting amount recoverable in action against estate. 25 ALR3d 1356.

Necessity of presenting claim under separation agreement to personal representative of other spouse's estate. 58 ALR2d 1283.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff. 36 ALR3d 693.

Exclusiveness of grounds enumerated in statute providing extension of time for filing claims against decedent's estate. 58 ALR2d 1304.

Law Reviews

Barred claims statute, appeals from probate court discussed. Article by Judge Nelson J. Brewer. 8 ClevBJ (No. 6) 83.

Necessity for presenting tort claims to executors and administrators. Article by Judge Carl A. Weinman. 11 OO 429.

Ohio statutes of limitation on claims against estates. Francis J. Eberly. 16 OSLJ 206.

Notification of tort claims against decedent's

estates: a trap for the unwary lawyer. Stanley B. Kent. 35 OBar (No.50) 1555.

CASE NOTES AND OAG [DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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See also case notes under RC § 2117.07.

1. The provisions of this section and GC § 10509-134 (RC § 2117.07) do not require the owner of a promissory note to present his claim thereunder to an executor or administrator when the executor or administrator at the time of his appointment is already in possession of the note for collection: Gerhold v. Papathanasion, 130 OS 342, 4 OO 425, 199 NE 353.

3. This section and GC § 10509-134 (RC § 2117.07) are statutes of limitation (or nonclaim statutes) which bar creditors' claims unless presented to an executor or administrator within four months after the date of appointment: Beach v. Mizner, 131 OS 481, 6 OO 155, 3 NE(2d) 642 [affirming 52 App 348]; Prudential Ins. Co. v. Joyce Bldg. Co., 143 OS 564, 28 OO 480, 56 NE(2d) 168.

5. The superintendent of banks, seeking in his official capacity to collect a claim from an administrator or executor is amenable to the laws governing the administration of estates the same as any other creditor. Before filing an action on a claim in court, he must first present such claim to the administrator or executor for allowance or rejection as provided by statute: State ex rel. Fulton v. Coburn, 133 OS 192, 10 OO 249, 12 NE(2d) 471.

7. An unliquidated claim for damages arising out of tort does not fall within the exception contained in this section, pertaining to contingent claims; and suit thereon must be instituted within two months

from the date of receipt of actual notice of disallowance of such claim by the executor or administrator, or be forever barred under the provisions of GC § 10509-133 (RC § 2117.12): *Pierce v. Johnson*, 136 OS 95, 16 OO 34, 23 NE(2d) 993.

9. The requirements of this section that "creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment" are mandatory and may not be waived by him: *Prudential Ins. Co. v. Joyce Bldg. Co.*, 143 OS 564, 28 OO 480, 56 NE(2d) 168.

10. Where an action against a deceased defendant has been revived properly it is not necessary for the plaintiff in such revived action to present his claim in writing to the executor or administrator as provided in this section: *Goehring v. Dillard*, 145 OS 41, 30 OO 274, 60 NE(2d) 704.

11. Where a court of chancery finds that the res of a trust is in the hands of the personal representatives of a deceased trustee, such res is not a debt and may be recovered from such personal representatives without compliance by the cestui que trust with the provisions of this section: *Staley v. Kreinbihl*, 152 OS 315, 40 OO 361, 89 NE(2d) 593.

11.1 The filing of a petition against an administrator of a decedent's estate, setting forth a cause of action against the estate, within four months of the administrator's appointment and accompanied by service of summons and a copy of the petition upon the administrator, constitutes a valid presentation of plaintiff's claim to the administrator and meets the requirements of this section: *Fortelka v. Meifert*, 176 OS 476, 27 OO(2d) 439, 200 NE(2d) 318.

11.2 Where the administrator for the estate of the deceased airplane passenger failed to present the statutory beneficiary's claim for wrongful death to the administratrix of the estate of the deceased pilot within the four-month provision of RC § 2117.06, and the nine-month provision of RC § 2117.07, but, in his capacity as next friend of the minor and sole heir of the deceased passenger, did present the minor's claim within nine months after the appointment the presentation is sufficient compliance with the provisions of RC §§ 2117.06 and 2117.07: *Burwell v. Maynard*, 21 OS(2d) 108, 50 OO(2d) 268, 255 NE(2d) 628.

11.3 Where it is alleged in an action for bodily injuries that such injuries were proximately caused by the negligence of a decedent and that he had a policy of insurance insuring him against liability for such negligence, and it does not appear that any other claims covered by such insurance have been asserted, such action may be brought against the executor or administrator of such decedent, and decedent's liability insurer, at any time within the statute of limitations on such actions without presenting a claim against the estate within the time specified in RC § 2117.06 or RC § 2117.07, and timely service of summons upon the insurer-defendant is sufficient to commence the action: *Heuser v. Crum*, 31 OS(2d) 90, 60 OO(2d) 56, 285 NE(2d) 340.

12. In the administration of an estate no claim need be presented unless it is such that the administrator or executor can legally refuse to pay; hence, where the testator by his will directed that the plaintiff should receive reasonable compensation for personal services rendered, her failure properly to present her claim or to bring an action thereon within a certain time does not defeat her right of recovery: *Fair v. Fair*, 46 App 51, 187 NE 727, 38 OLR 291.

13. Presentment to the executor of a physician's claim for services rendered during last sickness of testatrix was required in order to authorize physician's recovery therefor, although executor had knowledge

thereof before testatrix' death, notwithstanding that will directed payment of debts and expenses of testatrix' last sickness: *Devers v. Schreiber*, 50 App 442, 4 OO 183, 198 NE 601.

13.1 A claim for unpaid installments of alimony, under a decree rendered against a decedent during his lifetime, and which are delinquent at the time of his death, is a claim that must be presented for allowance or rejection, under the provisions of this section: *Swearingin v. Rendigs*, 53 App 221, 5 OO 457, 4 NE(2d) 695.

13.2 Where distribution in kind is made of a promissory note, an asset of the estate, before the time has elapsed within which creditor's claims may be filed with the executrix, and no indemnifying bond is given by the distributee as provided in [RC § 2113.55], the distribution in kind is premature and ineffective to transfer the note and mortgage: *Sager v. Breisach*, 61 App 413, 15 OO 266, 22 NE(2d) 644.

14. The provisions of this section, requiring the filing of a claim against an administrator as a condition precedent to the bringing of an action against him on the claim, apply to a suit brought by a minor on such a claim, and the disability of infancy will not save him from the operation of the statute; and a petition by or for the benefit of a minor on such a claim which does not allege that the claim has been so presented, does not state facts sufficient to constitute a cause of action: *Breen v. Conn*, 64 App 325, 18 OO 133, 28 NE(2d) 684.

15. An ancillary administrator of an estate may appeal from an order of the probate court, prescribing that he reject claims of a domiciliary executor set forth in the schedule of debts, which claims were presented to and allowed by the proper court of the state of the domiciliary executor, prescribing that the ancillary administrator require the domiciliary executor to perfect his claims under GC § 10509-112 (RC § 2117.06) et seq, and prescribing that, after the proper adjudication of the rejection or allowance of the domiciliary executor's claims, the ancillary administrator distribute the entire funds in his hands to beneficiaries named in the will of the decedent: *In re Kelley*, 68 App 51, 22 OO 158, 34 NE(2d) 34.

16. Although a claim of defendant against a plaintiff may be barred by the statute of limitation at the time the plaintiff institutes his action, such defendant may set up such claim as a setoff or defense to the extent it will equalize the claim of the plaintiff: *Shriner v. Price*, 74 App 373, 29 OO 542, 59 NE(2d) 152.

17. In an action for wrongful death between the administrators of the estates of two decedents killed in a common accident, the pleadings show on their face and by admission the date of appointment of plaintiff administrator to be more than four months after the date of appointment of defendant administrator, thus rendering it impossible for plaintiff administrator to have presented the tort claim to defendant administrator within the time prescribed by this section: *Stange v. Campbell*, 75 App 316, 31 OO 77, 62 NE(2d) 185.

18. The filing of a cross-petition for a money judgment in an action by an administrator is not the presentation of the asserted claim to the administrator as required by this section and GC § 10509-113 (RC § 2117.11), even if it is filed within four months of the appointment of the administrator: *Benson v. Rosine*, 76 App 439, 32 OO 195, 64 NE(2d) 845 [affirming 30 OO 55, 15 OSupp 28].

19. A deficiency judgment obtained by the superintendent of banks against the administrator of the estate of a decedent in a foreclosure action in the com-

mon pleas court is void where there was no presentation of the claim involved in the foreclosure action to and rejection by the administrator of the estate before the institution of such action: *Akron Commercial Securities Co. v. Ritzman*, 79 App 80, 34 OO 460, 72 NE(2d) 489.

20. The holder of a contingent claim is not required to present such claim under provisions of this section or GC § 10509-134 (RC § 2117.07): *Keifer v. Kissell*, 83 App 133, 38 OO 224, 75 NE(2d) 692.

21. The plaintiff in an action for money having died and the cause having been revived in the name of his administratrix, a cross-petition filed thereafter asserting a claim against the estate is subject to a demurrer unless it alleges that the claim was presented to the administratrix within four months of her appointment, as required by this section: *National-Ben Franklin Fire Ins. Co. v. Woolcott*, 86 App 462, 42 OO 67, 93 NE(2d) 31.

22. The presentation of a claim against an estate to the agent of an insurance company appointed by the administrator as his agent, does not satisfy the statute, and the claim becomes barred at the end of the time fixed by statute, unless otherwise properly presented: *Beacon Mut. Indem. Co. v. Stalder*, 95 App 441, 54 OO 69, 120 NE(2d) 743.

23. Where, in an action against an administrator for damages for personal injuries resulting from an automobile collision, it is disclosed that the petition does not allege that the claim sued on was presented to the administrator pursuant to this section, that at the close of plaintiff's case the defendant moved for a directed verdict, and that, thereafter, plaintiff's oral motion to dismiss the action without prejudice was granted and the jury dismissed, it is not prejudicially erroneous for the court to overrule plaintiff's motion for leave to withdraw the oral motion and to have the case set for trial, in the absence of a showing of abuse of discretion: *Robinson v. Engle*, 96 App 238, 54 OO 278, 120 NE(2d) 611.

23.1 This section, which provides, *inter alia*, that "all claims shall be presented within four months after the date of the appointment of the executor or administrator," is a "nonclaim statute," or a statute of limitation: *Conrad v. Sarver*, 97 App 199, 55 OO 453, 124 NE(2d) 749.

23.2 Where the maker of a note claimed by the administrator of an estate to be an asset of the estate asserts the defense of payment, it is not necessary, as a condition precedent to his right to assert such defense, that he comply with the requirement of this section, that such "claim" be presented to the administrator within four months after the appointment of such administrator: *Fox v. McCreary*, 103 App 73, 3 OO(2d) 155, 144 NE(2d) 546.

23.3 The provisions of RC § 5121.10, that, upon the death of a person who is or has been an inmate of any benevolent institution of the department of mental hygiene and correction, "the executor or administrator shall ascertain from the department whether the deceased person was supported while an inmate," are mandatory, place the responsibility for ascertaining whether the state's claim has been paid on such administrator, and dispense with compliance by the state with this section; and, upon the death of such person, the claim of the state becomes a preferred claim against such deceased person's estate: *In re Sowards*, 105 App 239, 6 OO(2d) 59, 152 NE(2d) 146.

23.4 A probate court is guilty of an abuse of discretion in refusing a claimant the right to file a claim with an executor after the expiration of the four-month time limit fixed by this section, when such

refusal to allow the claim to be filed prevents the revival of an action pending against the executor's decedent in the court of common pleas, where the uncontradicted evidence establishes that the claimant was under a legal disability as defined by RC § 2131.02: *Jaycox v. Fuller*, 112 App 25, 15 OO(2d) 378, 174 NE(2d) 613.

23.5 The right of a part-owner who pays the tax on the whole tract of which he is part-owner to have a lien on the share of the other part-owner for the tax paid on such other's share is subject to the statute of limitation requiring presentation of claims to executors and administrators: *Kuhnle v. Rusmisl*, 113 App 389, 17 OO(2d) 465, 178 NE(2d) 810.

23.6 The authority to file a claim against a decedent's estate after the four-month period prescribed by this section must be in conformance with RC § 2117.07, and cannot be predicated on general equitable principles outside the purview of the statute: *In re Andres*, 114 App 167, 19 OO(2d) 21, 180 NE(2d) 855.

23.7 A petition in an action against an executor of the estate of a decedent, which alleges an oral presentation of a claim against the estate to, and an oral rejection of the claim by, the executor, does not state facts which show a cause of action and is subject to demurrer: *Morgan v. City Nat. Bank & Co.*, 4 OApp(2d) 417, 33 OO(2d) 504, 212 NE(2d) 822.

23.8 A claim against a decedent's estate need not be in any particular form so long as it is in substantial compliance with this section and recognized by the fiduciary as a claim against the estate: *Gladman v. Carns*, 9 OApp(2d) 135, 38 OO(2d) 140, 223 NE(2d) 378.

23.9 This section applies only to claims to be filed with an executor or administrator, either ancillary or domiciliary, who has been issued letters in Ohio: *Kibbey v. Mercer*, 11 OApp(2d) 51, 40 OO(2d) 223, 228 NE(2d) 337.

24. If a defendant debtor is deceased, a claim for wrongful death must be presented to his legal representative in the manner and within the time limitations set forth in RC §§ 2117.06 and 2117.07, even though the complaint filed specifically states that damages are sought from assets other than those of the debtor's estate: *King v. Hargis*, 37 OApp(2d) 92, 66 OO(2d) 142, 307 NE(2d) 40 (1973).

24.1 Where no Ohio decision exists whose facts precisely fit a case involving the contention by the creditor of the decedent that a claim against the decedent's estate is not barred, since the administrator had knowledge of the creditor's claim within the statutory period, the controlling rule of law should not be fashioned until a plenary hearing is had with full exploration by cross-examination and otherwise of the facts out of which the rule of law will emerge: *Hart v. Johnston*, 44 OO(2d) 221, 389 F(2d) 239 [reversing 36 OO(2d) 366, 253 FSupp 621].

24.2 Where, in an action filed in the common pleas court by the administrator of a decedent's estate alleging that two defendants were liable for damages for causing the death of plaintiff's decedent, one of the defendants dies and his attorney in accordance with RC § 2313.31 files an entry in the pending case stating that the defendant had died and notified by letter the attorney for plaintiff that letters of administration had been issued, the plaintiff administrator had notice of defendant's death and of the appointment of the executrix in sufficient time to present a claim within the four-month period provided in RC § 2117.06: *In re Herron*, 49 OO(2d) 27, 21 OMisc 212, 252 NE(2d) 332 (PC).

24.3 A person having an unliquidated claim for damages arising from an automobile collision is a creditor within the meaning of this section, requiring presentation of claims by creditors to the executor or administrator within a specified time and such person is not entitled to the benefits of GC § 10509-216 (RC § 2117.37), governing the presentation of contingent claims: *Overman v. Yake*, 68 OLA 248, 109 NE(2d) 697 (App).

24.4 A contingent claim is one where the liability depends upon some future event which may or may not happen and which makes it wholly uncertain whether there ever will be a liability; a liability on an unliquidated claim for damages arising out of tort does not depend for its creation upon the occurrence of some uncertain event in the future and cannot be said to be contingent: *Lewis v. Knight*, 75 OLA 589, 144 NE(2d) 551 (App).

25. The word "shall" in this section makes it mandatory upon the administrator to allow or reject all claims within thirty days after the presentation: *In re Heimberger*, 6 OO 51 (PC).

26. The claim of a creditor filed within four months as provided by this section is not barred by a lapse of four years, where the administrator neither allows nor rejects such claim and no action is taken by the creditor: *In re Heimberger*, 6 OO 51 (PC).

27. The purpose of this section is that of presenting claims for allowance or rejection, and a lawsuit in another court, although involving the same parties, is not a compliance with this statute: *In re Christopher*, 8 OO 546 (PC) [affirmed 11 OO 251].

28. The state superintendent of banks is not chargeable with culpable neglect in failing to present a claim for superadded liability upon stock against the estate of a decedent who was the real owner of such stock within the time prescribed by this section, if the registered ownership is in the name of another person and the state superintendent had no knowledge of who the real owner was: *Squire v. Oerter*, 9 OO 4 (PC).

31. This section prescribes that if claims are not presented within the four-months period, they may lose their equality with claims of the same class and they may not prevail as against certain claims or against disbursements and distribution by the personal representative: *Roberts v. Hickerson*, 11 OO 471 (App).

32. A creditor whose claim is neither presented within four months after the appointment of an executrix, as required by this section, nor reinstated under GC § 10509-134 (RC § 2117.07), cannot participate in the distribution of the fund to general creditors, although the executrix knows of the existence of the claim: *Burkhardt v. Burkhardt*, 12 OO 359 (PC).

33. This section, which provides that "creditors shall present their claims, whether due or not due, to the executor or administrator within four months after the date of his appointment," is mandatory and includes a claim for support furnished minor children of a decedent: *In re Riggle*, 18 OO 179 (PC).

34. Where the claim accrues subsequent to the four months specified in this section, it is impossible for the claimant to present his claim within the four-month period, and the claim, is, therefore, not governed and is not barred by said statute; GC § 10509-134 (RC § 2117.07) does not apply; and the claimant may present his claim to the administrator at any time before the administration of decedent's estate is closed, and if allowance of the claim is refused, the claimant is entitled to sue thereon: *In re Runcie*, 20 OO 327 (PC).

37. A person who claims to be an equitable owner of assets being administered in the estate is not required by this section to present his "claim" to the administrator before bringing an action: *Williams v. Jones*, 42 OO 323 (CP).

38. Interest on a claim against a decedent's estate, based on running account payable in installments, is allowable only from the date claim is presented, in absence of custom to the contrary: *In re McCollum*, 16 OLA 132.

41. Under this section, creditors are required to present their claims to the administrator or executor within four months after the date of his appointment; if not so presented, the creditor or person deriving title from him may petition the probate court, under GC § 10509-134 (RC § 2117.07), for leave to file his claim for allowance and that court may permit such claim to be filed: *Holmberg v. Third Nat. Bank & Co.*, 23 OLA 631.

42. Where stockholder's double liability claim arose before the estate was settled but after statutory period for presentation of claims, the limitation statute does not begin to run until assessment has been made: *Reese v. Chapman*, 23 OLA 641.

43. In order to entitle a claimant to maintain an action against an administrator to recover from an estate on a claim based on a contract alleged to have been entered into with decedent, it is necessary for plaintiff to have presented the claim to the administrator for allowance or rejection within a period of two months after his appointment: *Davidson v. Miars*, 31 OLA 507.

44. This section, which provides that a claimant has four months after the appointment of the personal representative within which to present his claim, does not have the effect of extending the time for bringing action after the claim is rejected, but such action must be commenced within two months as provided in GC § 10509-133 (RC § 2117.12): *Chronerberry v. Bartel*, 32 OLA 284.

45. This section, which requires presentation of claim within four months, is very positive in its language, without exceptions other than as to negotiable instruments maturing subsequent to the time for presentation: *Prudential Ins. Co. v. Joyce Bldg. Realty Co.*, 44 OLA 481, 65 NE(2d) 516 (App).

46. The listing in a schedule of debts a possible claim against an estate would not constitute a waiver of the obligation placed upon the claimant to present its claim as provided under this section and GC § 10509-134 (RC § 2117.07): *Prudential Ins. Co. v. Joyce Bldg. Realty Co.*, 44 OLA 481, 65 NE(2d) 516 (App).

48. A party claiming to be an equitable owner of assets being administrated in an estate need not present a claim to the administrator according to this section: *Williams v. Jones*, 58 OLA 153 (CP).

49. Since plaintiff is claiming damages then the statutory requirements of this section that "All claimants shall present their claims to the executor or administrator in writing, including claims arising out of contract, out of tort, on cognovit notes or on judgments, whether due, secured or unsecured, liquidated or unliquidated . . ." must be met: *Buydden v. Mitchell*, 60 OLA 493, 102 NE(2d) 21 (App).

50. Where plaintiff's claim for services rendered decedent were compensated by a conveyance of real estate which later was decreed void after grantor's death, plaintiff's claim is "contingent" within the meaning of this section and GC § 10509-216 (RC § 2117.37), and commencement of an action thereon within four months after the appointment of the executor or administrator or before expiration of two months after rejection of claim by decedent's administratrix

is not barred by the statute of limitations: *Yenzer v. Burton*, 55 NE(2d) 665 (App).

51. It is not necessary that a mortgagee file its claim under the provisions of GC § 10509-112 (RC § 2117.06) before payment can be made to it for the balance due on the mortgage: *McAdams v. Bollsinger*, 57 OO 338, 129 NE(2d) 878 (PC).

53. Under RC § 2117.07, a creditor may present his claim against a decedent's estate after the four month limitation period provided by RC § 2117.06, if he did not have actual notice of the death of the decedent or actual knowledge of the appointment of the fiduciary, and if such lack of knowledge is shown the court must permit the creditor to file his claim: *In re Dulle*, 71 OLA 114, 130 NE(2d) 253 (PC).

55. The provision in RC § 2117.06 providing that an executor or administrator shall allow or reject all claims within thirty days after their presentation is directory rather than mandatory and failure of the executor or administrator to act raises no presumption: *In re Douglass*, 77 OLA 89, 144 NE(2d) 924 (PC).

57. The statute of limitations as to the presentation of claims against an estate does not apply to claims of the state for support of persons in the state hospital: *In re Moore*, 79 OLA 112, 154 NE(2d) 675 (PC).

58. Since the bureau of support is a governmental agency within the department of mental hygiene and correction, it is in effect the state itself, and it can not be barred by a statute of limitations: *In re Moore*, 79 OLA 112, 154 NE(2d) 675 (PC).

59. Donee beneficiaries of an antenuptial contract, who claim as distributees through the decedent, are not required to present their claims to the executor or administrator pursuant to RC §§ 2117.06 and 2117.07: *Cantor v. Cantor*, 15 OO(2d) 148, 174 NE(2d) 304 (PC).

60. The surviving tenant in common of real estate, who had not presented her claim for rent to the administrator of the estate of the deceased cotenant within four months after his appointment, could not recover the rental value of the property by cross-petition in the administrator's action to sell the real estate: *Evans v. May*, 18 OO(2d) 459, 176 NE(2d) 189 (PC).

61. Notice of a claim in writing given by counsel for plaintiff to deceased's insurance company did not constitute presentment of the claim to the administrator in writing within the purview of this section requiring presentment of claim within four months after the appointment of the administrator: *Simmons v. Bartley*, 19 OO(2d) 335, 177 NE(2d) 77 (CP).

62. The institution of an action against the administrator about six weeks after an accident, in which the deceased was involved, and causing summons to be issued to the administrator, together with a copy of the original petition, constituted compliance with the statute requiring presentment of claims to the administrator within four months of his appointment, or made it unnecessary for such presentment of claim to be made to the administrator: *Simmons v. Bartley*, 19 OO(2d) 335, 177 NE(2d) 77 (CP).

63. The presentment of a claim to an insurance company is not a presentment to an administrator within the purview of this section: *Wilcox v. Ceschiat*, 87 OLA 225, 179 NE(2d) 544 (CP).

64. Where the claimant has actual notice of the decedent's death in sufficient time to present his claim within the statutory period, claimant is not entitled to file his claim more than four months after the appointment of an administrator: *In re Young*, 174 OS 516, 23 OO(2d) 149, 190 NE(2d) 273.

65. The filing of a petition to contest a decedent's will does not suspend or extend the time in which a creditor must present his claim to the executor under the provisions of RC §§ 2117.06 and 2117.07: *In re Kehoe*, 27 OO(2d) 35, 199 NE(2d) 29 (PC).

66. The general purpose of RC §§ 2117.06 and 2117.07 is to facilitate the early completion of administration proceedings: *Baker v. Charles*, 31 OO(2d) 310, 202 NE(2d) 646 (PC).

68. Where the regularly appointed attorney for the executor of an estate within four months after the appointment of such executor receives a statement of claim for services with an accompanying affidavit addressed to the executor of the estate, and where such attorney acknowledges the receipt of the claim and affidavit against said estate, signing said acknowledgment as attorney for the executor and returns that claim to the attorney for the claimant as acting within the scope of his authority, and his act in accepting the claim is the acceptance by the executor, acting through his legally appointed attorney: *In re Clark*, 40 OO(2d) 347, 11 OMisc 103, 229 NE(2d) 122 (CP).

69. Where the plaintiff, a resident of Pennsylvania, was involved in an automobile collision in that state with the intestate, an Ohio resident, the remedy provided by the state of Pennsylvania will not be defeated in a federal court merely because the plaintiff failed to comply with the Ohio law requiring presentation of a claim against the administratrix of the intestate within a certain time: *Colman v. Pitzer*, 6 OO(2d) 476, 160 FSupp 862.

70. A federal district court does not acquire jurisdiction of an action on an alleged oral promise by the defendant administrator's decedent to pay the plaintiff a sum of money unless there has been a timely presentation to and rejection by the administrator of the plaintiff's claim against the estate or the reinstatement of a claim by the probate court: *Hart v. Johnston*, 36 OO(2d) 366, 253 FSupp 621 [reversed, 44 OO(2d) 221, 389 F(2d) 239].

71. The law does not prescribe the form or manner in which a claim should be presented to the representative of an estate, but any presentation to a so-called agent of the administrator falls outside the requirements of the statute with respect to presentation of a claim against an estate in that the fiduciary functions of the office of administrator in his capacity as an officer of the probate court cannot be delegated to agents who do not owe the fidelity required of an officer of the court: *Hart v. Johnston*, 36 OO(2d) 366, 253 FSupp 621 [reversed, 44 OO(2d) 221, 389 F(2d) 239].

72. Under Ohio probate law both a claim and an action against an estate may only proceed against a fiduciary of an estate: *United States v. Besase*, 57 OO(2d) 51, 319 FSupp 1064.

§ 2117.07 Presentation of claims after three months.

Anyone having a claim against an estate who fails to present his claim to the executor or administrator within the time prescribed by law may file a petition in the probate court for authority to present his claim after the expiration of the time. The petition forthwith shall be assigned for hearing, and at least five days before the date of the hearing, the claimant shall give written notice of the hearing to the executor or administrator,

and to other parties the court designates. The court may authorize the claimant to present his claim to the executor or administrator if, on the hearing, the court finds any of the following:

(A) That the claimant did not have actual notice of the decedent's death or of the appointment of the executor or administrator in sufficient time to present his claim within the period prescribed by section 2117.06 of the Revised Code;

(B) That the claimant's failure to present his claim was due to the absence of the executor or administrator from his usual place of residence or business during a substantial part of the period, or was due to any wrongful act or statement on the part of the executor or administrator or his attorney;

(C) That the claimant was subject to a legal disability during the period or any part of it.

A claim that is not presented within four months from the appointment of the executor or administrator shall be forever barred as to all parties, including devisees, legatees, and distributees, and no payment shall be made nor any action maintained on the claim, except as otherwise provided in sections 2117.37 to 2117.42 of the Revised Code, with reference to contingent claims.

The executor or administrator is not accountable to such a claimant for any assets of the estate that he may lawfully have paid out or distributed prior to service upon him of notice of the hearing on the petition, nor for any other action that he may lawfully have taken prior to that time, and such a claim shall not prevail against creditors, legatees, and distributees who have received payment or distribution from the assets of the estate prior to the service of such a notice, or against a surviving spouse who has made her election to take under the will or under sections 2105.01 to 2105.21 of the Revised Code, prior to that time, or against bona fide purchasers and other persons who have dealt with the executor or administrator in good faith.

This section applies to any person who is required to give written notice to the executor or administrator of a motion or application to revive an action pending against the decedent at the date of death.

Nothing in this section or in section 2117.06 of the Revised Code shall reduce the time mentioned in section 2125.02, 2305.09, 2305.10, 2305.11, or 2305.12 of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to any of those sections shall come from the assets of an estate, unless the claim has been presented against the estate in accordance with Chapter 2117. of the Revised Code.

HISTORY: GC § 10509-134; 114 v 320 (431); 119 v 394 (412); 125 v 903 (979); 130 v 617 (Ef 8-9-63); 133 v S 103 (Ef 11-21-69); 133 v S 185 (Ef 1-1-71); 136 v S 145. Ef 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.07 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC §§ 2107.54, 2129.12 which refer to this section.

Forms

1 A&H Probate FORM 2117.07a et seq.

Outline of Procedure

Claims of creditors, presentation after three months. Leyshon No. 54; A&H No. 24.

Research Aids

Late presentation of claims:

O-Jur2d: Executors and Administrators § 306 et seq.

Am-Jur2d: Executors and Administrators § 291 et seq.

ALR

Claim of government or subdivision thereof as within provision of nonclaim statutes. 34 ALR 2d 1003.

Failure of personal representative to file proof of publication of notice of appointment or notice to creditors within specified time as tolling statute of nonclaim. 42 ALR2d 1218.

Law Reviews

A survey of Ohio negligence case law—1968. Alvin C. Vinopal. 42 OBar (No. 42) 1347.

Barred claims statute, appeals from probate court discussed. Article by Judge Nelson J. Brewer. 8 ClevBJ (No. 6) 83.

Necessity for presenting tort claims to executors and administrators. Article by Judge Carl A. Weinman, 11 OO 429.

Estate—statute of limitations as bar to suit—saving statute. (Case note.) 19 CinLRev 288.

Ohio statutes of limitation on claims against estates. Francis J. Eberly. 16 OSLJ 206.

Notification of tort claims against decedent's estates: a trap for the unwary lawyer. Stanley B. Kent. 35 OBar (No.50) 1555.

CASE NOTES AND OAC

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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See also case notes under RC § 2117.06.

1. A barred claim may be reinstated and presented to an executor or administrator upon leave first obtained from the probate court in the manner provided in this section: *Beach v. Mizner*, 131 OS 481, 6 OO 155, 3 NE(2d) 417 [affirming 52 App 348].

2. Subject to the limitations therein prescribed, this section confers broad discretion upon the probate court to permit or deny a petitioner the right to file his claim for allowance, where such claim has not been presented to an administrator or executor within the time prescribed by law. Where such discretion has not been abused, a decision rendered by the probate court under this section will not be disturbed by a reviewing court: *State ex rel Fulton v. Coburn*, 133 OS 192, 10 OO 249, 12 NE(2d) 471.

3. Where a claim, filed with an executor but not within the time required by law, is rejected by the executor, and thereafter an action is filed in common pleas court on the same claim but not within the time required by law, the refusal of the probate court at a later time to permit such claims to be filed for allowance is not an abuse of its discretion vested by this section: *State ex rel Fulton v. Coburn*, 133 OS 192, 10 OO 249, 12 NE(2d) 471.

5. The disjunctive conjunction "or" is used in this section in its ordinary sense and meaning, and where upon hearing of the petition for authority to file a belated claim the evidence discloses that claimant actually knew of the decedent's death and his place of residence shortly after the death occurred, and that in the exercise of reasonable diligence the claimant could have learned of the appointment of an administrator, and thereafter had a fair opportunity to present his claim within the four months prescribed by GC § 10509-112 (RC § 2117.06), the court is chargeable with no error or abuse of discretion in denying claimant authority to present such claim: *In re Marrs*, 158 OS 95, 48 OO 46, 107 NE(2d) 148.

5.1 The hearing of an application to the probate court under this section for authority to present a claim to the administrator of a decedent's estate more than four months after his appointment is a special proceeding within the meaning of that term as used in RC § 2505.02: *In re Wyckoff*, 166 OS 354, 2 OO (2d) 257, 142 NE(2d) 660.

5.2 Under this section one who has a claim against an estate and who has failed to present it within the time prescribed by law may file a petition in the probate court to present his claim after the expiration of such time, and, upon proper showing, the probate court may extend the time for presentment to nine months from the date of the appointment of the executor or administrator; and such section applies to any person who is required to give written notice to the executor or administrator of a motion or application to revive an action pending against the decedent at the date of his death: *Miller v. Andre*, 167 OS 83, 4 OO(2d) 52, 146 NE(2d) 598.

5.4 If such claimant had actual notice of the decedent's death in sufficient time to present his claim within the statutory period, he may not be granted such leave: *Redifer Bus Co. v. Lumme*, 171 OS 471, 14 OO(2d) 374, 172 NE(2d) 304.

5.5 The words, "assets of the estate," as used in the 1963 amendment of this section, include only assets (1) which "may lawfully" be "paid out or distributed" by the executor or administrator, or (2) from which "payment

or distribution" may be made to "creditors, legatees, and distributees" or to a surviving spouse, or (3) which may be lawfully sold or otherwise encumbered or disposed of by the executor or administrator: *Meinberg v. Glaser*, 14 OS(2d) 193, 43 OO(2d) 296, 237 NE(2d) 605.

5.6 Where it does not appear that any claim covered by an automobile liability insurance policy of a decedent has been filed against the estate of the decedent within the four-month period specified in RC § 2117.06, or as provided in and within the nine-month period specified in RC § 2117.07, such policy is not an asset of the estate of the decedent within the meaning of those words as used in RC § 2117.07: *Meinberg v. Glaser*, 14 OS(2d) 193, 43 OO(2d) 296, 237 NE(2d) 605.

5.7 Where it is alleged in an action for bodily injuries and property damage that such injuries and damage were proximately caused by the negligence of a decedent and that he had a policy of insurance insuring him against liability for such negligence and it does not appear that any other claims covered by such insurance have been asserted, such action may be brought against the executor or administrator of such decedent at any time within two years after the cause thereof arose without presenting a claim against the estate within the four-month time specified in RC § 2117.06, or as provided in and within the nine-month time specified in RC § 2117.07: *Meinberg v. Glaser*, 14 OS(2d) 193, 43 OO(2d) 296, 237 NE(2d) 605.

5.8 The failure to file suit within two months of the rejection by the administrator of the estate of a claim against the estate for bodily injury does not bar an action for that bodily injury against that administrator where no part of the recovery sought is to come from "assets of the estate" as that term is defined in this section: *Collins v. Yanity*, 14 OS (2d) 202, 43 OO(2d) 301, 237 NE(2d) 611.

5.9 Under this section it is apparent that an action for personal injury which is not presented in due course as a claim against the estate may be brought against the estate within two years so long as recovery thereon will not subject the assets of the estate to any liability: *In re George*, 24 OS(2d) 18, 20, 53 OO(2d) 10, 262 NE(2d) 872.

6. Where the payee of notes executed by the decedent had accepted in satisfaction thereof a note executed by the executrix secured by a mortgage upon real estate in which she had only a life estate, the common pleas court was warranted, under authority of this section providing for the reinstatement of barred claims, in granting an order permitting the filing of such claim and directing its allowance and payment: *Schindler v. Schindler*, 50 App 517, 2 OO 95, 198 NE 879.

8. A court will take judicial notice that an ordinarily prudent person does not follow all the death notices in the daily papers, nor does he inform himself of the appointments of administrators published in a daily legal newspaper: *Home Owners Loan Corp. v. Doolittle*, 57 App 329, 10 OO 225, 13 NE(2d) 920.

9. Equity requires the reinstatement of a claim where no injury could result to creditors who have filed their claims in time or to others by the allowance of such a claim: *Home Owners Loan Corp. v. Doolittle*, 57 App 329, 10 OO 225, 13 NE(2d) 920.

11. This section, authorizing the probate court to permit claims to be presented when the claimant has failed to present them, does not apply to rejected claims: *Busse & Borgmann Co. v. Upchurch*, 60 App 349, 12 OO 493, 21 NE(2d) 349.

12. An entry of the probate court in a hearing on a petition for reinstatement, granting leave to present the claim, foreclosed inquiry by the municipal court

in a subsequent case as to whether the claim had been presented prior to the date of the entry: *Busse & Borgmann Co. v. Upchurch*, 60 App 349, 12 OO 493, 21 NE(2d) 349.

13. This section is a statute of limitation: In re *Erbaugh*, 73 App 533, 29 OO 177, 57 NE(2d) 294 [affirming 24 OO 58 (PC)].

13.1 Under this section, a claimant who has failed to present his claim to the executor or administrator within the time prescribed under GC § 10509-112 (RC § 2117.06), due to a legal disability existing during such period, may have an extension of nine months and no longer and any claim not presented within such time is forever barred and may not be revived under any of the otherwise pertinent revivor statutes: *Overman v. Yake*, 68 OLA 248, 109 NE(2d) 697 (App).

13.2 This section, which provides the conditions under which a claim may be presented after four months, requires that such claim must be presented within nine months or be forever barred: *Conrad v. Sarver*, 97 App 199, 55 OO 453, 124 NE(2d) 749.

13.3 Where a claimant seeking to file a belated claim under RC § 2117.07, actually knew of decedent's death and in the exercise of reasonable diligence could have learned of the appointment of an administrator and thereafter had a fair opportunity to present his claim within the four months prescribed by RC § 2117.06, the probate court is chargeable with no error or abuse of discretion in denying such claimant authority to present such claim: In re *Miller*, 98 App 445, 57 OO 481, 129 NE(2d) 838.

13.4 Where such claimant, for the four-month period following the appointment of the administrator, was able to and did go about and look into his business and affairs, he was not under legal disability so as to come within this section: In re *Christman*, 100 App 133, 60 OO 129, 136 NE(2d) 80.

13.5 Knowledge of a decedent's post office address is not synonymous with knowledge of his place of legal residence: In re *Lathrop*, 103 App 392, 1 OO (2d) 482, 141 NE(2d) 212 (App).

13.6 The mere knowledge of the death of the decedent by the claimant shortly after it occurred, is not, in and of itself, sufficient to bar the presenting of a belated claim within the provisions of RC § 2117.07(A): In re *Lathrop*, 103 App 392, 1 OO(2d) 482, 141 NE(2d) 212 (App).

13.13 In considering legislative intent with respect to the enactment of this section, it is clear that the legislature in limiting subsection (B) to any wrongful act or statement upon the part of the executor or administrator or his attorney did not intend expressly or by implication to extend the provisions of the act to any wrongful act or statement of the decedent: In re *Natherson*, 102 App 475, 3 OO(2d) 35, 134 NE(2d) 852.

13.14 Under subsection (A) of this section, such late claims against the estate of a deceased physician may not be allowed where claimants had actual notice of the decedent's death at or about the time thereof by reading newspaper articles published at the time of that event: In re *Natherson*, 102 App 475, 3 OO(2d) 35, 134 NE(2d) 852.

13.15 Under subsection (B) of this section, in a proceeding to file late claims against the estate of a decedent by claimants who charge that such physician had concealed his negligence in a surgical operation, the alleged wrongful acts of the physician do not qualify claimant's belated claim where it is not claimed that there was any wrongful act on the part of the administratrix or her attorney, which would

qualify claimants for relief under this section, as the acts of decedent are not imputed to the administratrix or her attorney: In re *Natherson*, 102 App 475, 3 OO(2d) 35, 134 NE(2d) 852.

13.17 A person committed to a mental hospital for mental incompetency is of unsound mind within the definition of legal disability contained in subdivision (C) of this section and subdivision (B) of RC § 2131.02 and for which a belated claim may be filed: In re *Wyckoff*, 105 App 212, 6 OO(2d) 42, 152 NE(2d) 141.

13.19 This section, providing for the presentation of claims against an estate after four months, is remedial in nature and is to be construed liberally in favor of the claimant: In re *Howe*, 107 App 361, 8 OO(2d) 321, 159 NE(2d) 622.

13.20 Where a petition for authority to present a claim after the expiration of four months is filed under favor of this section, the nine-month period provided therein dates from the filing of such petition: In re *Howe*, 107 App 361, 8 OO(2d) 321, 159 NE(2d) 622.

13.21 An insurance adjuster's statement, attributable to the administrator, as to the time of the insured's death comes within that part of this section which provides that a court may authorize a claimant to present his claim if his failure to do so was due to "any wrongful act or statement on the part of the . . . administrator": In re *Howe*, 107 App 361, 8 OO(2d) 321, 159 NE(2d) 622.

13.22 The order of a probate court authorizing the presentation of so-called late claims to the executor of an estate pursuant to this section, is a final order affecting a substantial right in a special proceeding, and such order is subject to review on appeal: *Smith v. Boyers*, 110 App 291, 13 OO(2d) 70, 169 NE(2d) 479.

13.23 Where a petition is filed and summons issued in a negligence action, wherein the executor of an estate is defendant, on the last day before the expiration of the time for commencing such action, which petition contains allegations that a petition had been filed in the probate court for authority to present plaintiff's claim to such executor, and, on the same day, the petition to present such claim is filed in the probate court pursuant to this section, the order of the probate court, entered after the expiration of the statutory time for bringing such negligence action, and the presentation of such claim relate back to the time of the filing of the petition in the negligence action, and such action is deemed commenced as required by law: *Smith v. Boyers*, 110 App 291, 13 OO(2d) 70, 169 NE(2d) 479.

13.24 Where, upon hearing of a petition for authority to file a belated claim against a decedent's estate under authority of this section, the evidence shows that claimant actually knew of decedent's death and his place of residence shortly after the death occurred and that in the exercise of reasonable diligence the claimant could have learned of the appointment of an administrator and thereafter had a fair opportunity to present his claim within the four-month period prescribed by RC § 2117.06, the trial court is not guilty of an abuse of discretion in denying claimant authority to present his claim: In re *Kiko*, 83 OLA 555, 169 NE(2d) 138 (App).

13.25 The use of the word "may" in this section, relating to presentation of claims after four months, is permissive, not mandatory, and when the legislature gives such discretion to a court, they do so that he might exercise it within rather broad limits: In re *Kiko*, 83 OLA 555, 169 NE(2d) 138 (App).

13.26 This section provides that the probate court

may authorize a claimant under certain circumstances to present her claim to the executor after the four-month period from the date of appointment but within the nine-month period: *Bronson v. Haywood*, 84 OLA 471 (App).

15. The provisions of this section, relating to the reinstatement of a claim against an estate, may be invoked only when such claim has not been presented or its presentation has not been waived within four months after the appointment of the estate's legal representative, in accordance with the requirements of GC § 10509-112 (RC § 2117.06): *In re Erbaugh*, 73 App 533, 29 OO 177, 57 NE(2d) 294 [affirming 24 OO 58 (PC)].

20. Where a claimant against a decedent's estate was injured in an automobile accident, out of which his claim arose, and as a result of such injuries he suffered from shock, and for a period of six to eight weeks after the accident he was kept under sedatives and suffered from mental confusion, so that he was unable to look into his affairs, properly consult with counsel, prepare and present his case and assert and protect his rights in a court of justice, which condition covered approximately one-half of the four-month period, referred to in this section, the trial court did not commit error in granting claimant authority to present his claim after the expiration of the four-month period: *In re Price*, 87 App 23, 42 OO 272, 93 NE(2d) 769.

23. An order of the probate court granting leave to present a claim under this section, is a final order from which an appeal may be taken: *In re Fahle*, 90 App 195, 47 OO 231, 105 NE(2d) 429; but see *In re Bauman*, 26 OLA 595 (App).

24. In the absence of evidence that a creditor of a decedent has read a notice of the death or the appointment of an administrator of a decedent, proof of publication of such notice is insufficient to establish "actual notice" thereof as the term is employed in this section: *In re Fahle*, 90 App 195, 47 OO 231, 105 NE(2d) 429.

24.1 The words "brought pursuant to," as used in the last paragraph of RC § 2117.07 have been determined to be limited to deal only with claims as may be covered by RC § 2305.10. An action for wrongful death is not one of those claims, but deals only with bodily injury or injuring personal property: *King v. Hargis*, 37 OApp(2d) 92, 66 OO(2d) 142, 307 NE(2d) 40 (1973).

25. Where, however, an application for reinstatement of a barred claim, as provided by this section, is accompanied by the written consent of all interested parties, including creditors and beneficiaries of the estate, such a claim should be reinstated: *In re Dudley*, 8 OO 404 (PC).

26. When a claim is reinstated under the provisions of this section, the probate court has jurisdiction to direct the executor or administrator to pay the same in the order of priority set forth in said section: *In re McGuire*, 8 OO 409 (PC). Some of the other probate courts of the state, however, take the position that if they allow the claim to be reinstated their power is exhausted, that the claimant shall then present his reinstated claim to the executor or administrator who may accept or reject the same. If he rejects it, then the claimant must sue on the claim in a court of competent jurisdiction.

29. Where the claim against a deceased stockholder is based upon the double liability under the federal farm loan act, the right of action against such stockholder accrued at the time of the insolvency of the bank and the appointment of a receiver, and is not deferred until the federal court by which the receiver is appointed shall have determined what is the equal

and ratable assessment to be collected from each stockholder: *In re Christopher*, 11 OO 251 (App).

30. The failure of the guardian to present the claim during the four-month period does not deprive the minor of the benefits of this section: *In re Gress*, 28 OO 268, 13 OSupp 70 (PC).

33. If a claimant has in some way been brought to an intelligent apprehension of the death of the decedent, or of the appointment of the executor or administrator, so that a reasonable man or ordinary man of business would act upon the information and regulate his conduct thereby, he has "actual notice" as that phrase is used in this section: *In re Hamlin*, 40 OO 1, 87 NE(2d) 691 (PC), discussed in 19 CinLRev 288.

34. This section applies to claims that have not been presented within the time prescribed by law, but has no application to claims which have been presented and allowed, and which the probate court has ordered rejected under GC § 10509-135 (RC § 2117.13): *Homan v. Lightner*, 20 OLA 76.

35. The fact that creditors do not file their claims promptly after the accrual of the cause of action against a bank stockholder or his executor may be considered by the probate judge when an application is made for reinstatement of the claim under this section: *Holmberg v. Third Nat. Bank &c. Co.*, 27 OLA 58.

36. It is not an abuse of discretion for the probate court to refuse to permit reinstatement of a claim under this section, where the negotiations between the creditor and administrator constituted in law a waiver of formal presentation and there was an allowance of the amount originally claimed to be due as shown by the creditor's books, but after examination of the books by an auditor the application was made to file claim for a much larger amount: *In re Leatherman*, 30 OLA 383.

37. It is not a prerequisite to the granting of authority to reinstate and file a claim with an executor or administrator, under this section, that proof be made as to the merits thereof. Upon reinstatement under such section, the probate court is without authority to order payment of the claim out of the estate; the only effect of the reinstatement of a barred claim is to require the executor or administrator, upon presentation, to allow or reject it as provided by GC § 10509-113 (RC § 2117.11): *In re Shartle*, 34 OLA 203, 36 NE(2d) 534.

38. The court may reinstate a barred claim under the provisions of this section where there is sufficient evidence in the record to sustain a finding that the failure of the claimant to present his claim within the four months' period was due to pending negotiations for the purchase of the property and to statements by the executor to the claimant's attorney that he could not allow the claim for funeral expenses at the time because he had ascertained that part of it had been paid by a lodge and part by the claimant: *In re Valencic*, 42 OLA 478 (App).

39. No rights can inure to a claimant under this section who fails to take any action necessary to invoke the provisions of the statute: *Prudential Ins. Co. v. Joyce Bldg. Realty Co.*, 44 OLA 481, 65 NE(2d) 516 (App).

41. Despite the fact that the permissive "may" rather than the mandatory "shall" is used in GC § 10509-134 (RC § 2117.07), designating the authority of the court of probate to permit a claimant to file a claim with an administrator more than four months after his appointment, said court abused its discretion when, in the face of a clear showing of a legal disability within the meaning of GC §§ 10512-2 and 10509-134 (RC §§ 2131.02 and 2117.07), it dismissed

claimant's petition for authority to file his alleged claim with the administrator after the four months period: *In re Gogan*, 63 OLA 69, 108 NE(2d) 170 (App).

46. Revised Code § 2117.07 providing that claims other than contingent claims, not presented to an estate within nine months after the appointment of an executor or administrator are forever barred is mandatory and must be complied with and the fact that a claimant was negotiating with decedent's insurance carrier who failed to inform her of decedent's death until after the nine-month period does not except claimant from the operation of its provisions: *In re Tomko*, 77 OLA 313, 3 OO(2d) 371, 146 NE(2d) 757 (PC) [affirmed 3 OO(2d) 374, 146 NE(2d) 761].

47. The proper procedure to reinstate a claim against an estate after the expiration of the four-month period for filing claims is by petition in the probate court and not by filing the claim with the administrator, and the failure to properly present such claim within the nine-month period as provided in this section bars the claim: *Wilcox v. Ceschiat*, 87 OLA 225, 179 NE(2d) 544 (CP).

49. A petition for the late filing of claims in an estate may only be allowed if one of the three grounds set forth in this section exists, and the fact that through an error of the clerical staff in the probate court a claim was sent to the wrong address is not one of such grounds: *Krash v. Jarvis*, 90 OLA 99, 187 NE(2d) 409 (App).

51. This section as amended lengthens and stretches the nine-months statute of limitation expressly provided by it to the full two-year statute of limitation provided for by RC § 2305.10 for actions involving injury to person or property, provided only that any recovery in that event not be satisfied from the assets of the estate: *Baker v. Farish*, 30 OO(2d) 606, 1 OMisc 1, 202 NE(2d) 331 (CP).

53. The absence of an executor from his residence for seven days before the expiration of the period for filing claims, without having arranged to receive his mail, is a wrongful act within the meaning of this section, such as will permit the probate court to authorize presentation of the claim of one who, five days before the deadline, had mailed a statement of her claim to the executor's residence: *In re McCracken*, 38 OO(2d) 283, 9 OMisc 195, 224 NE(2d) 181 (PC).

54. Where the question of the validity of filing a claim prior to the expiration of the four months after the appointment of the executor, and the question of authority to file a claim after said four-month period under the provision of this section, were considered by the probate court, the common pleas court, on an appeal from an order authorizing the filing of the claim must consider both the questions: *In re Clark*, 40 OO(2d) 347, 11 OMisc 103, 229 NE(2d) 122 (CP).

55. The 1963 amendment of this section permits an action for bodily injury or injuring personal property to be pursued against an executor without compliance with the requirements of that section for presentation of claims, provided that any recovery thereby adjudged is not permitted to be satisfied from the assets of the estate: *In re McDonald*, 44 OO(2d) 262, 15 OMisc 74, 239 NE(2d) 277 (PC).

56. An action which is filed against an executor pursuant to the last paragraph of this section may result in a judgment which can be satisfied from the rights accruing under a policy of liability insur-

ance issued to the decedent: *In re McDonald*, 44 OO(2d) 262, 15 OMisc 74, 239 NE(2d) 277 (PC).

57. A petition for leave to file a claim against a decedent's estate under this section will not be allowed if the claimant knew of the appointment of the executor or administrator in sufficient time to present his claim within the statutory time provided in RC § 2117.06: *In re Herron*, 49 OO(2d) 27, 21 OMisc 212, 252 NE(2d) 332 (PC).

§ 2117.08 Authentication of claims. (GC § 10509-114)

When a claim is presented against the estate of a deceased person, the executor or administrator may require satisfactory written proof in support of it and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no counterclaims against it to his knowledge. Such affidavit shall set forth any security held for the payment of said claim and, if the claim is not due, the date of maturity. If said claim arises out of tort, or if preference in payment is claimed, the facts in connection with the alleged tort or showing the right to such preference shall be briefly set forth.

HISTORY: GC § 10509-114; 114 v 320 (427); 119 v 394 (408), § 1. Eff 10-1-53. Analogous to former GC § 10717.

Forms

1 A&H Probate FORM 2117.08a et seq.

Research Aids

Authentication of claims:

O-Jur2d: Executors and Administrators § 311

Am-Jur2d: Executors and Administrators § 300

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Scope and construction

1. Former GC § 10717 (see now RC § 2117.08) must be limited according to its terms to personal obligations of the decedent, and has no application to a case in which it is sought to assert title, legal or equitable, in specific property in the hands of the personal representative: *Groat v. Wilkinson*, 23 NP (NS) 381.

Necessity of allowance

7. In an action against an administrator, the objection that the claim sued on was not presented for allowance before the action was brought, is waived,

- where the administrator joins issue and goes to trial on the validity of the claim without objection: *Pep-per v. Sidwell*, 36 OS 454; *Devereaux v. Hutchinson*, 16 CC(NS) 447, 31 CD 619 [affirmed, without opinion, 78 OS 415; see also 21 CC(NS) 462, sub nomine, 33 CD 391].
8. Where the same person is administrator of the creditor as well as the debtor estate, no formal pres-entation or allowance of the claim within the statu-tory period is necessary: *Thomas v. Chamberlain*, 39 OS 112.
9. Where a claim against an estate has been duly presented to and allowed by the administrator, no fur-ther allowance by a succeeding administrator de bonis non is required by statute: *Thomas v. Chamberlain*, 39 OS 112.
10. A devise of an annuity is not a "claim" within the meaning of this section and such devisee need not file his claim with the executor for allowance or disallowance: *Hunt v. Hayes*, 19 CC 151, 10 CD 388.
11. Where the surety upon an unpaid promissory note dies and the principal maker thereof is appointed and qualified as administrator of such surety's estate, the debt represented by such note is not chargeable as assets in the hands of the administrator, before the estate has been required to pay the same or it has been presented and allowed as a valid claim against the estate: *Urpman v. Urpman*, 1 App 476, 21 CC (NS) 600, 25 CD 442.
- Presentation**
17. Where an administrator has seen and examined a duly authenticated claim against the estate, and is subsequently requested to allow it, which he refuses to do, the claim being at the time present in the pocket of the owner, of which the administrator has full knowledge, a formal presentation is not neces-sary, but may be presumed to have been waived: *Kyle v. Kyle*, 15 OS 15.
18. A demand for a legacy need not be presented before suing: *Webster v. American Bible Soc.*, 50 OS 1, 33 NE 297.
19. Presentation of a note, executed by deceased, to the administrator with a request for partial pay-ment, but with the statement that the administrator need not hurry, sufficiently "exhibits" the claim. The claimant need not formally present it with a demand that the administrator indorse his allowance thereon: *Miller v. Ewing*, 68 OS 176, 67 NE 292.
20. A claim against an estate may be orally pre-sented to the executor or administrator, and may be orally allowed by him: *Weber v. Kohn*, 60 App 64, 13 OO 424, 19 NE(2d) 534.
21. A claim against a decedent's estate need not be in any particular form so long as it is in substan-tial compliance with RC § 2117.06 and recognized by the fiduciary as a claim against the estate: *Glad-man v. Carns*, 9 OApp(2d) 135, 38 OO(2d) 149, 223 NE(2d) 378.
22. If a guardian has rendered services to an imbe-cile ward, allowance for services and compensation is, by former GC § 10953 (see now RC §§ 2109.23, 2127.37), to be determined by the court settling the guardian's account; and, it not being a personal claim against the ward, it need not, in case of his decease, be presented to his personal representatives: *Scatter-good v. Ingram*, 86 OS 76, 98 NE 923 [for later report in same case, see 89 OS 460; which reversed in memo-randum opinion, *Ingram v. Scattergood*, 15 CC(NS) 93, 23 CD 269].
23. The administrator may require proof by vouch-ers and affidavit, but unless he requires it, such strict formal presentation is not necessary: *Morgan v. Bart-lette*, 3 CC 431, 2 CD 244.
24. A judgment against the administrator need not be again presented for allowance: *Williams v. Brad-ley*, 5 CC 114, 3 CD 58.
25. No presentation or rejection is necessary of a claim against an administrator, where the claim was in suit at the time of the death of the defendant and the petition stated facts sufficient to constitute a cause of action; such a cause may proceed to judgment: *Glass v. Buzzard*, 14 CC(NS) 427, 23 CD 144 [af-firmed, without opinion, *Buzzard v. Glass*, 85 OS 461].
26. It is not a condition precedent to the enforce-ment of stockholders' liability against the estate of a decedent, that the claim be presented to the executor: *Roebing Sons Co. v. Shawnee Val. Coal &c. Co.*, 4 NP(NS) 113, 17 OD 8 [judgment of circuit court af-firmed, without opinion, 78 OS 408]; *Hull v. Standard Coal &c. Co.*, 7 NP 157, 7 OD 527.
27. Where the estate derives a benefit from the use, by a third person, of his own money, at the re-quest of the executrix, in paying taxes and thus saving the property from sacrifice, the estate is liable for such indebtedness, and the nature of this claim is such that it is not necessary to its validity that it be formally presented to the executrix within the pre-scribed time: *Stillman v. Holmes*, 9 NP(NS) 193, 20 OD 84.
- Elements of allowance**
32. The executor or administrator has the right to take a reasonable time, after the presentation of a claim for allowance, to determine whether such claim ought to be allowed or rejected: *Keenan v. Saxton*, 13 O 41.
33. Payment of part of a claim by an administrator without disputing the balance is a sufficient allow-ance of the whole claim: *Thomas v. Chamberlain*, 39 OS 112.
34. Where an executor agreed with a mortgage creditor, who had obtained decrees for the sale of the mortgaged premises, to sell the lands and pay the decrees out of the proceeds before paying other debts, such agreement in effect "allowed" the decrees as valid claims against the estate of the mortgage debtor: *Western Reserve Bank v. McIntire*, 40 OS 528.
35. Not disputing or rejecting a claim is a sufficient allowance of it. Formal indorsement of allowance not indispensable: *Smock v. Bouse*, 12 CC 46, 5 CD 293.
36. Although payment by an administrator of separ-ate interest notes may not be an allowance of the claim on the principal note, a continuance by the administrator to pay the interest on the principal note for some years after it became due does amount to an allowance of the note as a just claim against the estate. And the allowance will be treated as of the date of the payment of the first interest note: *Kemper v. Apollo Bldg. &c. Co.*, 5 NP(NS) 403, 18 OD 484.
- Effect**
42. By the allowance of a claim by the administra-tor, the statute of limitations ceases to run against it: *Thomas v. Chamberlain*, 39 OS 112.
43. The allowance of a claim, when exhibited or presented to an administrator for allowance, is not conclusive against the estate as to its validity: *Thomas v. Chamberlain*, 39 OS 112.

§ 2117.09 Disputed claims. (GC §§ 10509-115, 10509-116, 10509-117)

If an executor or administrator doubts the justice of any claim presented against the estate

he represents, he may enter into an agreement in writing with the claimant to refer the matter in controversy to three disinterested persons, who must be approved by the probate judge.

Upon filing the agreement of reference in the probate court of the county in which the letters testamentary or of administration were issued, the judge shall docket the cause and make an order referring the matter in controversy to the referees selected.

The referees thereupon must proceed to hear and determine the matter and make their report to the court. The referees shall have the same powers and be entitled to the same compensation and the same proceedings shall be followed as if the reference were made under the provisions for arbitrations under a rule of the court of common pleas. The court may set aside the report of the referees, appoint others in their places, or confirm such report and adjudge costs as in actions against executors and administrators. The judgment of the court thereupon shall be valid and effectual.

HISTORY: GC §§ 10509-115, 10509-116, 10509-117; 114 v 320 (427). **EFF** 10-1-53. Analogous to former GC §§ 10718, 10719, 10720, 10721.

Cross-References to Related Sections

Ohio arbitration act, RC § 2711.01 et seq.

Forms

1 A&H Probate FORM 2117.09a et seq.

Outline of Procedure

Claims of creditors, referring to disputed claims. Leyshon No. 53; A&H No. 23.

Research Aids

Disputed claims:

O-Jur2d: Executors and Administrators § 320;
Arbitration and Award § 22

Am-Jur2d: Executors and Administrators § 257

ALR

Necessity of presenting claim against decedent's estate as affected by executor's or administrator's personal duty or obligation to claimant. 103 ALR 337.

Who entitled to contest, or appeal from, allowance of claim against decedent's estate. 118 ALR 743.

Right of executor or administrator to contest court's rejection of claim against decedent's estate. 129 ALR 922.

Arbitration as issues or questions pertaining to probate matters. 104 ALR 359.

Law Reviews

Necessity for presenting tort claims to executors and administrators. Article by Judge Carl A. Weinman. 11 OO 429.

CASE NOTES AND OAC

Disputed claims

1. The executor or administrator is a trustee for the benefit of creditors of the estate: Kilbourne v. Fay, 29 OS 264.

2. An executor or administrator has the power, at common law, to submit to arbitration a disputed claim against the estate. This power is not affected by the above statute, which is cumulative merely: Child v. Updyke, 9 OS 333.

3. Parties may waive objection as to manner of swearing arbitrators. The court may order a remittitur of what, in its opinion, is excessive in an award by an arbitrator, even though it is agreed by the parties that the award should be final: Jeffer v. Pross, 11 Bull 102.

4. Where the justice of a claim exceeding one hundred dollars is doubted by an executor or administrator, and he enters into an agreement to refer the matter to three disinterested persons, the referees shall be approved by the probate judge; but this does not authorize the probate judge or the probate court to receive the report of the referees, or to act upon it, for when the probate judge approves of the referees, his duty and authority in the matter end, and the reference must be perfected in, and the report of the referees made to, the court of common pleas, and there disposed of: Anderson v. Baker, 15 OS 173.

5. In a proceeding by an administrator to sell real estate to pay judgments entered upon awards of arbitrators, it is competent for the heir, upon a cross-petition in the same proceeding, to attack said judgments for fraud: Conway v. Duncan, 28 OS 102.

6. The burden to establish the credibility of a claim against an estate for services rendered is on the administrator where he initially allows such a claim: In re Bowman, 102 App 121, 2 OO(2d) 118, 141 NE (2d) 499.

7. A disputed proper claim may be settled if it is provable: Roberts v. Hickerson, 11 OO 471, 26 OLA 616, 46 NE(2d) 803.

8. A probate judge, in fixing fees and taxing them as costs, may use RC § 2315.35, since the arbitration provisions were repealed: Williard v. Kilbourne, 34 OLA 491, 38 NE(2d) 92 (1941).

Reference of claim

12. In a proceeding by an administrator to sell real estate to pay judgments entered upon awards of arbitrators, it is competent for the heir, upon a cross-petition in the same proceeding, to attack said judgments for fraud: Conway v. Duncan, 28 OS 102.

§ 2117.10 Failure of lienholder to present claim. (GC § 10509-123)

The failure of the holder of a valid lien upon any of the assets of an estate to present his claim upon the indebtedness secured by such lien, as provided in Chapter 2117. of the Revised Code, shall not affect such lien if the same is evidenced by a document admitted to public record, or is evidenced by actual possession of the real or personal property which is subject to such lien.

HISTORY: GC § 10509-123; 114 v 320 (429); 119 v 394 (411), § 1 (**EFF** 10-1-53); 130 v 619. **EFF** 1-23-63.

Analogous to former GC § 10716.

Research Aids

Failure of lienholder to present claim:

O-Jur2d: Executors and Administrators § 294

Am-Jur2d: Executors and Administrators § 296

CASE NOTES AND OAC

1. Upon the decease of a debtor his estate, real and

personal, stands for the payment of his general creditors alike, and one creditor cannot, by superior diligence, acquire a superior right over the others: *McDonald v. Aten*, 1 OS 293.

2. It is the duty of an executor, with reference to property subject to a chattel mortgage, but which is declared void as to creditors, to defend his possession against the claim of the mortgagee, notwithstanding such mortgage was valid as against the mortgagor: *Kilbourne v. Fay*, 29 OS 264.

3. No lien, legal or equitable, shall be impaired by an administrator, who is to a certain extent a trustee for the benefit of a mortgagee as well as other creditors of the decedent: *Lingler v. Wesco*, 79 OS 225, 86 NE 1004, 21 LRA(NS) 182, 128 AmSt 714.

4. Where property, subject to the lien of a chattel mortgage, is taken possession of by the administrator and sold by him, the mortgagee is not authorized to maintain an action to foreclose his mortgage. He must assert his lien against the fund arising from the sale by the administrator: *Whitely v. Weber*, 2 CC 336, 1 CD 517.

5. If a creditor of the estate of a decedent who claims that his mortgage is prior to another mortgage given by such decedent in his lifetime, accepts a mortgage upon decedent's realty after his death, executed by his heirs, such creditor does not waive his priority over such other mortgage, especially if the mortgage which such creditor accepts from such heirs provides expressly that such creditor by the acceptance of such mortgage did not admit a priority of such other mortgage: *Schell v. Bernhard*, 25 CC(NS) 411, 26 CD 39 [appeal from 24 OD(NP) 182].

6. The exceptions provided in this section, that the failure of the holder of a lien on any asset of an estate to present his claim shall not affect such lien if it is evidenced by a document admitted to record or by actual possession of the property which is subject to such lien, are conditioned upon the requirement that the excepted lien be "evidenced" by a public record or by actual possession: *Kuhnle v. Rumsel*, 113 App 389, 17 OO(2d) 465, 178 NE(2d) 810.

7. Where the mortgagor of goods dies, and his administrator proceeds to administer same, the mortgagee cannot maintain an action of replevin against the administrator for the possession of the mortgaged property, even though the condition was broken before the mortgagor's death. The mortgagee's interest in the property is transferred to the fund arising from the sale by the administrator: *Linghler v. Kraft*, 3 NP(NS) 653, 16 OD 474.

8. Where a mother died intestate having record title to real estate which descended to her daughter who alleged that she had advanced a substantial sum toward the purchase price of the real estate but had no lien evidenced by a recorded document or by actual possession of the property, the inheritance tax will be imposed upon the full value of the real estate: *In re Philhower*, 34 OO(2d) 415, 215 NE(2d) 627 (PC).

9. Bankruptcy act giving trustee right of lien creditor held not to create such lien as, under state statute, would preclude allowance to bankrupt's widow: *Seigel v. Wells*, 55 F(2d) 877; *In re Seigel*, 54 F(2d) 269.

§ 2117.11 Rejection of a claim. (GC § 10509-113)

An executor or administrator shall reject a creditor's claim against the estate he represents by giving the claimant written notice of the dis-

allowance thereof. Such notice shall be given to the claimant personally or by registered mail with return receipt requested, addressed to the claimant at the address given on the claim. Notice by mail shall be effective on delivery of the mail at the address given. A claim may be rejected in whole or in part. A claim which has been allowed may be rejected at any time thereafter.

A claim is rejected if the executor or administrator, on demand in writing by the claimant for an allowance thereof within five days, which demand may be made at presentation or at any time thereafter, fails to give to the claimant, within such period, a written statement of the allowance of such claim. Such rejection shall become effective at the expiration of such period.

HISTORY: GC § 10509-113; 114 v 320 (426); 119 v 394 (408), § 1. Eff 10-1-53. Analogous to former GC § 10723.

Cross-References to Related Sections

See RC § 2117.17 which refers to this section.

Forms

1 A&H Probate FORM 2117.11a et seq.

Research Aids

Rejection of claim:

O-Jur2d: Executors and Administrators § 314

Am-Jur2d: Executors and Administrators §§ 303, 304

Law Review

Ohio statutes of limitation on claims against estates. Francis J. Eberly. 16 OSLJ 206.

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1. The phraseology of the last clause, when contrasted with the other sections, seems to indicate that its principal object is to compel a doubting or distrustful executor or administrator to allow the claim or to submit to an action for its enforcement. The provision is a beneficial one, and should be fairly construed. Its object is attained when the creditor is advised by the executor that his claim is rejected, and the policy of the statute then requires him to institute proceedings without delay. If such rejection is distinctly declared, and the creditor told so to regard it, no beneficial purpose can be attained by requiring a written indorsement of an allowance which he is already advised the executor will not make. The proof of rejection must, necessarily, still rest in parol, unless the executor should perform an act which the statute nowhere enjoins, by indorsing his rejection upon the claim: *Harter v. Taggart*, 14 OS 122-126.

2. Again the court said, "We do not conceive that by the statute or under the authority of the case referred to, the right to sue depends upon an indorsement on the claim of its disallowance, or upon the

fact that the creditor has made a specific demand that the allowance of the claim be indorsed thereon. That an unequivocal rejection of the claim should be obtained before suit is brought is undoubtedly true; but the only purpose of the last clause in the section of the statute referred to, is to make a refusal on the part of the executor or administrator to indorse his allowance, when demand is made for that purpose, conclusive proof of its rejection": *Stambaugh v. Smith*, 23 OS 584.

5. The probate court is without authority to determine and pass upon the merits of a claim rejected by an administrator in compliance with this section. The claimant's exclusive recourse, after such rejection, is the commencement of an independent action within the time prescribed in GC § 10509-133 (RC § 2117-12): In *re Buchanan*, 82 App 240, 37 OO 557, 81 NE(2d) 409.

6. Presentment and rejection of claim are conditions precedent to bringing action on claim, and neither oral compliance nor service of a copy of petition on the corporate executor are sufficient: *Morgan v. City Nat. Bank &c. Co.*, 40 OApp(2d) 417, 33 OO(2d) 504, 212 NE(2d) 822.

8. Filing of exceptions to the administrator's final account is not the proper proceeding, but the creditor shall file suit upon a claim within two months after rejection of the claim or proceed under this section in the event of the failure of the administrator to take any action: In *re Heimberger*, 6 OO 51 (PC).

9. A claimant may invoke the provisions of this section and demand that an allowance as a valid claim be indorsed and, upon refusal, the statute proclaims that such refusal is a rejection of the claim: *Reese v. Chapman*, 23 OLA 641.

10. Claimants desiring to make amendment may protect themselves from the time limitation by presenting same immediately to the personal representative with demand for indorsement of allowance as provided by this section; if, however, the personal representative refuses to make such indorsement, the claim becomes at once a disputed or rejected claim: *Chronerberry v. Bartel*, 32 OLA 284.

11. To constitute a rejection of a claim something must be done by the executor or administrator to show that he does not intend to pay the claim and such rejection must be plain and unequivocal and the mere indication by the administrator that he does not want to pay the claim is not sufficient: In *re Douglass*, 77 OLA 89, 144 NE(2d) 924 (PC).

12. The purpose of the statute providing that a rejection of a claim by an executor or administrator shall be personally or by registered mail is to provide a conclusive method of showing a rejection and is not intended to be a sole method of rejection: In *re Douglass*, 77 OLA 89, 144 NE(2d) 924 (PC).

13. Under RC § 2117.11 a claimant does not have any duty to make any demand on the executor or administrator for allowance of his claim and a presumption of rejection arises only if such demand is made: In *re Douglass*, 77 OLA 89, 144 NE(2d) 924 (PC).

14. A letter by an administratrix wherein she first specifically rejects a claim but later in the same letter offers to compromise such claim is equivocal and does not constitute a rejection of such claim: In *re Douglass*, 77 OLA 89, 144 NE(2d) 924 (PC).

15. The suit brought on a rejected claim is a civil action, and not a special proceeding: *Kennedy v. Thompson*, 3 CC 446, 2 CD 254.

16. Where the executor upon the presentation of the claim did not deny its validity but merely claimed the right of paying it in wheat, there was neither an

acceptance nor rejection of the claim: *Keenan v. Saxton*, 13 O 41.

17. The probate court has no jurisdiction to instruct the administrator whether he should allow or reject the claim: *Jackson v. Jackson*, 5 Bull 647.

18. In a nisi prius case, the evidence showed that, "On the 11th day of April last the plaintiff handed to Perry G. Walker, Esq., one of the defendants, a written statement of the taxes standing charged upon the tax duplicate of this county against the estate of Mary Barney, deceased. About ten days or two weeks thereafter plaintiff spoke to Mr. Prout, Walker's co-executor, about the payment of the taxes. Prout then requested him to defer payment for a short time for the purpose of determining whether an adjustment of the matter might not be reached. A short time after the above conversation he again met Mr. Prout, when he (Prout) said, 'all I can say in reference to the tax matter is, 'No!'" After considering the decisions of the supreme court, the judge concluded: "The object of the statute referred to is to give the executor or administrator time and opportunity to investigate, and inquire into the merits of the claim and prevent needless and vexatious litigation and wasting the estate in useless costs and expenses. It is the opinion of the court that the evidence shows that the executors had ample time and opportunity to inquire into the merits of the claim, and that upon mature deliberation they decided to reject it. And we are also of the opinion, as a conclusion of law, that a right of action on said claim accrued to plaintiff from the time such decision was reached by the executor, whether he was cognizant of such decision or not": *Treasurer v. Walker*, 22 Bull 106.

§ 2117.12 Action on rejected claim barred. (GC § 10509-133)

When a claim against an estate has been rejected in whole or in part but not referred to referees, or when a claim has been allowed in whole or in part and thereafter rejected, the claimant must commence an action on the claim, or that part thereof rejected, within two months after such rejection if the debt or that part thereof rejected is then due, or within two months after the same becomes due, or be forever barred from maintaining an action thereon. If the executor or administrator dies, resigns, or is removed within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor.

For the purposes of this section, the action of a claimant is commenced when the petition and praecipe for service of summons on the executor or administrator have been filed.

HISTORY: GC § 10509-133; 114 v 320 (431); 116 v 385 (400), § 1; 119 v 394 (412), § 1. Eff 10-1-53. Analogous to former GC § 10722.

Cross-References to Related Sections

Creditor, suit against heir or devisee, RC § 2117.37 et seq.

Statute of limitations generally, RC § 2305.03 et seq.

Suits against executor or administrator generally, RC § 2117.30.

Comparative Legislation

Suits against executor or administrator:

- Cal.—Probate Code, § 703
- Ill.—Rev Stat, ch 3, § 18-6
- Ind.—Burns' Stat, § 29-1-14-2
- Ky.—KRS, § 396.020
- Mich.—MCLA, § 708.22
- N.Y.—SCPA, § 2102
- Pa.—Purdon's Stat, Tit. 20, § 3383
- Fla.—FSA, § 733.705

Forms

- 1 A&H Probate FORM 2117.12a et seq.

Research Aids

Action on rejected claim:

- O-Jur2d: Executors and Administrators §§ 605, 606
- Am-Jur2d: Executors and Administrators §§ 740-743

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Failure of executor, administrator or guardian to give additional bond; effect on sale of decedent's or ward's land. (Case note.) 4 OO 193.

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1. Where a claim for the superadded liability is presented by the superintendent of banks to the personal representative of a decedent for allowance, and such personal representative rejects such claim and the superintendent of banks does not within two months thereafter commence his suit for recovery against such personal representative, he is forever barred from maintaining an action thereon, as provided by this section: State ex rel Fulton v. Bremer, 130 OS 227, 4 OO 242, 198 NE 874.

2. Where a definite claim for superadded liability assessed on bank stockholders is presented by the superintendent of banks to an executor and rejected, the right to institute an action thereon accrues immediately: State ex rel Fulton v. Coburn, 133 OS 192, 10 OO 249, 12 NE(2d) 471.

3. Where it is claimed that an administrator failed to set up the bar provided in this section, as a defense to an action on a rejected claim commenced under this section, as amended 116 v 385, 400, the burden is upon the executors to show that such action was not duly commenced within two months after receipt by the claimant of actual notice of the rejection by the administrator of a claim duly presented under GC

§ 10509-112 (114 v 320, 426) (RC § 2117.06): In re Lamberton, 142 OS 417, 27 OO 356, 52 NE(2d) 855 [reversing 24 OO 14 (PC)].

4. A failure to file suit within two months of the rejection by an administrator of a claim does not bar the action where no part of the sought recovery will come from the "assets of the estate." Collins v. Yanity, 14 OS(2d) 202, 43 OO(2d) 301, 237 NE(2d) 611 (1968).

5. The presentation to an executor or administrator of a wrongful death claim by one of the statutory beneficiaries meets the standard of RC §§ 2117.06 & 2117.07 and is not barred under this section: Burwell v. Maynard, 21 OS(2d) 108, 50 OO(2d) 268, 255 NE(2d) 628 (1970).

6. An action for services rendered to a decedent commenced six months after the administrator rejected claim is barred by the statute of limitations. A presentation of a claim does not constitute commencement of a pending proceeding under the statute: Matthews v. Raff, 45 App 242, 39 OLR 58, 15 OLA 94, 186 NE 887; Bank v. Raff, 76 F(2d) 843; see also 4 FSupp 230.

7. Action to compel surety of administrator to pay claim allegedly allowed by administrator is not barred in statutory time for bringing action against administrator on rejected claim (former GC §§ 10722 [see now RC § 2117.12], 10869 [repealed, 114 v 320]): Bowman v. Delaney, 46 App 109, 187 NE 788, 39 OLR 264.

8. Where a trust company, having been appointed executor under a will and having served as such for a period exceeding nine months, not, however, having fully administered the estate, is taken over by the superintendent of banks for liquidation, and an administrator de bonis non is appointed at a later date, a cause of action accruing against the deceased in the interim must be brought against the administrator within two months after such administrator is appointed: State ex rel Squire v. Cleveland Trust Co., 58 App 16, 11 OO 420, 15 NE(2d) 640.

8.1 When a claim is first allowed, then later rejected, the statute of limitations runs from the date of rejection: Weber v. Kohn, 60 App 64, 13 OO 424, 19 NE(2d) 534; Parrish v. McKee, 73 OLA 65, 59 OO 316, 135 NE(2d) 486; Reese v. Chapman, 23 OLA 641.

9. Exceptions filed to a schedule of debts in the probate court do not, in and of themselves, preclude the exceptor from pursuing his claim by action in the court of common pleas, if such suit is brought in compliance with this section: Pfeiffer v. Sheffield, 64 App 1, 17 OO 305, 27 NE(2d) 494.

9.1 A claim of a funeral director for funeral expenses founded on a contract with the decedent during his lifetime may be maintained under this section in some other forum than probate court once the claim is rejected by the executor: Schroyer v. Hopewood, 65 App 443, 19 OO 45, 30 NE(2d) 440, 32 OLA 511.

9.2 Where an appointment of an executor for a deceased nonresident is filed in probate court in accordance with RC § 2129.02, the filing of a claim within six months is not governed by this section: Foulks v. Talbott, 74 App 281, 29 OO 434, 58 NE(2d) 790.

9.3 Revised Code § 2117.12, which provides for a suit on a rejected claim to be brought within two months provided, not an exclusive, but only an alternative remedy: In re Hedges, 75 App 518, 31 OO 301, 62 NE(2d) 613.

10. Acceptance by the state of payments less than the prescribed statutory amount for care in a state

mental hospital does not waive the state's claim for the balance: *Ohio v. Security Central Nat'l Bank*, 100 App 425, 60 OO 346, 137 NE(2d) 158.

10.1 The division of aid for the aged, department of public welfare of the state of Ohio, is not subject to the limitation provisions of this section, barring an action on a rejected claim against an estate where not commenced within the time allowed: *Division of Aid v. Mull*, 105 App 305, 6 OO(2d) 100, 152 NE(2d) 295.

11. An action against an executor which alleges an oral demand and an oral rejection does not state a claim on which relief may be granted: *Morgan v. City Nat'l Bank*, 4 App(2d) 417, 33 OO(2d) 504, 212 NE(2d) 822 (1964); *Heitz v. Iredale*, 36 OLA 558, 44 NE(2d) 720.

11.1 The provisions of CivR 3(A) and CivR 4 are fully applicable to proceedings brought under RC § 2117.12, so that the requirement that a praecipe be filed, to either commence an action or generate the process of issuing summons, is eliminated: *Yancey v. Pyles*, 44 OApp(2d) 410, 73 OO(2d) 530, 339 NE(2d) 835 (1975).

12. Where a claim is rejected in Ohio, an action commenced in another state seven months after the rejection cannot be enforced on the Ohio estate. In *re Rettig*, 8 OMisc 38, 35 OO(2d) 141, 216 NE(2d) 924.

12.1 A probate court cannot re-obtain jurisdiction over a rejected claim through the device of a declaratory judgment for specific performance: *Mainline Construction v. Warren*, 11 OMisc 233, 40 OO(2d) 509, 227 NE(2d) 432.

13. The limitations upon the bringing of actions upon rejected claims provided by this section, or upon suits of a creditor against an administrator, under GC § 10509-144 (repealed, 116 v 385, § 5), are not limited in their application to claims required to be presented for allowance or rejection: *Swearingin v. Rendigs*, 5 OO 457 (App).

13.1 Where debt is not due, no action on a claim may be maintained: In *re Method*, 10 OO 489, 26 OLA 209, 2 OSupp 225.

14. Under this section, an appeal from the rejection by an executor of a claim against decedent's estate must be made by way of a civil action for a money judgment. The probate court has no jurisdiction to entertain such a suit: *Flax v. Oppenheimer*, 12 OO 48 (CP).

15. An administrator is without authority to waive any statute providing for the limitation of action set forth in the probate act affecting the administration of estates: In *re Lamberton*, 25 OO 14 (PC).

17. This section is clearly a statute of limitation and does not bind the sovereign: *Baker v. Charles*, 31 OO(2d) 310, 202 NE(2d) 646 (PC).

18. A creditor who presents a claim to the personal representative of a decedent for allowance but fails to commence his suit within two months after such claim has been rejected, is forever barred by this section from maintaining an action thereon: In *re Rettig*, 35 OO(2d) 141, 216 NE(2d) 924 (PC).

19. This section applies to creditors of the estate other than the executor or administrator: In *re Grube*, 21 OLA 1.

21. A claim for superadded liability against the estate of a deceased bank stockholder prior to the making of an assessment is a contingent claim only, and is governed by the limitation in GC § 10509-144 (repealed, 116 v 385, § 5): *State ex rel Fulton v. Blackburn*, 26 OLA 381.

22. The failure of the executor to plead the bar of GC § 10509-144 (repealed, 116 v 385, § 5) does not

preclude its enforcement: *State ex rel Fulton v. Blackburn*, 26 OLA 381.

23. The rejection by an administrator of a claim must be unequivocal in order to start the time running within which an action on the claim must be commenced: *Martin v. Spellman*, 30 OLA 225.

26. The portion of this section, providing that one asserting a claim against the estate of a deceased person must commence an action on his rejected claim within two months after receipt of actual notice of its rejection or be forever barred from maintaining an action thereon, is a statute of limitation within the rule that such enactments do not run against the state: *Division of Aid v. Marshall*, 42 OLA 131, 59 NE(2d) 942 (App); *Chronerberry v. Bartel*, 32 OLA 284.

27. The state and its agencies are bound by this section upon receipt of actual notice of claim rejection: *Division of Aid for Aged v. Wargo*, 48 OLA 47, 73 NE(2d) 701 (1947); *State v. Drake*, 47 OO 401, 106 NE(2d) 91 (CP).

28. A claimant against a decedent's estate, other than a claimant who is also administrator or executor of said estate, must proceed under the provisions of GC § 10509-112 (RC § 2117.06) et seq, and if his claim is rejected by the executor or administrator, must bring his action in a court of general jurisdiction under the provisions of this section: In *re Smith*, 67 OLA 409, 120 NE(2d) 632 (PC).

29. Where a co-administrator and his wife hold a joint claim on an estate, the probate court has jurisdiction. In *re Smith*, 67 OLA 409, 120 NE(2d) 632.

30. The requirement for an actual rejection before suit can be brought is not jurisdictional and may be waived by the administrator by his answering of the complaint. *Barman v. Feid*, 27 NP(NS) 409.

31. A claimant whose claim has been reduced or rejected by an executor or administrator can bring an action under provisions of this section, or file exceptions to the schedule of debts: In *re Czatt*, 30 NP (NS) 355.

32. A suit on a claim which was rejected by the administrator of an estate on October 20, 1931, must have been brought not later than December 31, 1931, and not within two months from January 1, 1932, the effective date of the statute enacted in April, 1931, and shortening the period of limitations from six months to two months after rejection of a claim against the estate: *Philadelphia Nat. Bank v. Raff*, 76 F(2d) 843.

DECISIONS UNDER FORMER GC § 10722

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Scope

1. Former GC § 10722 (see now RC § 2117.12) must be limited according to its terms to personal obligations of the decedent, and has no application to a case in which it is sought to assert title, legal or equitable, in specific property in the hands of the personal representative: *Groat v. Wilkinson*, 23 NP(NS) 381.

2. The probate court cannot order a claim paid:

In re Miller, 12 OD(NP) 562; Jones v. Green, 21 CC 96, 11 CD 548.

3. The general rule in regard to the application of statutes of limitations is, that all persons, whether under disability or not, are barred by them, unless excepted from their operation by a saving clause: *Favorite v. Booher*, 17 OS 555.

When period begins to run

4. Where a creditor exhibits an authenticated claim to the personal representative of an estate, with the avowed purpose of having it allowed as a valid claim against the estate of such deceased person, and the personal representative thereupon distinctly refuses to allow it, and tells the creditor to consider the claim rejected, such claim is actually rejected, and the six months' limitation begins to run from such rejection: *Harter v. Taggart*, 14 OS 122.

5. As between the estate of a deceased debtor and the creditors thereof, the statute of limitations does not run against their claims after they have been presented to and allowed by the executor or administrator: *Taylor v. Thorn*, 29 OS 569.

6. If, within reasonable time after a claim has been presented to the administrator, he informs the claimant that the claim is rejected, the six months' statute will then begin to run. Such rejection may be made by an attorney for the estate acting for the administrator. After the expiration of six months, the administrator cannot, by estoppel or in any other manner, waive the statute and thus bind the estate: *Miller v. Ewing*, 68 OS 176, 67 NE 292.

7. The statute limiting the right of action to six months after the claim is rejected, does not apply to a case where the claim is allowed upon presentation, and afterwards disputed, but only to cases where it is disputed or rejected upon presentation for allowance: *Thomas v. Chamberlain*, 39 OS 112; *Bray v. Darby*, 82 OS 47, 91 NE 861 [see also *Royer v. Hall*, 82 OS 453].

8. A agreed with B that if he would render her certain services she would, in compensation thereof, make a will giving him all the property she owned at the time of her death. B performed services under the agreement. A died intestate. It was held that the statute of limitations does not begin to run against such action until the appointment of an administrator of A's estate: *Walters v. Heidy*, 1 App 66, 19 CC (NS) 252, 26 CD 166.

Extension of period

9. Where a claimant begins suit within six months after the rejection of the claim, and after the expiration of that period is nonsuited, limitation may be pleaded: *Haymaker v. Haymaker*, 4 OS 272.

10. This section must be construed with GC § 11233 (RC § 2305.19), whereby the time is prolonged by a proper attempt to sue in time: *Burgoyne v. Moore*, 12 CC 31, 5 CD 522 [affirmed, without report, 51 OS 626].

Effect of lapse of time

11. If the claim is not presented to the executor as required by statute, it cannot be enforced against the heirs. Former GC § 10876 (see now RC § 2117.37) et seq do not apply: *Robson v. Evans*, 3 App 248, 20 CC(NS) 122, 25 CD 510 [affirmed, without opinion, *Evans v. Robson*, 92 OS 540].

12. It is an error to render judgment against the estate upon a claim due and disallowed more than six months prior to the commencement of the action; the failure of the executor to plead the statute in bar does not give a right to such judgment: *Pollock v. Pollock*, 2 CC 140, 1 CD 408.

13. Under GC § 10722 (see now RC § 2117.12), that administratrix had made final account, distributed assets, and had been discharged, did not bar action on claim commenced within six months from day claim was rejected and within eighteen months from day administratrix qualified: *Beck v. Schmidt*, 38 App 476, 176 NE 595.

14. An action does not lie on an agreement to make testamentary provision for compensation for services in caring for the decedent and his wife in their old age, where the suit to enforce the agreement was not filed for more than two years after the appointment of the executor and more than six months after the rejection of the claim by the executor: *Saylor v. Sellers*, 2 App 439, 19 CC(NS) 206, 26 CD 225 [affirming, with modifications, *Sellers v. Saylor*, 14 NP (NS) 1, 24 OD 441].

Nature of action

15. This is not a special proceeding but a civil action: *Kennedy v. Thompson*, 3 CC 446, 2 CD 254; *Keck v. Bahlke*, 6 App 246, 26 CC(NS) 398, 27 CD 390.

Defenses

16. Former GC § 10757 (see now RC § 2113.10) requires notice to be given of the appointment of a new administrator, and where there is a failure to give such notice the limitation provided by this section will not avail as a defense to an action brought more than six months after the rejection of the claim: *Croxton Mining Co. v. Hubbard*, 8 App 105, 28 OCA 249, 30 CD 150 [motion to certify record overruled, 16 OLR 107, 63 Bull 223].

17. Delay in bringing suit on a claim against an estate during which delay the administrator has not refused to allow the claim, is no defense to an action thereon against an estate, though meanwhile others jointly liable with the estate on the claim have become insolvent: *Bronson-Kalamazoo Cement Co. v. Second Nat. Bank*, 20 CC(NS) 323, 31 CD 331 [affirmed, without opinion, 90 OS 412].

Pleading

18. In an action against the estate of a deceased person, it is not necessary to aver or prove that at the time the claim on which suit is brought was rejected by the executor or administrator, a specific demand was made for the indorsement of his allowance thereon: *Stambaugh v. Smith*, 23 OS 584.

19. In an action against an administrator of an estate on an account alleged to be due from his intestate, it is essential to prove a presentation of such claim to the administrator, and its rejection, or what is equivalent thereto, by him, or to show some other reason why the administrator is liable to be sued, notwithstanding the provisions of former GC § 10746 (repealed, 116 v 385, § 5): *Yager v. Greiss*, 1 CC 531, 1 CD 296.

20. Where a petition against an administrator does not show that the claim was presented and disallowed, or that the necessary time has preceded the commencement of the action, and the administrator makes no objection either by demurrer or answer, but goes to trial upon an answer denying the validity of the claim, it is too late after several trials have been had and costs incurred, for him to raise that issue by demurring to an amended petition: *Devereaux v. Hutchinson*, 16 CC(NS) 447, 31 CD 619 [affirmed, without opinion, 78 OS 415; see also 21 CC(NS) 462, sub nomine, 33 CD 391].

Evidence

21. Admissions made by an administrator, respect-

ing a claim against the estate, when not in the act of accepting or rejecting the same, are not admissible in evidence in a suit which is brought after the person making the admission had been divested of his functions; and the fact that the administrator is one of the heirs does not alter the character of the testimony: *Hueston v. Hueston*, 2 OS 488.

22. Where the evidence of plaintiff tended to show a presentation of the claim and its return, with no indorsement and no verbal message, but accompanied with a letter which a witness for plaintiff stated was a rejection of the claim, and defendant was not allowed to cross-examine such witness as to such letter, or to introduce it in evidence on his cross-examination, or afterwards in chief, such action of the court was erroneous: *Yager v. Greiss*, 1 CC 531, 1 CD 296.

23. In an action against an administrator to recover for the board and care of his intestate, brought by a son-in-law in whose family intestate lived, a contract for such board and care is not made out by evidence that a witness saw intestate pay plaintiff one hundred dollars with the statement that it was on account, and a statement to another witness that he intended to make his home with plaintiff and had made arrangements for his board and keep while with him: *Edgar v. Shock*, 16 CC(NS) 118, 27 CD 603 [affirmed, without opinion, 85 OS 448, on authority of *Hinkle v. Sage*, 67 OS 256].

24. In an action to recover for personal services rendered a deceased person, it is not competent to introduce the decedent's will, in which she makes a bequest to the plaintiff, as evidence tending to show that the bequest was in payment for the services, unless the will so states: *Fell v. Carter*, 16 CC(NS) 241, 26 CD 511.

§ 2117.13 Claims rejected on requisition of heir, devisee, or creditor. (GC § 10509-135)

If a devisee, legatee, heir, creditor, or other interested party files in the probate court a written requisition on the executor or administrator to reject a claim presented for allowance against the estate he represents, whether the claim has been allowed or not, but which has not been paid in full and enters into a sufficient bond running to such executor or administrator, the amount, terms, and surety of which are to be approved by the probate judge, the claim shall be rejected by the executor or administrator. The notice of rejection shall inform the claimant of the filing of the requisition and of the name of the party filing the same. The condition of the bond shall be to pay all costs and expenses of contesting such claim, including such reasonable fee as the court allows to the attorney for the executor or administrator, in case the claim finally is allowed in whole, and if such claim is allowed only in part, to pay such part of the expenses as the court may determine, including such reasonable fee as the court may allow to the attorney for the executor or administrator.

HISTORY: GC § 10509-135; 114 v 320 (431); 119 v 394 (413), § 1. Eff 10-1-53. Analogous to former GC § 10724.

Cross-References to Related Sections

See RC §§ 2117.14, 2117.17 which refer to this section.

Forms

1 A&H Probate FORM 2117.13a et seq.

Outline of Procedure

Claims of creditors, rejection at instance of interested party. *Leyshon No. 52; A&H No. 22.*

Research Aids

Claims rejected on requisition:

O-Jur2d: Executors and Administrators § 315

Suits on claim rejected on requisition:

O-Jur2d: Executors and Administrators § 646

ALR

Right of personal representative to allowance for attorneys' fees or other expenses incurred in unsuccessful efforts to claim property for the estate out of the property involved. 126 ALR 1349.

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1. Verbal notice to the administrator by the widow not to allow a certain claim is not sufficient proof of fraud on the part of the administrator for afterwards making such allowance: *Thomas v. Chamberlain*, 39 OS 112.

2. In a suit by an administrator to recover upon a bond given under this section, he must show that the requirements of the bond have been strictly complied with: *Fullerton v. Davis*, 1 CC 572, 1 CD 320.

3. Legacy not such claim as may be disallowed by the executor at requisition of an heir. And a devisee, who has been paid in full, is not an "heir" under this section: *Hunt v. Hayes*, 19 CC 151, 10 CD 388.

4. General Code § 10509-135 (RC § 2117.13) et seq give to the heirs the right to prosecute error to any judgment, although not parties thereto: *Spaulding v. Allen*, 19 CC 609, 10 CD 259.

5. "Heir" may be construed to mean devisees and legatees, who are proper parties in any action brought upon a claim rejected under their requisition, and who have the right to defend against such claim: *Todd v. Todd*, 6 CC(NS) 105, 17 CD 224.

6. Where the administrator pays claims out of his own funds, a requisition for disallowance of such claims may nevertheless be filed. If disallowed, the administrator then becomes subrogated to the rights of those creditors: *Glenn v. Eicher*, 11 CC(NS) 95, 20 CD 821 [affirming *Eicher v. Darby*, 17 OD(NP) 780, 5 OLR 102].

7. A surviving husband, who is entitled to curtesy in his wife's real estate, is not thereby an heir or creditor within the meaning of this section. He has no right to contest claims accepted by the administrator, as his interests are not affected thereby: *Pirrmann v. Gerhold*, 7 NP 664, 5 OD 414.

8. Where a claim against an estate is contested by an heir, and the claim is greatly reduced, the claimant is still entitled to his costs; and the heir may have an allowance for attorney fees made by the probate court: *Koelble v. Runyan*, 25 App 426, 158 NE 279.

9. When the heirs request that a claim to an estate be rejected and execute a bond, the administrator must reject it. Suit against the administrator must be brought within six months, against the heirs at any time: *Baughn v. Duncan*, 31 App 518, 167 NE 490.

10. Sole legatee of deceased who entered into bond to pay expenses of contesting claim against deceased's estate could plead and make defense to action: *Anderson v. Houpt*, 43 App 538, 184 NE 29.

11. Where an heir who has not requisitioned the disallowance of a claim against a decedent's estate under the provisions of RC § 2117.13, et seq., but said claim is disallowed by the probate court pursuant to hearing of the schedule of claims, is permitted by the common pleas court to intervene as a party defendant in a suit filed therein against the administrator of the decedent's estate by the claimant, and in which suit the administrator fails to join issue or defend against the claim, the intervening heir, in effect, is substituted for the administrator to defend in such representative capacity the decedent's estate against the claim: *Gerardot v. Parrish*, 44 OApp(2d) 293, 73 OO(2d) 360, 338 NE(2d) 531 (1975).

§ 2117.14 Parties to action on claim rejected on requisition. (GC § 10509-136)

The devisee, legatee, heir, creditor, or other interested party filing the requisition referred to in section 2117.13 of the Revised Code, shall be made a party defendant with the executor or administrator to any action on a claim rejected on requisition and have a right to plead and make any defense thereto. Any judgment in favor of the claimant shall be against the executor or administrator only.

HISTORY: GC § 10509-136; 114 v 320 (431); 119 v 394 (413), § 1. Eff 10-1-53.

Cross-References to Related Sections

See RC § 2117.17 which refers to this section.

Research Aids

Parties:

O-Jur2d: Executors and Administrators § 600

CASE NOTES AND OAG

1. Where a claim has been rejected by an administratrix, GC § 10509-119 (RC § 2117.17) does not prevent the operation of this section, which requires that suit be brought on such claim against the administratrix within two months after her rejection of the same: *Locotosh v. Brothers*, 52 App 158, 6 OO 274, 3 NE(2d) 556 [affirming *In re Locotosh*, 3 OO 185 (PC)].

2. The holder of a claim rejected by order of the probate court is required by this section to bring suit within two months after rejection: *Homan v. Lightner*, 20 OLA 76.

3. The refusal of a court to grant a continuance of an action on a claim against an estate requested because of the death of one of the heirs who was made a party defendant under this section, and refusal to substitute, was not reversible error where deceased party had not filed an answer although case had been pending several months: *Homan v. Lightner*, 20 OLA 78.

DECISIONS UNDER LAW PRIOR TO 1932

1. Suit on a claim duly allowed and later rejected

at instance of creditor, may be brought within six months after notice of such rejection, notwithstanding that, deducting the time intervening between such allowance and such rejection, more than six years have elapsed after the accruing of the cause of action: *Speidel v. Phillips*, 78 OS 194, 85 NE 53 [distinguishing *Thomas v. Chamberlain*, 39 OS 112].

2. In an action against the executor and heirs on a note allegedly executed by the deceased, the heirs and executor are permitted to call the plaintiff as a witness for cross-examination though RC § 2317.03 forbids testimony in certain cases: *Atley v. Atley*, 20 App 497, 3 OLA 686, 152 NE 761.

2.1 Suit on claim against estate need not be brought against heirs within six months after rejection; they may be joined any time before trial (former GC § 10725 [see now RC § 2117.14]): *Baughn v. Duncan*, 31 App 518, 167 NE 490.

3. In a suit to recover for services rendered to decedent, a legatee who has been made a party defendant, under former GC § 10725 (see now RC § 2117.14), is a competent witness: *Anderson v. Houpt*, 43 App 538, 184 NE 29, 37 OLR 234.

4. The sole legatee of a deceased, entering into bond to pay the expenses of contesting a claim against a deceased's estate, may plead and defend the action: *Anderson v. Houpt*, 43 App 538, 37 OLR 264, 184 NE 29, 13 OLA 312.

6. The party giving bond must be made a party to the suit and permitted to defend, if he desires, or he will not be liable for the costs and expenses of such suit: *Fullerton v. Davis*, 1 CC 572, 1 CD 320.

7. Where facts and dates relative to presentation and rejection are fully set out in the petition or answer, an answer averring that "the right of recovery has long since been barred" is sufficient; the statute need not be pleaded specifically: *Crouse v. Frybarger*, 22 CC 315, 12 CD 254.

8. A claim against an executor for room and board is recognized as a civil action for money and is within the jurisdiction of municipal court: *Keck v. Bahlke*, 26 CC(NS) 398, 27 CD 390.

9. Claims allowed by the administrator but later disallowed by the administrator *de bonis non*, may be sued on, under this section, within six months after their rejection: *Eicher v. Darby*, 5 OLR 102, 17 OD (NP) 780.

§ 2117.15 Payment of debts after three months.

After three months from the appointment of an executor or administrator, he may proceed to pay the debts due from the estate in accordance with Chapters 2113. to 2125. of the Revised Code. If it appears at any time that the estate is insolvent, the executor or administrator may report that fact to the court, and apply for any order that he deems necessary because of the insolvency. In case of insolvency, a creditor who has been paid according to law shall not be required to make any refund.

HISTORY: GC § 10509-127; 114 v 320 (429); 119 v 394 (411); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10741.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.15 applicable to estates of

decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2111.24 which refers to this section.

Forms

1 A&H Probate FORM 2117.15a et seq.

Research Aids

Insolvent estates:

Application for order:

O-Jur2d: Executors and Administrators § 343

Refund by creditor:

O-Jur2d: Executors and Administrators § 346

Am-Jur2d: Executors and Administrators § 315

When debts paid:

O-Jur2d: Executors and Administrators § 325

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Where an administrator, supposing an estate solvent, pays a creditor beyond his distributive share, upon final settlement he may recover back the difference, in an action for money had and received: *Rogers v. Weaver*, 5 O 536.

2. The provision in this section for reporting the insolvency of the estate to the court and making an application for any order that the executor or administrator deems necessary, is permissive and contemplates an ex parte hearing: *In re Murphy*, 88 App 167, 44 OO 193, 95 NE(2d) 590.

6. In a hearing on application filed under this section, the court is without authority to question the validity of a land sale proceeding or the correctness or validity of the inventory and appraisal; to disallow a claim of a creditor of the estate when the claim has been allowed by the administrator; and to adjudicate the question of the ownership of joint and survivorship bank accounts held in the name of the decedent and his wife. The attempt to adjudicate such matters was a nullity: *In re Murphy*, 88 App 167, 44 OO 193, 95 NE(2d) 590.

7. When an estate is insolvent because of claims of the Department of Public Welfare, the funeral director is entitled to \$300 ahead of the state and is a general creditor for amounts in excess of \$300: *In re Young*, 74 OLA 129, 140 NE(2d) 792.

8. An administrator may pay after the year from the time notice was given, without being personally liable to a creditor who had not presented his claim, or of which he had no notice; but he must pay the debts after eighteen months: *In re Wakefield*, 7 NP 562, 5 OD 395.

9. If the owner of realty insures a building in a mutual insurance company, his estate is liable for assessments made in accordance with the terms of such policy up to the time of his death, and his estate is liable together with his heirs for assessments made in accordance with the terms of such policy after his death and before the expiration of such policy: *In re Lones*, 57 Bull 122.

[SCHEDULE OF DEBTS]

§ 2117.16 Schedule of debts.

The probate court may by rule require that every executor or administrator, after three and not later than five months following the date of his appointment, shall make and return into the probate court a schedule of all claims against the estate he represents that have then been presented to him and any other valid debts of the estate of

which he has knowledge. The schedule shall state the name and address of the claimant as it appears on his claim, the amount claimed, the date of presentation of the claim, the class into which it falls for payment, the security held for it, the date of maturity if not yet due, whether allowed or rejected by the executor or administrator, and the date of allowance or rejection.

HISTORY: GC § 10509-118; 114 v 320 (427); 119 v 394; 130 v 619 (EF 6-24-63); 133 v S 185 (EF 1-1-71); 136 v S 145. EF 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.16 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2117.17 which refers to this section.

Comparative Legislation

Schedule of debts:

Cal.—Probate Code, § 600

Ill.—Rev Stat, ch 3, § 18-10

Ind.—Burns' Stat, § 29-1-1-23

Ky.—KRS, § 396.010

Mich.—MCLA, § 707.2

Pa.—Purdon's Stat, Tit. 20, § 3392

Fla.—FSA, § 733.707

Forms

1 A&H Probate FORM 2117.16a et seq.

1 A&H Probate FORM 2117.17a et seq: Hearing on allowed claims.

Outline of Procedure

Claims of creditors, presentation, schedule, exception and payment. *Leyshon No. 51; A&H No. 21.*

Research Aids

Schedule of debts:

O-Jur2d: Executors and Administrators § 118

Law Review

Necessity for presenting tort claims to executors and administrators. Article by Judge Carl A. Weinman. 11 OO 429.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Where no exceptions have been filed in the probate court to a schedule of debts against a decedent's estate as permitted by this section, and although the schedule of debts as filed has been approved by the probate court and the claims listed therein paid by the administrator, the validity of such claims may still be challenged by exceptions of a legatee to the account of the administrator which shows that the latter has allowed and paid such claims: *In re Butler*, 137 OS 96, 17 OO 432, 28 NE(2d) 186.

2. Where an estate is primarily liable for a mortgage indebtedness, no objection can be made to listing it in the schedule of debts on the ground that part of the obligation is the debt of the executor: *In re Fiebig*, 61 App 40, 14 OO 216, 22 NE(2d) 288.

2.1 The sole statutory obligation of an executor or administrator relative to the listing of debts against the estate he is administering is imposed by this section, which enjoins upon the fiduciary the obligation, within the time limits therein established, to verify

and return to the probate court a schedule of claims against the estate he represents which have been presented to him: *Conrad v. Sarver*, 97 App 199, 55 OO 453, 124 NE(2d) 749.

2.2 The probate court has the statutory authority to disapprove, and thus, in effect, order rejected, a claim which, in the schedule of debts filed pursuant to this section, the executor had classified as an allowed debt or claim against an estate: *In re Koplin*, 100 App 553, 60 OO 421, 137 NE(2d) 424.

3. The probate court has no jurisdiction to determine the merits of a claim presented against the estate for the first time as an exception to the schedule of debts, but should order the claim filed as neither accepted nor rejected: *In re Gouvy*, 3 OO 58 (PC).

4. The listing of a claim known to exist but not presented, in a schedule of debts, and filing the same in the probate court after the expiration of the four months' period within which to present claims, does not operate to raise the status of such claim above that of a barred claim: *Burkhardt v. Burkhardt*, 12 OO 359 (PC).

6. An executrix in performing her duty to comply with the provisions of this section, by listing on the schedule of debts the claims which were known to exist but which were never presented, did not waive a formal presentation: *Burkhardt v. Burkhardt*, 12 OO 359 (PC).

7. Inquiry by the probate court into the validity of the claim as a proper inheritance tax deduction is not precluded: *In re Cooke*, 93 OLA 311, 29 OO(2d) 419.

8. The provisions of the probate law in effect at the time a will is admitted to probate are controlling for the duration of the action: 1932 OAG No. 4029.

§ 2117.17 Hearing on allowed claims; optional. (GC § 10509-119)

The probate court on its own motion may, and on motion of the executor or administrator shall, assign the schedule of debts, filed under section 2117.16 of the Revised Code, for hearing on a day certain. Forthwith upon such assignment, and in no case less than ten days before the date fixed for hearing or such longer period as the court may order, the executor or administrator shall cause written notice thereof to be served upon the following persons who have not waived the same in writing or otherwise voluntarily entered their appearance:

(A) If it appears that the estate is fully solvent, such notice shall be given to the surviving spouse and all other persons having an interest in the estate as devisees, legatees, heirs, and distributees.

(B) If it appears probable that there will not be sufficient assets to pay all of the valid debts of the estate in full, then such notice also shall be given to all creditors and claimants whose claims have been rejected and whose rights have not been finally determined by judgment, reference, or lapse of time.

Such notice shall state that the schedule of debts has been filed, shall set forth the time and place of the hearing thereon, and shall state that the action of the executor or administrator in allowing and classifying claims will be con-

firmed at such hearing unless cause to the contrary is shown. Such notice shall be served personally or by registered mail in the manner specified for service of notice of the rejection of a claim under section 2117.11 of the Revised Code. Proof of such service to the satisfaction of the court, by affidavit or otherwise, and all waivers of service shall be filed in court at the time of the hearing. At any time before hearing, any interested person may file exceptions in writing to the allowance or classification of any specific claim. The court may cause or permit other interested persons to be served with notice and witnesses to be subpoenaed as may be required to present the issues fully.

The court upon hearing shall determine whether the executor or administrator acted properly in allowing and classifying each claim and shall make an order confirming or disapproving such action.

An order of the court disapproving the allowance of a claim shall have the same effect as a rejection of the same on the date on which the claimant is served with notice of the court's order. Such notice shall be served personally or by registered mail in the manner specified for service of notice of the rejection of a claim under section 2117.11 of the Revised Code. An order of the court confirming the allowance or classification of a claim shall constitute a final order and shall have the same effect as a judgment at law or decree in equity, and shall be final as to all persons having notice of the hearing and as to claimants subsequently presenting their claims, though without notice of such hearing. In the absence of fraud, the allowance and classification of such claim and the subsequent payment thereof in good faith shall not be subject to question upon exceptions to the executor's or administrator's accounts. The confirmation of a claim by the court shall not preclude the executor or administrator from thereafter rejecting such claim on discovery of error in his previous action or on requisition as provided in sections 2117.13 and 2117.14 of the Revised Code.

HISTORY: GC § 10509-119; 114 v 320 (428); 116 v 385; 119 v 394; 133 v S 185. Eff 1-1-71.

SECTION 3. (133 v S 185) Sections 1 and 2 of this act shall take effect on January 1, 1971. This act does not affect the administration of the estates of persons who die before January 1, 1971, and the estates of such persons shall be administered as if this act had not been passed and approved.

Forms

1 A&H Probate FORM 2117.17a et seq.

1 A&H Probate FORM 2117.16a et seq: Schedule of debts and claims.

Outline of Procedure

Claims of creditors, presentation, schedule, exception and payment. Leyshon No. 51; A&H No. 21.

Research Aids

Hearing on allowed claims:

O-Jur2d: Executors and Administrators §§ 119-121

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1. Under this section, the finding and order of the probate court overruling exceptions to an item contained in the schedule of debts involving a claim upon which the probate court is authorized by those provisions to act, are final as to parties filing exceptions or otherwise voluntarily entering their appearance, subject only to the right of review or to be opened up for fraud, collusion or mistake: *In re Beabout*, 136 OS 412, 16 OO 575, 26 NE(2d) 211 [affirming 15 OO 2 (App)].

2. Probate court does not have jurisdiction to review the administrator or executor on the allowance or rejection of claims. Claim must be brought within two months: *Locotosh v. Brothers*, 52 App 158, 6 OO 274, 3 NE(2d) 556, 21 OLA 521.

3. The effect of this section is clearly to bind the executors and those who have otherwise voluntarily entered their appearance, and where they have failed to avail themselves of the right of review, their right to open up the order entered by the court on the hearing of the schedule of debts is limited to cases of fraud, collusion or mistake: *Amrine v. Gabriel*, 67 App 37, 14 OO 447, 32 NE(2d) 499.

4. A hearing on a debt schedule is an in rem proceeding. Provision of the section as to a hearing without a jury does not violate any constitutional rights to a jury trial: *In re Blue*, 67 App 37, 14 OO 447, 32 NE(2d) 499, 29 OLA 161.

4.1 A decision by a probate court on a debt schedule is final to all persons interested in the estate subject to a right of review or to be vacated under RC § 2101.33 or to be re-opened for fraud or collusion: *In re Blue*, 67 App 37, 14 OO 447, 32 NE(2d) 499, 29 OLA 161.

5. The probate court had express authority under this section (116 v 398), without the intervention of a jury, to affirm, modify or reverse the action of an executor or administrator as to any items contained in the schedule of debts, except claims on which suit had been brought or which had been referred to referees or disallowed by requisition: *In re Hedges*, 75 App 518, 31 OO 301, 62 NE(2d) 643.

5.1 The probate court cannot act arbitrarily in the matter of disapproving a claim allowed by the executor, for this power of the court can be exercised only upon a showing that the executor allowed the claim without due examination as to the validity of such claim. Where there is no evidence offered to refute the conclusion as to validity reached by the executor, the probate court is required to find that the executor acted properly in allowing and classifying the claim: *In re Koplin*, 100 App 553, 60 OO 421, 137 NE(2d) 424.

5.2 The probate court has jurisdiction to pass on an application for attorney's fees to be taken out of the estate: *In re Colosimo*, 104 App 342, 5 OO(2d) 24, 149 NE(2d) 31.

5.3 In actions by creditors of a decedent to enforce their claims, where the personal representative of the decedent refuses or neglects to defend, an heir of the decedent may be permitted to come in and defend although he is ordinarily neither a proper nor a necessary party defendant: *Gerardot v. Parrish*, 44 OApp(2d) 293, 73 OO(2d) 360, 338 NE(2d) 531 (1975).

6. Where a claim for support of minor children of the deceased has been presented to an executor or administrator and disallowed, the probate court has jurisdiction of such claim, upon exceptions being filed by the claimant to the schedule of debts: *In re Riggle*, 18 OO 179 (PC).

6.1 Powers of examination allowed probate court on schedule of claims discussed: *In re Perkins*, 22 OLA 513.

7. The finding and order of the probate court affirming a schedule of debts is not final under this section, where no exceptions allowed by GC § 10509-118 (RC § 2117.16) were filed and no voluntary appearance entered; consequently claims listed therein and paid in full may still be challenged through the filing of exceptions by legatees to the account of the administrator as provided in GC § 10506-40 (RC § 2109.35): *In re Butler*, 32 OLA 1 [affirmed, 137 OS 96].

8. The action of the probate court in overruling exceptions, under this section, to an item in the schedule of debts is a final order as to those who filed exceptions, subject only to their right of review or to be opened up for fraud, collusion or mistake: *In re Throckmorton*, 34 OLA 219, 36 NE(2d) 792.

9. Probate courts may inquire into the validity of claims as deductions for income tax purposes: *In re Cooke*, 93 OLA 311, 29 OO(2d) 419.

10. Orders of probate courts allowing claims which adversely affect the property rights of beneficiaries are binding determinations of validity for federal estate tax purposes: *Goodwin's Estate v. Commissioner*, 201 F(2d) 576, 51 OO 73, 67 OLA 233.

DECISIONS UNDER FORMER GC § 10509-119 IN EFFECT FROM JANUARY 1, 1932 TO SEPTEMBER 2, 1935

1. The probate court is without jurisdiction to pass upon the merits or validity of the claim of a creditor on exceptions filed to the schedule of claims, debts and liabilities, when the same creditor has theretofore presented his claim for allowance, the executor has rejected the same and when action for recovery thereon has been begun in the common pleas court: *In re Perkins*, 22 OLA 513.

2. The probate court's jurisdiction granted by this section, relative to executor's schedule of debts, etc., is exhausted when it has ordered that the schedule be approved and confirmed: *In re Perkins*, 22 OLA 513.

3. General Code §§ 10509-118, 10509-119 (RC §§ 2117.16, 2117.17) and 10509-120 (repealed, 118 v 78) are in pari materia with GC §§ 10501-30, 10501-32, 11379 (RC §§ 2101.30, 2101.31, 2311.04) and 11469 (see now RC § 2315.20), and must be construed together; hence this section is applicable only in a case where the issue is one of law: *In re Helfrich*, 30 NP(NS) 307.

4. Where, in the administration of an estate, issues of fact arise upon exceptions to particular items contained in administrator's schedule of claims, court is obliged to disallow such claim or claims in schedule and leave claimant to his remedy as provided in code of civil procedure: *In re Helfrich*, 30 NP(NS) 307.

5. In a hearing upon administrator's schedule of claims a claimant is a party adverse to the estate and

as such is disqualified, under GC § 11495 (RC § 2317-03), from testifying as a witness: *In re Helfrich*, 30 NP(NS) 307.

6. Where the item excepted to has been approved and allowed by the administrator, he is disqualified to act as a witness: *In re Helfrich*, 30 NP(NS) 307.

7. A claimant whose claim is reduced or rejected by an executor or administrator may bring an action or file exceptions to the schedule of debts: *In re Czatt*, 30 NP(ns) 355.

8. In a hearing in probate court upon the schedule of debts filed by an administrator, the court has no jurisdiction to determine the merits of a claim presented as an exception to the schedule of debts where the administrator has no previous knowledge of such claim, and the only order the court can make is that the claim be filed in the schedule as neither accepted nor rejected: *In re Gouvy*, 3 OO 58 (PC).

[PERSONAL PROPERTY TAXES]

§ 2117.18 Taxes or forfeitures. (GC §§ 10509-81, 10509-82)

Taxes or penalties placed on a duplicate or added by the county auditor or the tax commissioner because of a failure to make a return or because of a false or incomplete return for taxation shall be a debt of a decedent and have the same priority and be paid as other taxes. Such taxes or penalties shall be collectible out of the property of the estate either before or after distribution, by any means provided for collecting other taxes. No distribution or payment of inferior debts or claims shall defeat such collection; but no such tax or penalty can be added before notice to the executor or administrator, and before an opportunity is given him to be heard. All taxes omitted by the deceased must be charged on the tax lists and duplicate in his name.

In all such additions to the personal tax lists and duplicate, each succeeding tax year shall be considered as beginning at the time of the completion of the annual settlement of the duplicate for the previous year with the county treasurer.

HISTORY: GC §§ 10509-81, 10509-82; 114 v 320 (419); 114 v 714 (774); 125 v 903 (980). Eff 10-1-53. Analogous to former GC §§ 10662, 10663.

Comparative Legislation

Taxes as debt:

- Cal.—Probate Code, § 1024
- Ill.—Rev Stat, ch 3, § 18-13
- Ind.—Burns' Stat, § 29-1-14-9
- Mich.—MCLA, § 708.10
- N.Y.—SCPA, § 1811
- Fla.—FSA, § 733.805

Research Aids

Taxes or penalties because of failure to make return or because of a false or incomplete return:

O-Jur2d: Executors and Administrators § 279; Taxation § 429

ALR

Duty or right of executor or administrator to pay tax on real estate of his decedent. 163 ALR 724.

Law Reviews

Personal judgment may not be rendered in Ohio

for delinquent general taxes and special assessments on real estate. Article by Ansel B. Curtiss of the Cleveland bar. 6 CinLRev 251.

Real estate taxes in Ohio are charges ad rem only. Article by Ansel B. Curtiss of the Cleveland bar. 10 CinLRev 1.

CASE NOTES AND OAG

1. Taxes under this section are preferred over liens securing claims of general creditors: *Pioneer Trust Co. v. Stich*, 71 OS 459, 73 NE 520.

2. In so far as an intangible tax levied against a decedent's estate in the state of Ohio is concerned, such tax is definitely made a debt under the statutes: *State ex rel Hostetter v. Hunt*, 58 App 120, 9 OO 254, 10 NE(2d) 155 [affirmed, 132 OS 568].

2.1 A municipal income tax ordinance which is collectible as other debts has the effect of creating a debt once liability is determined: *Cincinnati v. Degoyer*, 16 OMisc 229, 45 OO(2d) 92, 241 NE(2d) 769 (1968).

3. As this section existed from January 1, 1932, until September 2, 1935, there was considerable difference of opinion as to whether or not it was necessary to file with the account certificates showing that taxes which had accrued on real property of the decedent at the time of his death had been paid. Many probate courts held that it was necessary to file such certificates regarding real estate taxes with the account. However, the common pleas court of Cuyahoga county held that the provisions of GC § 10509-176 (see now RC § 2109.30 et seq) and related sections did not require that a certificate of the county auditor and county treasurer be filed showing that the real estate taxes charged against the estate had been paid, before the final account may be approved: *In re Kastelic*, 3 OO 164.

4. Tax inquisitors are not entitled to a commission on omitted property which has been placed on the duplicate under this section from information derived from inventories in the probate court: *State v. Lewis*, 12 OD(NP) 46.

5. A tax inquisitor's compensation for discovery of omitted property of decedent will be limited to a percentage on taxes collected on property which should have been returned in the lifetime of the decedent: *State v. Gilfillan*, 3 NP(NS) 153, 15 OD 756 [affirmed, 3 OLR 476, 19 CD 709; modified, 76 OS 341].

6. County auditor not required to make search for property not placed on tax duplicate in accordance with this and preceding section: *State v. Lewis*, 4 NP(NS) 454, 17 OD 370.

9. When an administrator has paid taxes which were added by the county auditor by reason of the failure of the deceased to list taxable items of property for taxation during the preceding five years, the administrator or personal representative cannot recover such payment unless such payment was an involuntary one: 1932 OAG No.4403.

§ 2117.19 No allowance to tax inquisitors. (GC § 10509-84)

For the years during which property is required to be listed in the name of the executor or administrator, no percentage or part of any increased tax on such property of an estate, covered by an inventory required by section 2115.02 of the Revised Code, shall be allowed or paid to a person under a contract for securing for taxation, or putting on the tax list or duplicate,

property omitted, or not listed or returned for taxation.

HISTORY: GC § 10509-84; 114 v 320 (419). Eff 10-1-53. Analogous to former GC § 10665.

Research Aids

No allowance to tax inquisitors:

O-Jur2d: Taxation § 438

[YEAR'S ALLOWANCE]

§ 2117.20 [Surviving spouse or children to receive allowance.]

If a person dies leaving a surviving spouse, or leaving minor children and no surviving spouse, the surviving spouse or the minor children shall be entitled to receive in money or property the sum of five thousand dollars as an allowance for support. The money or property set off as an allowance shall be considered estate assets.

HISTORY: 136 v S 145. Eff 1-1-76.

Analogous to former RC § 2117.20 (133 v S 185), repealed 136 v S 145, eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.20 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Estate tax—

Deductions, RC § 5731.16.

General exemptions, RC § 5731.15.

See RC §§ 2107.42, 2113.03, 2117.22 which refer to this section.

Comparative Legislation

Year's allowance:

Cal.—Probate Code, § 713.5

Ill.—Rev Stat, ch 3, § 15-1

Ind.—Burns' Stat, § 29-1-4-2

Ky.—KRS, § 391.030

Mich.—MCLA, § 702.93

N.Y.—SCPA, § 1421

Pa.—Purdon's Stat, Tit. 20, § 2110

Fla.—FSA, § 732.403

Forms

1 A&H Probate FORM 2113.03a et seq: Release from administration; order fixing allowance.

Outline of Procedure

Inventory, making, filing, and exceptions thereto. Leyshon 79; A&H No. 53.

Research Aids

Year's allowance:

O-Jur2d: Executors and Administrators § 218 et seq; Wills § 743

Am-Jur2d: Executors and Administrators § 324 et seq.

As affected by election of spouse to take under will:

O-Jur2d: Wills § 836

As affected by legitimacy of children:

O-Jur2d: Bastardy § 44

ALR

Allowance in state of decedent's domicile for wid-

ow's or children's support as enforceable against decedent's real estate, or proceeds thereof, in another state. 13 ALR2d 973.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure. 27 ALR3d 863.

Family allowance granted widow as payable from community interests of decedent and widow. 9 ALR2d 529.

Effect of extrajudicial separation on surviving spouse's right to widow's allowance. 34 ALR2d 1056.

Statutory family allowance to minor children as affected by previous agreement or judgment for their support. 6 ALR3d 1387.

Widow's or family allowance out of decedent's estate as surviving death or marriage of widow or minor children, or attainment of majority of children. 144 ALR 270.

When is widow put to her election between provision made for her by her husband's will, and her dower, homestead, or community right. 171 ALR 649.

Bank deposit to credit of decedent or other indebtedness to him as subject to widow's or family allowance or other estate exemption, where bank has right to apply deposit, or other debtor has right to assert counterclaim or set-off. 108 ALR 773.

Statute regarding surviving spouse's right in estate of deceased spouse as affecting contract or waiver in that regard executed before passage of the statute. 137 ALR 1099.

Waiver of right to widow's allowance by antenuptial agreement. 30 ALR3d 858.

Law Reviews

Avoiding probate of decedents' estates. Gilbert A. Sheard. 36 CinLRev 70.

Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

See explanatory article in 4 OBar 411.

Wills; decedent's estates; year's allowance (Case note). 5 OO 29.

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1. Where a wife dies within three days after her husband (or thirty in the case of a common accident)

the husband is deemed to have died last for probate purposes: In re Metzger, 140 OS 50, 23 OO 257, 42 NE(2d) 443; Harrison v. Hillegas, 13 OO 523, 28 OLA 404, 1 OSupp 160.

1.1 Rights to which a surviving spouse is entitled are contingent in the sense that they go to the survivor if not sold or given away prior to death: Neville v. Sawicki, 146 OS 539, 33 OO 19, 67 NE(2d) 323.

2. Under this section, the right of a widow to a year's allowance in the estate of her deceased husband vests immediately upon his death, becomes a preferred and secured debt of the estate, and must comprehend a sufficient support for her for a period of twelve months without respect to her actual need: In re Croke, 155 OS 434, 44 OO 411, 99 NE(2d) 84, discussed in 47 OO 303. See also 20 CinLRev 134, discussing In re Croke, 57 OLA 97 (App), which was reversed by 155 OS 434.

3. Even though such widow dies within the period of twelve months after the death of her husband and such allowance has not been set off to her during her lifetime, the allowance must be awarded, fixed, and determined on a basis of her reasonable support for twelve months, and such allowance or any unpaid balance thereof survives as an asset of her estate: In re Croke, 155 OS 434, 44 OO 411, 99 NE(2d) 84, discussed in 47 OO 303. See also 20 CinLRev 134, discussing In re Croke, 57 OLA 97 (App), which was reversed by 155 OS 434.

4. Where the widow of a testator is bequeathed for life the income of a going business which is to be operated by a trustee, she is entitled to such income from the time of the death of the testator in the absence of anything in the will to the contrary, notwithstanding the fact that she is allowed an amount in money for her year's support pursuant to GC § 10509-74 (RC § 2117.20): Holmes v. Hrobon, 158 OS 508, 49 OO 450, 110 NE(2d) 574.

4.1 A widow can be barred from any part of her husband's estate where both have substantial amounts of land from a prior marriage and execute a valid pre-nuptial agreement: Troha v. Sneller, 169 OS 397, 8 OO 435, 159 NE(2d) 899.

5. The year's allowance given to a widow by this section is governed by GC § 10510-46 (RC § 2115.07), so that the widow's claim is subject and subordinate to the claims of judgment lien creditors to the proceeds of the sale of real estate: Dillman v. Warner, 54 App 170, 7 OO 492, 6 NE(2d) 757.

6. Although a husband may, by conveyance and trust agreement made during his lifetime, defeat his widow's interest as statutory heir and distributee, yet such conveyance and trust agreement will be constructively fraudulent to the extent of the wife's statutory right to an allowance for a year's support from the state of the husband, and a lien for the amount of such allowance will be impressed on the real estate conveyed in the proportion that the value of such real estate bears to the total value of such real estate plus the value of the real estate of which the husband died seized: Routson v. Hovis, 60 App 536, 15 OO 38, 22 NE(2d) 209.

7. A widow may not set aside as fraud a conveyance without consideration made by her husband of real estate which eliminates any assets from which to pay an allowance or year's support: Dick v. Bauman, 73 App 107, 28 OO 176, 55 NE(2d) 137; In re Kusar's Estate, 5 OMisc 23, 34 OO(2d) 32, 211 NE(2d) 535.

8. A surviving spouse may waive any right to her husband's estate by virtue of a separation agreement: Burlovic v. Farmer, 96 App 403, 54 OO 349, 115 NE(2d) 411.

9. The widow's year's allowance under this sec-

tion, and the allowance given her under RC § 2115.13, as property exempt from administration, are preferred claims against her deceased husband's estate and even though a wife deserted her husband through her own fault and choosing and remained separate and apart from him for a long period of time, she is nevertheless entitled to such allowance if the marriage relationship existed at the time of the husband's death: In re Clark, 99 App 458, 59 OO 244, 125 NE(2d) 917 (App).

10. The right of a widow to a year's allowance in the estate of her deceased husband vests immediately upon death and such debt survives as an asset of her estate if not contested by the children: In re Wreede, 106 App 324, 7 OO(2d) 75, 154 NE(2d) 756; Monger v. Jones, 91 App 246, 48 OO 361, 108 NE(2d) 116.

11. A widow who freely enters into a contract with other beneficiaries before an inventory was made is not entitled to rescission of the contract when she discovers she has greater rights: Carnahan v. Carnahan, 109 App 350, 11 OO(2d) 142, 159 NE(2d) 795.

12. Acceptance by a widow as sole heir and devisee under the will of a transfer of all the assets of the estate effects a merger of all claims of the widow for allowance and reimbursement for funeral expenses: Kaczinski v. Kaczinski, 118 App 225, 25 OO(2d) 68, 193 NE(2d) 731.

13. A probate court has jurisdiction to determine the issues of a common law marriage, as incident to a hearing upon exceptions to an inventory: In re Soeder, 7 OApp(2d) 271, 36 OO(2d) 404, 220 NE(2d) 547.

14. When the evidence relating to exceptions to an inventory and final account shows that the surviving spouse has, on numerous occasions, counseled and directed the administratrix of her husband's estate to pay the bills of the estate, even if such payment would result in no money being left for distribution to the surviving spouse, stating as her reason that her husband never had any bills that weren't paid, and the surviving spouse has offered no evidence of probative value to the contrary, it is clearly apparent that she has waived the determination and payment or allowance to her of the year's allowance provided by RC § 2117.20 and the property exempt from administration as provided by RC § 2115.13: In re Burchett, 16 OApp(2d) 45, 45 OO(2d) 133, 241 NE(2d) 787.

16. Unless barred by an antenuptial agreement or "the will expressly directs otherwise" as required by RC § 2107.42, a widow is entitled to her year's allowance, use of the mansion house and exemptions under RC §§ 2117.20 and 2115.13, even though she takes under the will, whether by her voluntary election or by operation of law: Jacobsen v. Cleveland Trust Co., 35 OO(2d) 366, 6 OMisc 173, 217 NE(2d) 262 (CP).

17. A daughter who was under the age of eighteen years at the time of her father's death and marries before the period of one year during which she was entitled, under this section to support from his estate, is thereby limited to an allowance for support which will end at the date of her marriage: In re Nixon, 34 OO(2d) 333, 5 OMisc 169, 214 NE(2d) 716 (PC).

18. Property passing to a widow for an allowance or to reimburse funeral expenses does not come under the half and half statute. If the widow takes the property rather than selling it to pay the claims, the statute becomes operable: Chupp v. Tomas, 7 OMisc 204, 36 OO(2d) 317, 216 NE(2d) 658.

19. An illegitimate child whose paternity has been

established during the lifetime of the natural father is entitled to a year's allowance for support from the father's estate: *In re Estate of Holley*, 44 OMisc 78, 73 OO(2d) 265, 337 NE(2d) 675 (1975).

20. The guardian of an insane widow who killed her husband is entitled to receive the sum of money in lieu of realty while in the insane asylum and her portion of her allowance: *Winters Nat'l Bank v. Shields*, 14 OO 438, 29 OLA 193, 3 OSupp 134.

21. Under this section, allowance for a minor child is to be set aside only when necessary, and when the minor's natural father is dead and she is supported and maintained by her adoptive parent there is no reason, either moral or legal, why this obligation should be cast upon the estate of the said child's natural father: *Warden v. Warden*, 35 OO 374 (PC).

22. The term "children," as used in this section, providing for support and maintenance to the widow and minor children of the deceased husband and father for one year after his death, does not embrace illegitimate children: *In re Humbert*, 12 OO 241 (PC).

23. A postnuptial agreement, providing that "I hereby agree to release all claims on anything belonging to him," does not bar a surviving widow of her right to property not deemed assets under GC § 10509-54 (RC § 2115.13), and her right to an allowance for a year's support under the provisions of this section: *In re Crabtree*, 15 OO 487 (PC).

24. Where will of husband, after making certain provisions for his wife, recites that "the foregoing devises and bequests to my said wife . . . shall be in lieu of her dower and all other interest which she may have in my estate," if wife elects to take under husband's will, such election shall bar her of her year's allowance and money exemption; and where, in such will, household goods are specifically bequeathed to wife, such election shall bar wife of her right, under GC § 10509-54 (RC § 2115.13), to select such household goods as property exempt from administration: *Atwood v. Miller*, 24 OO 398 (PC).

25. The surviving spouse's exempt property and year's allowance take precedence over a claim from the Division of Aid for the Aged: *Fultz v. Singer*, 5 OO(2d) 433, 78 OLA 177, 149 NE(2d) 270.

26. A delay of eight years in seeking her year's allowance, deprives a widow of her right to such: *In re Gardner's Estate*, 13 OO(2d) 293, 81 OLA 250, 160 NE(2d) 20.

27. The balance due on a year's allowance should be paid from the corpus of an amendable trust before distribution of lawful trust shares under descent and distribution statutes: *Darrow v. Fifth Third Union Trust Co.*, 1 OO(2d) 104, 78 OLA 303, 139 NE(2d) 112.

28. This section and GC § 10509-75 (RC § 2117.21) do not create a right in favor of a widow of a non-resident decedent to a year's allowance out of the personal property located in this state: *In re McCombs*, 52 OLA 353 (PC).

29. The property exempt from administration provided by RC § 2115.13 and the year's support provided by this section are not intestate successions but are debts and preferred claims arising as incidents to the marriage and therefore not affected by the simultaneous death statute: *In re Priest*, 79 OLA 444 (PC).

30. Where a claim has not been presented within the four month statutory period, one must file a petition for permission to reinstate a claim. Failure to do so bars the claim: *Wilcox v. Ceschiati*, 87 OLA 225, 179 NE(2d) 544.

31. An allowance for a widow of \$4500. may be upheld despite the fact she could survive on less: *In re Stump's Estate*, 89 OLA 570, 185 NE(2d) 334.

32. The legislative intent in providing a widow's allowance for her support for twelve months after the death of her husband was to hold sacred that amount against execution for her debts, other than for her necessary support during that period: *Norwood-Hyde Park Bank & Co. v. Howard*, 32 NP(NS) 191.

33. Where the payee of a promissory note, executed jointly by husband and wife, upon default and death of the husband, secured judgment against the widow, individually and as administratrix of the husband's estate, the widow's allowance for twelve months' support was not subject to levy by the payee in satisfaction of the judgment: *Norwood-Hyde Park Bank & Co. v. Howard*, 32 NP(NS) 191.

34. Under Ohio law, the widow's allowance is a vested interest which is not divested upon the occurrence of a contingency: *Miller v. United States*, 71 OO(2d) 31 (USDC 1974).

35. For the purposes of the marital deduction under Internal Revenue Code § 2056, a general award to the widow as an allowance under Ohio law is not a terminable interest and therefore may be included in the computation of the marital deduction; and this rule applies notwithstanding the presence of minor children: *Miller v. United States*, 71 OO(2d) 31 (USDC 1974).

[DECISIONS UNDER FORMER GC § 10656]

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Nature of allowance

1. Under statutes, appraisers of deceased husband's estate have mandatory duty to set off widow's allowance: *In re Crouse*, 44 App 31, 184 NE 253.

2. Where deceased's estate had not been closed, claim for widow's allowance, made over three years after it could have been made, held not stale: *In re Crouse*, 44 App 31, 184 NE 253.

3. That widow had consumed some personal property of deceased did not bar application for widow's allowance, since she could be charged therewith: *In re Crouse*, 44 App 31, 184 NE 253.

4. Executor of deceased widow could make application for widow's allowance out of estate of deceased husband: *In re Crouse*, 44 App 31, 184 NE 253.

5. The allowance for the support of the widow for one year is such a debt of her husband's estate, that resort may be had, for payment of same, against land conveyed away by deceased for the purpose of defrauding his creditors: *Allen v. Allen*, 18 OS 234.

6. The year's allowance is a debt of the estate, which, on payment by an executrix, is a proper credit in her account: *Watts v. Watts*, 38 OS 480.

7. When a widow has consumed property of the estate greater in value than the year's allowance made for the benefit of her estate, after her death, the allowance will be held to have been paid: *In re McDermott*, 13 OD(NP) 390.

8. Where the appraisers in an estate set off and allow to a widow and minor children, in due form of law, a first year's support, such allowance so made becomes a debt of the estate and preserves it from the limitations of former GC § 10746 (repealed, 114 v 320), and has the same effect in law as the allowance of any other claim by an executor or administrator: *In re Patterson*, 11 OLR 373, 58 Bull 305.

9. Where appraisers allow a stated sum in money to a widow and likewise to each of the minor children under fifteen years of age, for a first year's support, the allowances to such of the children as are not supported during said first year by said widow, do not vest in the widow but must be applied to the support of such children: *In re Patterson*, 11 OLR 373, 58 Bull 305.

10. The first year's support set off and allowed to a widow and minor children under fifteen years of age vests in the widow where the widow and children reside together, and the sum allowed to such minor children is in trust to her, to be used for their benefit and support. If the widow and children do not reside together, and the appraisers have not apportioned the allowance, it shall be apportioned by the court as may seem fair and equitable: *In re Patterson*, 11 OLR 373, 58 Bull 305.

To whom set off—widow

11. In order to establish her claim to a year's allowance, the widow must show not only that the marriage relation once existed and was never legally severed, but also that it actually existed at decedent's death, or, if it did not exist, that it was against her wish, and without her fault: *In re Roth*, 6 NP 498, 9 OD 429.

12. The widow of bankrupt is entitled to certain articles, or their equivalent in money, and allowance for a year's support for herself and children: *In re Parschen*, 13 OFD 443.

12.1 It is the duty of the appraisers in all cases to set off, at the time of taking inventory, money to the surviving spouse claimed as a set off under RC § 2115.13, and to the widow her allowance: *In re Felman*, 32 NP(NS) 73.

12.2 Where an administrator is not appointed for a deceased husband and the widow dies six months later, the appraisers of the husband's estate should set aside money for the wife's allowance and charge the husband's estate with whatever was consumed: *In re Phillips*, 27 NP(NS) 142, 18 OD 538.

—Children

13. Children under fifteen are entitled to have set off and allowed to them, out of the estate of their deceased mother, provision for twelve months' support, in like manner as out of the estate of their deceased father: *In re Hinton*, 64 OS 485, 60 NE 621 [reversing *Hance v. Chappell*, 20 CC 214, 11 CD 139]; *In re Glenn*, 3 CC(NS) 608, 13 CD 397.

14. A child under fifteen which has never been a resident of Ohio is entitled to a year's support out of its father's estate, and this besides its distributive share out of the estate: *Bause v. Muhme*, 13 CC 501, 7 CD 224.

15. Where a minor child does not live with the mother, the year's allowance may be apportioned: *In re Pollard*, *Goebel*, 216.

Amount

16. Whether the amount fixed for the year's allowance for the widow should draw interest or not depends upon additional facts; and if the order of the probate court, which provides that such allowance shall bear interest, does not disclose the existence or nonexistence of any other facts, it cannot be pre-

sumed, in a proceeding in the court of common pleas to reverse such order, that such order was erroneous: *Palmer v. Robinson*, 24 CC(NS) 125, 34 CD 510 [for a former opinion, see *Robinson v. Palmer*, 24 CC(NS) 215, 34 CD 561].

Priorities

17. Widow not entitled to her year's support out of the proceeds of lands sold to pay debts, as against judgment liens covering more than such proceeds: *Jones v. Allen*, 6 NP 518, 8 OD 338.

Bar to allowance

18. Wife cannot be deprived of year's support except in cases of divorce: *In re Diller*, 5 NP 255, 6 OD 182.

19. Mere separation of husband and wife does not destroy the latter's right of exemption as a widow; but until they are divorced, the wife at the husband's death is entitled to a year's support and the articles of personal property mentioned in the statute: *In re McMillan*, 8 CC(NS) 294, 18 CD 645.

—Antenuptial contract

20. Whether an antenuptial contract, making provision for the wife in case of her survivorship, and expressed to be in satisfaction of her share of the personal estate of her husband, will operate as a bar in equity to her year's support was discussed but not decided: *Lowe v. Phillips*, 14 OS 308.

21. The year's support cannot be barred by antenuptial surrender: *Baldwin v. Broadstone*, 35 Bull 161.

—Postnuptial contract

22. Where a husband during coverture makes a provision for his wife, in full of all her claims as widow against his estate, including her right to dower, which she accepts, and he dies intestate, she is not thereby barred of her right to the year's support provided by law out of his estate: *Spangler v. Dukes*, 39 OS 642.

23. The year's support cannot be barred by a postnuptial agreement to make no claim on the estate: *Garretson v. Garretson*, 4 CC 336, 2 CD 581.

—Devise

24. A devise to a widow, expressed in the will to be in lieu of dower and all other claims against the estate of the testator, does not bar her of the right to the year's support: *Collier v. Collier*, 3 OS 369.

25. Where, by the terms of a will, it is plainly shown to be the intention of the testator to bar his widow of a first year's support, and a provision is made for her in lieu thereof, if she elects to take under the will, she is not entitled to the allowance: *In re Witner*, 7 NP 143, 10 OD 30.

26. If the will does not provide expressly that a gift of income is in lieu of a year's allowance, the widow of the testator is not deprived of her year's allowance by the fact that testator has given to her for life all the income from his property, real and personal, after the payment of his debts: *In re Mesang*, 20 NP(NS) 60, 27 OD 481 [affirmed by court of appeals].

—Waiver

27. Where the appraisers neglect to set off to the widow her allowance for a year's support, and she, after the expiration of the year, dies without having waived or relinquished her right to such allowance, the right to the same survives to and may be recovered by her personal representative: *Bane v. Wick*, 14 OS 505.

28. Demand not necessary to secure the year's allowance, and mere lapse of time is no waiver of the

right to same. If the allowance has never been set off because of no appraisal made, on the widow's application an appraisal will be ordered any time while the estate remains unsettled. And the appraisers, in making their allowance, will take into consideration any part of the estate which the widow has used for her support: In re Rierdon, 5 NP 516, 5 OD 606.

29. The settlement made by an administrator will not be opened up forty years after the estate was closed in order to let in the claim of the widow for her first year's support, where no such claim was asserted at the time the estate was being settled: Evans v. Evans, 13 CC(NS) 62, 21 CD 635.

30. If an executrix who is also the widow of the decedent files an account in which she states, "That no claim is made for expenses or compensation on account of said trust by affiant, other than the amount found due her by last account, and her year's support, which she is content to leave in the farm," such statement is not a waiver of her year's support: In re Patterson, 11 OLR 373, 58 Bull 305.

31. Where a widow who administers her deceased husband's estate and to whom and her children there is set off and allowed by the appraisers, in due form of law, a first year's allowance, which she does not collect out of either the personal or real estate and she herself fully settles and distributes all the estate, or the same is done by a subsequent administrator with her full knowledge and assent, such neglect or omission on her part will be held to be a waiver or relinquishment of her right to such year's support: In re Patterson, 11 OLR 373, 58 Bull 305.

—Death

32. The allowance for a year's support confers a vested right of property, and is not divested by the widow's death, or any other contingency occurring after the amount has been fixed by the proper tribunal; and the death of the widow, within the year and before the whole amount has been expended in her support, does not bar the right of her executor or administrator to recover the balance unpaid from the representative of her husband's estate: Dorah v. Dorah, 4 OS 292.

33. The right of widow to an allowance survives her death prior to the appointment of an administrator of her husband's estate; this allowance is chargeable with the amount used by her after her husband's death: In re Phillips, 27 NP(NS) 142.

Procedure

34. The allowance herein provided for may be reviewed and increased for the benefit of the estate of the widow by the probate court, under former GC § 10659 (see now RC § 2117.22), on petition of a "person interested": Sherman v. Sherman, 21 OS 631.

35. Where the appraisers first appointed failed to make to the widow her year's allowance, and the probate court, on her application, appointed new appraisers to make such allowance, the executor or administrator should have notice of the proceedings: Heck v. Heck, 34 OS 369.

36. If injustice is done, application must first be made to the probate court: Heck v. Heck, 34 OS 369.

38. Allowances to a widow made in a proceeding to sell real estate belonging to her deceased husband to pay debts, to which no error was prosecuted or appeal taken, cannot be attacked collaterally by exception to her account as administratrix of the said estate: In re Hess, 14 CC(NS) 463, 23 CD 449.

[GC § 10509-75; 114 v 320; 116 v S 385]. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01

For text of RC § 2117.21 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 REPEAL]

1. The general rules for allowing interest on the accounts of fiduciaries apply to the unpaid portion of the widow's year's allowance, and, in the absence of a showing of negligence on her part as a co-fiduciary of her husband's estate, interest is allowable thereon: Monger v. Jones, 91 App 246, 48 OO 347, 108 NE(2d) 116.

2. Year's allowance to widow and children is excessive when it is more than twice as much as the family has lived on previously, especially if this prevents payment in full of decedent's estate: In re Rahe, 12 OD(NP) 590.

3. A discussion of the rights of a widow to the Ohio property owned by a nonresident decedent appears in: In re McCombs' Estate, 52 OLA 353, 80 NE(2d) 573.

4. Where the debts of an estate exceed assets at date of death, only such debts may be deducted as do not exceed those assets. Joint bank accounts are not includable for computing such deductions: In re Williams' Estate, 73 OLA 441, 138 NE(2d) 189.

5. Whether the amount fixed for the year's allowance for the widow should draw interest or not depends upon additional facts; and if the order of the probate court, which provides that such allowance shall bear interest, does not disclose the existence or nonexistence of any other facts, it cannot be presumed, in a proceeding in the court of common pleas to reverse such order, that such order was erroneous: Palmer v. Robinson, 24 CC(NS) 125, 34 CD 510 [for a former opinion, see Robinson v. Palmer, 24 CC(NS) 215, 34 CD 561].

§ 2117.22 Repealed, 136 v S 145, § 2. [GC § 10509-77, 114 v 320; 133 v S 185]. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.22 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Research Aids

Review by probate court:

O-Jur2d: Executors and Administrators § 229

Am-Jur2d: Executors and Administrators § 327

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 REPEAL]

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§ 2117.21 Repealed, 136 v S 145, § 2

Construction

1. Rule 13 of the uniform rules of practice in the probate courts of Ohio, adopted pursuant to GC § 10501-13 (RC § 2101.04), and prescribing the time within which a petition shall be filed to secure a review of the allowance made to a widow or children under this section, is reasonable and valid: *Brown v. Mossop*, 139 OS 24, 21 OO 518, 27 NE(2d) 598.

2. If a probate court has rules prescribing the time in which a petition can be filed, it still may not diminish the allowance if the petition is filed after such time has expired: *In re Johnson's Estate*, 80 OLA 180, 150 NE(2d) 501.

Person interested

6. A person with whom the widow lived during the twelve months, and until her death, and who supported and took care of her, and incurred expense for her in sickness, and who has a valid claim therefor against her estate, is a "person interested," within the meaning of this section: *Sherman v. Sherman*, 21 OS 631.

7. Determining the amount of a widow's allowance, factor to consider: *In re Clark's Estate*, 99 App 458, 59 OO 244, 125 NE(2d) 917.

9. An allowance of \$4500. may be upheld even where a widow could be maintained at less expense in a rest home. An allowance may be challenged under RC §§ 2115.16 or 2117.22: *In re Stump's Estate*, 89 OLA 570, 185 NE(2d) 334.

Review

11. The allowance may be reviewed and increased for the benefit of the widow's estate on petition of a person interested, although the petition be not filed until the expiration of twelve months, and after the death of the widow: *Sherman v. Sherman*, 21 OS 631.

12. The proper method to have the allowance reviewed is by petition, and not by exception to the inventory under former GC § 10639 (now GC § 10509-59 [RC § 2115.16]): *In re Rierdon*, 5 NP 516, 5 OD 606.

13. The court may increase or decrease the allowance, but it has not original jurisdiction to fix same: *In re Roth*, 6 NP 498, 9 OD 429.

14. A paper styled a motion that sets forth sufficient facts to justify a probate judge in reviewing the allowance made to the widow and children is a sufficient compliance with the above section which provides that petition shall be filed for that purpose: *In re Rahe*, 12 OD(NP) 590.

Second review

19. The order of court upon a petition to review is conclusive, and no relief can be granted upon a second petition to review: *Moore v. Moore*, 46 OS 89, 18 NE 489.

20. A widow who, after seeking the action of the probate court for an increase in the amount of the year's allowance made by the appraisers, fails to avail herself of the right to appeal or prosecute a proceeding to vacate, cannot by a new application again invoke the action of the probate court upon the same question: *In re Brown*, 22 OO 229, 39 NE(2d) 857 (App).

Reduction after payment

25. If the appraisers fixed the amount of the widow's allowance, and the administrator in good faith paid such allowance to the widow; and more than nine months thereafter, the creditors of the estate, upon learning that the estate was probably insolvent, filed an application to have the probate court reduce the amount of such allowance, and upon considera-

tion the court reduced the same, the administrator cannot be charged with the amount of such reduction until he has recovered the amount thereof from the widow: *Steward v. Barry*, 102 OS 129, 131 NE 492.

Procedure

30. Where the appraisers of the personal estate of a decedent first appointed failed to make to the widow any allowance for her year's support, and the widow makes application to the probate court for the appointment of new appraisers for that purpose, the executor or administrator should have notice of the making and time of hearing of such application: *Heck v. Heck*, 34 OS 369.

33. The filing of a petition under the provisions of this section for review of the amount set off to a widow as a year's allowance is not governed by the time limit set forth in RC § 2115.16, relating to the filing of exceptions to the inventory, but may be filed within a reasonable time: *In re Stump*, 89 OLA 570, 185 NE(2d) 334 (PC).

§ 2117.23 Allowance when decedent is nonresident.

When a nonresident decedent dies leaving property in Ohio, and the will of the decedent has been admitted to probate in Ohio, as provided by sections 2107.11 and 2107.18 of the Revised Code, the person granted letters testamentary or of administration shall, at any time prior to the approval of the inventory and appraisement, notify the surviving spouse and a child or children of the decedent under the age of eighteen, that each or all of them have sixty days after the approval of the inventory and appraisement to apply for an allowance to be set off out of the Ohio property of the decedent. The probate court may set off an allowance to the surviving spouse and child or children or apportion it among them as it considers just and reasonable, having due regard for the laws of the state of decedent's residence as to its provisions for a surviving spouse and children, the assets of the estate that are subject to administration in the state of decedent's residence, the amount the surviving spouse and children may be expected to receive in the state of decedent's residence, and any other facts and circumstances that may have a bearing on the case. No allowance shall be made that will exceed the amount usually allowed a surviving spouse and children under the laws of this state relating to the administration of estates of resident decedents. Any allowance granted to a child or children shall be held by the surviving spouse, if living with and supporting the child or children, or a resident or foreign guardian, with power to use it for the support of the child or children. Notice of the hearing on an application for the allowance may be given to any person as the court may require. The allowance so set off shall acquire no greater charge against the Ohio property than in estates of resident decedents.

HISTORY: GC § 10509-78; 114 v 320 (418); 125 v S 40 (Ef 10-16-53); 136 v S 145. Ef 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.23 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2129.10 which refers to this section.

Research Aids

Allowance as affected by residence:

O-Jur2d: Executors and Administrators § 221

Am-Jur2d: Executors and Administrators § 326

ALR

Diverse adjudications by courts of different states as to domicile of decedent as regards taxation, administration, or distribution of estate. 121 ALR 1200.

Allowance in state of decedent's domicile for widow's or children's support as enforceable against decedent's real estate, or proceeds thereof, in another state. 13 ALR2d 973.

Law Review

Probate code amendments. Francis J. Eberly. 14 OS LJ 368.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. The provisions of this section apply equally to persons having their abode in this state but domiciled in another state, the term "nonresident" including all those persons not domiciled within the state of Ohio: In re McCombs, 52 OLA 353 (PC).

2. Under the provisions of this section the probate judge may in the exercise of his discretion fix a year's allowance for the widow of a nonresident decedent but, in any event, such allowance is not to be set off by the appraisers appointed by the court: In re McCombs, 52 OLA 353 (PC).

3. The right of a nonresident surviving spouse of a nonresident decedent to a year's allowance in property located in Ohio is governed according to the statute in effect at the time of his death: In re Weatherhead, 73 OLA 524 (PC).

4. Since the state of Texas has not made provision for a widow's year's allowance as contemplated by the Ohio legislature, a widow, a resident of Texas, whose spouse, also a resident of Texas, died owning property located in Ohio, is entitled to have set off to her a year's allowance in such Ohio property: In re Weatherhead, 73 OLA 524 (PC).

5. Under the provisions of this section it is within the discretion of the probate court, upon proper application by the widow and children, whether or not the year's allowance will be set off to a nonresident widow and children out of the local estate of a nonresident decedent: In re Weatherhead, 73 OLA 524 (PC); In re Mitchell's Estate, 97 App 443, 56 OO 357, 127 NE(2d) 39 (1954).

§ 2117.24 Mansion house.

A surviving spouse may remain in the mansion house of the deceased consort free of charge for one year, except that such real estate may be sold within that time for payment of debts of the

decedent, in which event such surviving spouse shall be compensated from the estate to the extent of the fair rental value for the unexpired term, such compensation to have the same priority in payment of debts of estates as the allowance made to the surviving spouse or children.

HISTORY: GC § 10509-79; 114 v 320 (418); 136 v S 466. EF 5-26-76.

Analogous in part to former GC § 8607.

Comparative Legislation

Mansion:

Ky.—KRS, § 392.050

Mich.—MCLA, § 702.68

Fla.—FSA, § 732.401

Forms

1 A&H Probate FORM 2117.24a et seq.

Research Aids

Mansion house:

O-Jur2d: Executors and Administrators § 208; Wills § 743

Right to remain in, as affected by election to take under will:

O-Jur2d: Executors and Administrators § 837

ALR

Widow's right of quarantine. 126 ALR 796.

Respective rights and obligations of testamentary trustee and one whom will permits to occupy property. 172 ALR 1283.

Law Review

Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

CASE NOTES AND OAG

1. This section, granting to the surviving spouse of a deceased consort the right to remain in the mansion house for one year free of charge, does not entitle a husband living separate and apart from his wife for twenty-five years to the occupancy of the mansion house for one year after the wife's death, where the husband never occupied the property after his separation from his wife and she continued to remain therein until her death: In re Lonz v. Glann, 66 App 467, 20 OO 430, 35 NE(2d) 153.

2. A surviving spouse is not entitled to money received from rental of apartment in mansion house under this section: Scobey v. Fair, 70 App 51, 24 OO 371, 45 NE(2d) 139.

3. Where there is a valid prenuptial agreement relinquishing all rights in the property of the other, the wife will be barred from all rights to the husband's estate: Troha v. Sneller, 108 App 153, 9 OO (2d) 195, 151 NE(2d) 595, 79 OLA 74.

4. An antenuptial agreement signed by the deceased's spouse bars her from exempt property and year's allowance: Troha v. Sneller, 108 App 153, 79 OLA 74, 151 NE(2d) 595.

5. A widow's right to live in the mansion house is not a vested right under Ohio law, and is therefore a terminable interest within the meaning of Internal Revenue Code § 2056, and as such, is not includible in the marital deduction: Miller v. United States, 71 OO(2d) 31 (USDC 1974).

6. Devise in will of "amount entitled to under state law" discussed in: Schardt v. Prexler, 45 OLA 119, 67 NE(2d) 549.

DECISIONS UNDER FORMER GC § 8607

1. The right of a widow to remain in the mansion house of her deceased husband, as provided by statute, is not restricted to a personal continuance in the house merely, but she is entitled to a reasonable enjoyment of the possession of the premises, and may therefore either personally occupy them or she may rent them, as she may deem best promotive of her comfort: *Conger v. Atwood*, 28 OS 134.

2 The right of the surviving spouse of a bankrupt to remain in the mansion house of the deceased consort free of charge for one year is recognized in the bankruptcy courts: *In re Parschen*, 119 Fed 976, 13 OFD 443.

[PAYMENT OF DEBTS]

§ 2117.25 Order in which debts to be paid.

Every executor or administrator shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in the following order:

- (A) Costs and expenses of administration;
- (B) Bill of funeral director not exceeding eight hundred dollars for funeral and burial expenses, and such funeral expenses other than the bill of the funeral director as are approved by the probate court;
- (C) The allowance made to the surviving spouse and children;
- (D) Debts entitled to a preference under the laws of the United States;
- (E) Expenses of the last sickness of the decedent;
- (F) Personal property taxes and obligations for which the decedent was personally liable to the state or any of its subdivisions;
- (G) Debts for manual labor performed for the deceased within twelve months preceding decedent's death, not exceeding three hundred dollars to any one person;
- (H) Other debts as to which claims have been presented within three months after the appointment of the executor or administrator;
- (I) All other debts for which claims have been presented after three months from the appointment of the executor or administrator.

The part of the bill of the funeral director that exceeds eight hundred dollars, and the part of a claim included in division (G) of this section that exceeds one hundred fifty dollars shall be included as a debt under division (H) or (I) of this section, depending upon the time when the claim for the additional amount is presented.

Chapters 2113. to 2125. of the Revised Code, relating to the manner in which and the time within which claims shall be presented, shall apply to claims set forth in divisions (B) and (G) of this section. Claims for an expense of administration or for the allowance for support need not be presented. The executor or administrator shall pay debts included in divisions (D) and (F) of this section, of which he has knowledge, regardless of presentation.

The giving of written notice to an executor or administrator of a motion or application to revive an action pending against the decedent at the date of death shall be equivalent to the presentation of a claim to the executor or administrator for the purpose of determining the order of payment of any judgment rendered or decree entered in such an action.

No payments shall be made to creditors of one class until all those of the preceding class are fully paid or provided for. In the event of an insufficiency of assets to pay all the claims of one class, the creditors of that class shall be paid ratably.

If it appears at any time that the assets have been exhausted in paying prior or preferred charges, allowances, or claims, such payments shall be a bar to an action on any claim not entitled to such priority or preference.

HISTORY: GC §§ 10509-121, 10509-122; 114 v 320 (428); 116 v 385; 119 v 394; 121 v 115; 128 v 320 (Eff 10-14-59); 135 v S 318 (Eff 1-1-74); 135 v H 162 (Eff 5-30-74); 136 v S 145. Eff 1-1-76.

See former GC §§ 10714, 10715.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.25 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Commissions, RC § 2113.35.

Court costs, RC § 2101.16.

Expenses of administration, extraordinary, attorney fees, RC § 2113.36.

Comparative Legislation

Order of paying claims:

Ill.—Rev Stat, ch 3, § 18-13

Ind.—Burns' Stat, § 29-1-14-9

Ky.—KRS, § 396.090

Mich.—MCLA, § 708.10

N.Y.—SCPA, § 1811

Pa.—Purdon's Stat, Tit. 20, § 3392

Fla.—FSA, § 733.707

Forms

1 A&H Probate FORM 2113.25a et seq: Extension of time.

Outline of Procedure

Claims of creditors, presentation, schedule, exception and payment. Leyshon No. 51; A&H No. 21.

Research Aids

Claims for which presentation not required:

O-Jur2d: Executors and Administrators § 292

Am-Jur2d: Executors and Administrators § 270 et seq.

Diligence in payment of debts required:

O-Jur2d: Executors and Administrators §§ 172, 325

Exhaustion of assets bars subordinate claims:

O-Jur2d: Executors and Administrators § 349

Notice of motion to revive pending action is sufficient presentation:

O-Jur2d: Executors and Administrators § 300

Priority of claim for old age assistance given decedent:

O-Jur2d: Executors and Administrators § 13

Priority of creditors:

O-Jur2d: Executors and Administrators § 329 et seq.

Am-Jur2d: Executors and Administrators § 467 et seq.

Reasonable amount for funeral expenses:

O-Jur2d: Executors and Administrators § 239, 290

Am-Jur2d: Executors and Administrators § 320

Written notice of motion to revive action pending against deceased is sufficient presentation:

O-Jur2d: Executors and Administrators § 300

ALR

Amount of funeral expenses allowable against decedent's estate. 4 ALR2d 995.

Expense of preserving assets before appointment of executor or administrator as entitled to priority. 108 ALR 393.

Priority in event of incompetent's death of claims incurred during guardianship over other claims against estate. 113 ALR 402.

Rank of foreign judgment, or judgment of sister state rendered in lifetime of debtor in settlement of debtor's estate after his death. 128 ALR 1400.

Right to partial distribution of estate or distribution of particular assets, prior to final closing. 18 ALR3d 1173.

Statutory provisions as to classification or priority of claims against decedent's estate in respect of money or property received by decedent as trustee or fiduciary. 125 ALR 1487.

Judgment against executor or administrator, or levy of attachment or execution against him, as affecting right of creditor's claim against estate or his rights in respect of property of estate. 121 ALR 656.

Law Reviews

Liability of husband and wife's estate for funeral expenses of wife. (Editorial note) 4 CinLRev 486.

Funeral expenses; liability of husband where wife has separate estate. (Case note.) 4 ClevBJ (No. 3) 10.

Real estate taxes in Ohio are charges ad rem only. Article by Ansel B. Curtiss of the Cleveland bar. 10 CinLRev 1.

Claim for funeral expenses. (Case note) 7 OSLJ 472.

Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

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Construction

1. This section construed and applied in *Campbell v. Lloyd*, 162 OS 203, 55 OO 102, 122 NE(2d) 695.

Manner of payment

2. When all preferred claims against the estate of

a deceased person have been paid in accordance with the provisions of GC § 10509-121 (RC § 2117.25), and such estate thereafter becomes insolvent, a pro rata distribution of the remaining funds therein must be made among the general creditors in accordance with GC § 10509-122 (RC § 2117.25): *Moore v. Midland Buckeye Fed. Sav. & C. Assn.*, 72 App 323, 27 OO 224, 51 NE(2d) 758.

2.1 Partnership creditors are not permitted to share equally with individual creditors in the separate estate of an insolvent partner, for an amount remaining due after dividends are received from the partnership estate: *Union Properties, Inc. v. Anzalone*, 23 OO 206 (CP).

Order in which debts to be paid

7. The debts and other expenses enumerated in GC § 10509-121 (RC § 2117.25) include the federal estate tax: *Tax Commission ex rel Price v. Lamprecht*, 107 OS 535, 140 NE 333, 31 ALR 985; *Davidson v. Miners and Mechanics Sav. & Trust Co.*, 129 OS 418, 430, 2 OO 404, 409, 195 NE 845, 98 ALR 1318; *In re Gatch*, 38 OO 279 (PC) [affirmed, 43 OO 143 (App), and 153 OS 401].

8. General Code §§ 10509-181 and 10509-182 (RC §§ 2113.53 and 2113.54), requiring executors and administrators to pay or otherwise secure debts before the distribution of the estates of decedents, and GC § 10509-121 (RC § 2117.25), prescribing the order in which the debts of the deceased are to be paid, do not fix the ultimate burden of federal estate taxes upon the estates passed by will or under the law of descent and distribution: *Miller v. Hammond*, 156 OS 475, 46 OO 405, 104 NE(2d) 9.

8.1 The federal estate tax is a legal charge made upon the decedent's estate and his right to transmit it either by will or by law as an intestate, and the charges imposed by law upon an estate must first be paid out of the estate as a whole, before payment of the charges imposed upon the estate by the will of the testator; a residuary devisee or legatee is presumed in law to be in the position of the last lienholder, after all prior lawful claims and charges have been satisfied out of the estate and, therefore, must stand the burden of charges of the federal estate tax: *YMCA v. Davis*, 106 OS 366, 140 NE 114.

8.2 Common law liability of a husband for the funeral expenses of the wife still exists and may be enforced contrary to the will of the decedent: *Lee v. Hempy*, 35 App 402, 31 OLR 246, 172 NE 421, 8 OLA 155.

9. General Code §§ 10509-121 and 10510-46 (RC §§ 2117.25 and 2127.38) should be construed together: *Nolan v. Kroll*, 37 App 350, 174 NE 750.

10. For the purpose of the administration of a decedent's estate, a certain schedule for the payment of debts and the order in which they are to be paid in such cases is established by GC § 10509-121 (RC § 2117.25): *State ex rel Hostetter v. Hunt*, 56 App 120, 9 OO 254, 10 NE(2d) 155 [affirmed, 132 OS 568].

11. The reasonableness of a funeral director's services is to be determined by such factors as the nature of the services and supplies furnished, and not by whether the services could have been done for less: *Busse & Borgmann Co. v. Upchurch*, 60 App 349, 12 OO 493, 21 NE(2d) 349.

12. Where a physician, for a period of several months, treated a patient for a particular disease, and upon discontinuance of the treatment the patient resumed her usual occupation for nearly a year, at the end of which period treatments for the same disease were again resumed by the same physician, the fees

for the treatment given prior to the interim when she ceased to be a patient and resumed work, are not "expenses of the last sickness," within the meaning of GC § 10509-121 (RC § 2117.25), so as to be a preferred claim against the assets of the estate of the patient, although the disease of which the patient died was that for which the physician first examined and treated her: *Murphy v. Langa*, 62 App 192, 15 OO 500, 23 NE(2d) 516.

13. General Code § 10509-121 (RC § 2117.25), which provides that an executor may allow three hundred fifty dollars for funeral expenses and that the probate court must approve the allowance of any sum in excess of such amount, does not require the approval of the probate court to the allowance of a claim of a funeral director in excess of three hundred fifty dollars founded on a contract made with the decedent in his lifetime. Such a contract fixing a price in excess of three hundred fifty dollars for services rendered by the funeral director is valid: *Schroyer v. Hopwood*, 65 App 443, 19 OO 45, 30 NE(2d) 440 discussed in 7 OSLJ 472.

13.1 In an action by administrator to recover money in a bank, the bank may set off against claim of administrator a contractual obligation acquired by the bank: *Haefner v. First Nat'l Bank*, 67 App 213, 21 OO 197, 36 NE(2d) 308, 34 OLA 523.

14. General Code § 10509-121 (RC § 2117.25) et seq furnish the provisions for the payment of debts chargeable against the estate of a decedent: *Riley v. Keel*, 84 App 313, 39 OO 468, 85 NE(2d) 123.

15. General Code § 10503-5 (RC § 2105.10) is to be read in pari materia with GC § 10509-121 (RC § 2117.25) et seq: *Riley v. Keel*, 84 App 313, 39 OO 468, 85 NE(2d) 123.

15.1 From the wording of this section it appears that the legislature recognized an honest and proper claim for funeral expenses presented within time to an administrator of the estate of a deceased person as a debt of the estate for which the estate of the deceased is liable: *Adams v. Malik*, 106 App 461, 463, 7 OO(2d) 196, 155 NE(2d) 237.

15.2 Under RC § 2305.21 the administrator, as legal owner of the general personal estate of the deceased which has come to him in the course of law, may sue for injury to property comprising the estate; and, where the estate is diminished by a charge upon it for funeral expenses (RC § 2117.25) which directly resulted from another's wrongdoing, there is injury to property in the deceased's estate to the extent of the charge: *Adams v. Malik*, 106 App 461, 7 OO(2d) 196, 155 NE(2d) 237.

15.3 The right of a widow to a year's allowance vests immediately upon husband's death and survives the widow as an asset of her estate: In re *Wreed's Estate*, 106 App 324, 7 OO(2d) 75, 154 NE(2d) 756; In re *Bremer's Estate*, 67 App 144, 21 OO 150, 34 OLA 193, 36 NE(2d) 48.

15.4 Revised Code § 5105.13, providing for the priority of claims against certain estates, is a special statute covering only the administration of estates in which a claim of the division of aid for the aged is involved; constitutes an exception to this section, which is a general statute covering estates generally; and governs the amount allowable as a preferred claim for funeral expenses against an estate in which the division of aid for the aged has a claim (a sum not exceeding \$300): In re *Pfeiffer*, 109 App 331, 11 OO(2d) 132, 165 NE(2d) 795.

15.5 A lien of the division of the aged takes priority over the claim of the surviving spouse for the property exempt from administration: *Division of Aid for the Aged v. Huff*, 110 App 483, 11 OO(2d) 397, 168 NE(2d) 316; 1938 OAG No. 2111.

15.6 Intestate personality resulting from the lapse of a will bequest shall first be applied to debt payment and then to the cost of administration: *Spoerl v. Schriever*, 44 OApp(2d) 161, 73 OO(2d) 159, 336 NE(2d) 851 (1975).

16. Determination of federal income tax liability on income derived from personal property discussed: In re *Gamble's Estate*, 8 OMisc 314, 36 OO(2d) 388, 220 NE(2d) 621.

17. The legislature's use of the word "preferred" in GC § 1359-7 (RC § 5105.13), in describing the claim of the Ohio division of aid for the aged against a recipient's estate, gives such claim priority over the claims set forth in GC § 10509-121 (RC § 2117.25): *Rogers v. Peoples Bldg. & Co.*, 12 OO 245 (PC).

19. A stranger who pays the decedent's funeral bill not as an officious meddler but out of the necessity of the occasion is entitled to reimbursement by the estate of the deceased provided the bill is reasonable: *Textler v. Marquard*, 14 OO 381 (MC).

21. Under amended paragraph 4, the unpaid taxes, penalties and assessments no longer constitute taxes and special assessments remaining unpaid against the estate; they are only a lien against the real estate and impose no obligation against the remainder of the estate or upon the heir succeeding to the estate: In re *Haughton*, 21 OO 360 (PC).

22. In an insolvent estate of a decedent administered in the state of Ohio, debts of the deceased due to the United States shall be paid to the extent of assets available therefor after making deductions for costs and expenses of administration, preferred claims for funeral expenses, and the amount fixed as the year's allowance for the support of the widow and children of the deceased; and after paying the claim of the United States for debts of the deceased to the extent of assets available therefor, the assets remaining shall be paid on claims in the priority listed in GC § 10509-121 (RC § 2117.25), disregarding further consideration of item 4 thereof: In re *Fackler*, 27 OO 232, 12 OSupp 145 (PC).

23. Under the authority of GC § 10509-121 (RC § 2117.25), an administrator can maintain an action for the benefit of his decedent's estate to recover the funeral expenses of his decedent: *Hunter v. McKinney*, 46 OO 17, 101 NE(2d) 810 (CP).

24. General Code § 10509-121 (RC § 2117.25) is a provision for payment of debts of deceased and determination of priority in which they shall be paid; in no sense does it secure the payment of any debt: *Howett v. Howett*, 25 OLA 150.

25. The probate court has no power to allow an amount in excess of three hundred and fifty dollars for funeral expenses, under subdivision seven of GC § 10509-121 (RC § 2117.25), so as to make the excess amount payable under subdivision one: *Bush v. Cleaver*, 29 OLA 284.

25.1 A preferred claim of the Division of Aid for the Aged has priority only over general claims but not over preferred claims contained in RC § 5105.13: *Bush v. Cleaver*, 29 OLA 284.

26. The fact that the estate of a deceased wife is liable for the expenses of her last sickness, by reason of GC § 10509-121 (RC § 2117.25), does not in any way modify the husband's obligation with regard to medical services furnished the wife, if he would otherwise be liable under any of the three legal theories set forth next above: *Heym v. Juhasz*, 45 OLA 571, 68 NE(2d) 119 (App).

28. The husband is primarily responsible for the expenses of his wife's last illness and a claim for such expenditures made by a surviving husband is not a

proper item to be listed by the administrator in the schedule of debts owing from the estate: *In re Shields*, 67 OLA 457, 116 NE(2d) 828 (PC).

29. A claimant who rendered no care to the decedent during her last illness, as contemplated by this section, is not entitled to a bequest of the residue of decedent's estate to "whoever takes care of me in my last illness": *Holmes v. Krause*, 56 OO 272, 123 NE(2d) 337 (PC).

30. A personal representative may properly pay and be compensated for the funeral expenses of his decedent: *Hunter v. McKinney*, 69 OLA 237 (CP).

31. If an administrator has paid or obligated himself to pay the funeral expenses of his decedent he may maintain an action for the benefit of the estate to recover such funeral expenses against the person who caused the wrongful death of his decedent: *Hunter v. McKinney*, 69 OLA 237 (CP).

31.1 Personal property of decedent is primarily liable for debts: *Ginder & Smith v. Ginder*, 72 OLA 277, 134 NE(2d) 603.

31.2 Regardless of whether the surviving spouse takes under the will or statute, the federal estate tax is a debt against the entire estate: *Ginder & Smith v. Ginder*, 72 OLA 277, 134 NE(2d) 603.

32. This section is a general statute covering the administration of estates generally while RC § 5105.13, is a specific statute covering only the administration of estates in which a claim of the division of aid for the aged is involved: *In re Young*, 74 OLA 129, 140 NE(2d) 792 (PC).

33. The sovereigns which have a claim against a decedent's estate and which claim comes to the knowledge of the fiduciary, should be paid regardless of whether or when the claim was presented: *Baker v. Charles*, 31 OO(2d) 310, 202 NE(2d) 646 (PC).

34. The United States is not required to file its claim for unpaid withholding and social security taxes against a decedent's estate within four months after appointment of the fiduciary, or within nine months after such appointment by leave of court, nor to proceed with an action within two months after the claim had been rejected; and an executor who has no objection to the merits of the claim is under a duty to pay the same before distributing the assets to the sole beneficiary: *Baker v. Charles*, 31 OO(2d) 310, 202 NE(2d) 646 (PC).

35. Revised Code § 5105.13 is an exception to this section and should be so read: 1940 OAG No. 1853.

DECISIONS UNDER FORMER GC § 10714

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Scope and effect

1. Duties of administrator or executor enumerated: *Greer v. State*, 2 OS 574.

2. The year's allowance is payable at once: *Steward v. Barry*, 102 OS 129, 131 NE 492.

Payment of debts in general

3. A recognizance for the appearance of an individual is not such special claim on the estate of the recognizer as to be entitled to a preference over ordinary creditors upon distribution of that estate: *Dewitt v. Osburn*, 5 O 480.

4. Under a provision in a will requiring the executor to reject all claims presented by testator's children; and providing that if one of such children should recover upon a claim against the estate, such claim should be deducted from his share, the amount recovered by an assignee of one of such children must be deducted from the share of the assignor: *Scheets v. Hunter*, 56 OS 761, 49 NE 1116.

5. A debtor of decedent's estate will be allowed credit on his debt for money which he has expended in paying debts of the decedent: *Caraway v. Robinson*, 85 OS 485, 98 NE 1121.

6. Money which has been borrowed after the death of the owner of realty and applied to the discharge of a valid ditch assessment against such property, is a lien upon such property in favor of the person advancing such money: *Sears v. Walker*, 85 OS 490, 98 NE 1132.

7. The charges imposed by law upon an estate must first be paid out of the estate as a whole before payment of the charges imposed upon the estate by the will of the testator: *Christian Association v. Davis*, 106 OS 366, 140 NE 114.

8. A residuary devisee or legatee is presumed in law to be in the position of the last lienholder, after all prior lawful claims and charges have been satisfied out of the estate: *Christian Association v. Davis*, 106 OS 366, 140 NE 114.

9. The liability of a husband for necessities or care furnished to his wife is not affected by the fact that he is insane or mentally incompetent to transact business, and an action for recovery for services or necessities so furnished may be maintained against the administrator of such husband, although the indebtedness was incurred during the lifetime of the husband and was not approved by his guardian: *Badger v. Orr*, 1 App 293, 17 CC(NS) 312, 24 CD 328.

9.1 Shares of stock are part of an estate's assets even if in the hands of remote distributees: *Starr v. Weir*, 35 App 374, 172 NE 537.

10. If an executor who has no authority to borrow money does so, and the money which he thus borrowed actually goes into the estate, the estate must repay the amount thus borrowed: *Westwater v. Guitner*, 18 NP(NS) 209, 30 OD 370.

11. If a creditor of the estate of a decedent who claims that his mortgage is prior to another mortgage given by such decedent in his lifetime, accepts a mortgage upon decedent's realty after his death, executed by his heirs, such creditor does not waive his priority over such other mortgage, especially if the

mortgage which such creditor accepts from such heirs provides expressly that such creditor by the acceptance of such mortgage did not admit a priority of such other mortgage: *Schell v. Bernhard*, 25 CC(NS) 411, 26 CD 39 [appeal from 24 OD(NP) 182].

12. If the owner of realty insures a building in a mutual insurance company, his estate is liable for assessments made in accordance with the terms of such policy up to the time of his death, and his estate is liable, together with his heirs, for assessments made in accordance with the terms of such policy after his death and before the expiration of such policy: *In re Lones*, 57 Bull 122.

13. The fact that the executor represents the testator in giving effect to his wishes as embodied in his last will, does not justify the executor, as a matter of law, in undertaking the defense of a contest of such will at the expense of the estate: *In re Curry*, 20 NP (NS) 49, 27 OD 485.

14. For order for payment of debt, see *Lingler v. Wesco*, 79 OS 225, 86 NE 1004, 128 AmSt 714, 21 LRA(NS) 182 [affirming circuit court, which affirmed, *Lingler v. Kraft*, 3 NP(NS) 653, 16 OD 474]; *In re Seigel*, 53 F(2d) 269.

—Funeral expenses

15. Funeral expenses may include a reasonable amount for a tombstone or monument: *Kilbourne v. Fay*, 29 OS 264.

16. Large expenditures for burials, disproportionate to the assets of an estate, should not be encouraged: *In re McKenna*, 1 LegGazRep 12.

17. It has been held that an undertaker's bill of two hundred and one dollars, where the estate was seven hundred and ninety-eight dollars, was unreasonably high, and it was cut down to one hundred and fifty dollars: *In re Karschner*, 6 NP(NS) 459, 52 Bull 107 [affirmed, *Kroll v. Close*, 82 OS 190, 92 NE 29].

18. It is the duty of the probate judge, upon the hearing of an administrator's account, whether exceptions have been filed or not, to scan closely the amounts claimed to have been paid for funeral expenses, and if unreasonable and extravagant, should be disallowed, even against legatees and next of kin: *Kroll v. Close*, 82 OS 190, 92 NE 29.

19. Where husband and wife each held ample separate estate, the husband was not entitled to reimbursement for payment of his wife's funeral expenses: *Phillips v. Tolerton*, 9 NP(NS) 565, 20 OD 249 [affirmed, without opinion, 82 OS 403, 92 NE 1121].

20. The husband was held liable for payment of his wife's funeral expenses though there existed a contract of separation between them releasing him from all claims for her support, regardless of any separate estate of the deceased wife: *Humphrey v. Huff*, 3 App 111, 20 CC(NS) 178, 25 CD 117.

21. The husband has been held liable upon the death of his wife while divorce proceedings were pending: *Eveland v. Sherman*, 9 NP(NS) 559, 21 OD 726.

22. By these decisions it seems settled that a husband is liable for the funeral expenses of his deceased wife and when he pays same out of his own funds is not entitled to reimbursement therefor from her estate. However, GC § 10509-125 (RC § 2117.26) modifies these cases, allowing reimbursement to the extent that the rights of other creditors of the estate of the wife will not be prejudiced thereby.

23. Revised Statutes § 6090, which directed the payment of funeral expenses and those of last sickness, may apply to the estate of a deceased married woman, though such deceased left surviving her a husband

having property: *McClellan v. Filson*, 44 OS 184, 5 NE 861, 58 AmRep 814.

24. In such case, where it is shown that the physician, who attended the deceased in her last illness, was called at her request under such circumstances as to warrant a charge against her, and that the purchase of coffin and other necessary articles for the funeral, being suitable to the station of the deceased, were made by the executor, such executor may properly allow such expenses, and pay them from the assets of the estate: *McClellan v. Filson*, 44 OS 184, 5 NE 861, 58 AmRep 814.

25. This section, which directs payment of funeral expenses and those of last sickness, may apply to the estate of a deceased married woman, though such deceased left surviving her a husband having property: *McClellan v. Filson*, 44 OS 184, 5 NE 861.

26. The estate of a married woman, who dies leaving property, is primarily liable for her funeral expenses, and where the husband pays them he may recover them from her administrator: *Clawson v. Briggs*, 16 CC(NS) 225, 26 CD 582.

27. Formerly, where an executor or administrator voluntarily or under process paid funeral expenses of deceased wife out of her estate, the estate was not entitled to reimbursement from her husband: *In re Guthrie*, 28 NP(NS) 447.

28. Where the consort of a deceased husband or wife received the entire property of said decedent by virtue of a devise for his or her support during life, with the remainder over, the said consort died leaving no estate, the expenses of his or her last sickness and funeral are a legal charge against the estate which passed to him or her for life: *Kennedy Bros. v. Price*, 23 CC(NS) 12, 27 CD 28 [affirmed, without opinion, *Price v. Kennedy*, 83 OS 472].

29. Unless it appears that a wife by special contract bound her separate estate for medical services rendered in her behalf during her lifetime, the husband is not relieved from liability for such services, and the physician may proceed against him without first exhausting her separate estate: *Withrow v. Boone*, 16 NP(NS) 506, 25 OD 402.

30. Funeral expenses and expenses of last sickness are made preferred claims under this section, and as such should be presented to the executor or administrator for his allowance or rejection, as provided by former GC § 10717 (see now RC § 2117.08): *In re Miller*, 12 OD(NP) 562.

—Expenses of administration

31. Necessary attorney fees in collecting assets or resisting unjust claims when paid by the administrator are expenses entitled to precedence as such: *Thomas v. Moore*, 52 OS 200, 39 NE 803.

32. Where the administrator is ordered by the court to pay to his attorney a sum found due him out of the assets of the estate in his hands for distribution, a failure to comply with such order is a breach of the administration bond for which the surety thereon is liable: *Smith v. Rhodes*, 68 OS 500, 68 NE 7.

33. An action cannot be maintained against an executor in his representative capacity for services which have been rendered by an attorney on behalf of the estate: *Payne v. Rech*, 6 App 327, 27 OCA 60.

34. If an executor assumes the burden of defending a proceeding to contest a will because of his own interest under such will, he is not entitled, in case of success, to be reimbursed out of the estate for the attorney fees expended by him in such contest: *In re Curry*, 20 NP(NS) 49, 27 OD 485.

35. The administrator may be entitled to the ex-

penses for gathering crops: *In re Turpin*, 7 NP 569, 5 OD 410.

—Allowance to widow

36. The allowance of support to widow and children is made a debt of the estate by this statute, and land may, therefore, be sold to pay same: *Allen v. Allen*, 18 OS 234; *Neely v. Neely*, 1 NP(NS) 97 [reversed on another ground, 49 Bull 85].

38. This section is an express declaration that the year's allowance to a widow is a debt of the estate and that she is a creditor thereof: *Whitely v. Weber*, 2 CC 338, 1 CD 517; *Watts v. Watts*, 38 OS 480.

39. Upon distribution of the proceeds of lands sold by the administrator to pay debts, the widow's claim for a year's support does not take precedence over judgment liens: *Jones v. Allen*, 6 NP 518, 8 OD 338.

40. Lands, upon which the widow gave a mortgage after her husband's death, having been sold to pay debts, the distribution of the fund arising therefrom must be as to the widow in accordance with the provisions of this section and not under the provisions of former GC § 10809 (see now RC § 2127.38), providing how a fund from the sale of land shall be applied: *Neeley v. Neely*, 1 NP(NS) 97, 48 Bull 929 [reversed on another ground, 49 Bull 85].

—Taxes

41. Taxes accumulating upon a decedent's real estate, which the personal representative has no funds to pay, are properly debts for the payment of which the lands of decedent may be sold: *Welsh v. Perkins*, 8 O 52.

42. The definition of taxes as "debts of decedent," under former GC § 10714 (see now RC § 2117.25), will be adopted in construing the inheritance tax law: *Tax Commission v. Lamprecht*, 107 OS 535, 140 NE 333, 31 ALR 985.

43. Plaintiff was entitled to the remainder in certain real estate, subject to a life estate in another. The life tenant died October 24, leaving a will of which defendant was executor. Before December 20, 1909, plaintiff requested defendant to pay the taxes for 1909, payable at that time, which defendant refused to do, the same remaining unpaid until March 16, 1910, when plaintiff paid all the taxes for 1909 and penalty attached for nonpayment of the part due December 20, 1909, and presented his claim therefor to the executor who rejected it. Suit being brought upon the claim, it was held that the taxes were a debt of the estate of the life tenant, and it was the duty of her executor to pay the same; the remainderman was not a volunteer in paying them and was entitled to recover: *Robinson v. Bowler*, 18 CC(NS) 372, 33 CD 102 [affirmed, without opinion, 88 OS 614].

44. Taxes and assessments and the liens for them are preferred over the liens securing the claims of general creditors: *Pioneer Trust Co. v. Stich*, 71 OS 459, 73 NE 520; *Peoples Building Assn. v. Hanson*, 5 NP 162, 7 OD 179.

45. Although an executor is made liable under the statute for payment of collateral inheritance tax, such tax is not paid on account of the estate, but on account of the legatees or distributees whom the state is unwilling to trust: *State ex rel Hunt v. American Bonding Co.*, 16 NP(NS) 497, 23 OD 609, 58 Bull 249.

46. The taxes for the last half of a preceding year, which are due in June, whether against real or personal property, are a personal debt of a decedent, even if he dies before the time at which such taxes are payable in June. The administrator should pay

such taxes out of the funds of the estate, and if he pays such taxes, he is entitled to credit on his account for such payment: *In re Lones*, 57 Bull 122.

46.1 Priority of statutory allowances to widows and minor children are fixed as of the date of the allowances and cannot be modified by subsequent developments: *Swackhammer v. Fulton*, 32 NP(NS) 100.

46.2 A widow and children of a deceased bankrupt are entitled to payment of a year's allowance even though the assets are in the hands of a bankruptcy trustee: *Siegel v. Wells*, 55 F(2d) 877.

—Expense of carrying on business

47. Where an executor, without authority, carries on the business of deceased, in order to pay debts and support the family of such testator, the general assets of the estate, not embarked in such business, are not liable for debts incurred by the executor in that business: *Lucht v. Behrens*, 28 OS 231.

Procedure

48. A creditor of decedent's estate may testify as to an independent claim asserted by a third person: *Citizens Nat. Bank v. Andrews*, 24 NP(NS) 361.

49. If a widow of decedent asserts a claim against the estate, and objection to her competency as a witness is sustained, the act of the administrator in cross-examining her is a waiver of her incompetency, and she may testify generally, except as to confidential communications: *Citizens Nat. Bank v. Andrews*, 24 NP(NS) 361.

50. An action by a creditor of an estate against the executor to recover judgment on a claim against decedent is not appealable from the court of common pleas: *Yarian v. Stouffer*, 14 App 306.

Bankruptcy

51. On death of bankrupt after adjudication and sale of assets, allowance from estate for widow's support held precluded by lien of trustee: *In re Seigel*, 54 F(2d) 269.

52. Bankruptcy act giving trustee right of lien creditor held not to create such lien as, under state statute, would preclude allowance to bankrupt's widow: *Siegel v. Wells*, 55 F(2d) 877.

§ 2117.26 Spouse's funeral expenses.

A surviving spouse is entitled to reimbursement from the estate of the deceased spouse for funeral expenses, if paid by the surviving spouse, to the extent that the rights of other creditors of the estate will not be prejudiced by such reimbursement.

HISTORY: GC § 10509-125; 114 v 320 (429); 129 v 1265, § 1. Eff 8-4-61.

Text Discussion

1 *Anderson Fam.L.* § 16.5.

Research Aids

Spouse entitled to reimbursement for funeral expenses:

O-Jur2d: Executors and Administrators § 241

Am-Jur2d: Executors and Administrators § 320;

Husband and Wife §§ 378, 380

Law Review

Claim for funeral expenses. (Case note.) 7 OSLJ 472.

CASE NOTES AND OAG

See case notes re funeral expenses under RC § 2117.25.

1. Where a widow takes property and uses it, rather than sell it to pay funeral expenses, such property loses its exemption from the half and half statute: *Chupp v. Thomas*, 7 OMisc 204, 36 OO(2d) 317, 216 NE(2d) 658.

§ 2117.27 Vendor's lien not preferred. (GC § 10509-126)

A vendor's lien not disclosed of record shall not, after the death of the vendee, have priority as against general creditors of the deceased.

HISTORY: GC § 10509-126; 114 v 320 (429). **EFF** 10-1-53.

Comment

The purpose of this section is to prevent a vendor who has not seen fit to disclose his lien either by reservation in the deed or by taking back a purchase money mortgage and recording the same, from having preference over general creditors who may have relied upon the absence of a lien of record when the credit was extended.

Research Aids

Priority of vendor's lien:

O-Jur2d: Executors and Administrators § 329; Vendor and Purchaser § 154, 166

ALR

Automobiles: priorities as between vendor's lien and subsequent title or security interest obtained in another state to which vehicle has been removed. 42 ALR3d 1168.

§ 2117.28 Debts not due. (GC § 10509-124)

Debts not due may, and on demand of the creditor shall, if assets are available therefor, be paid by the executor or administrator according to the class to which they belong. If the debt does not bear interest before maturity, it shall be discounted at the legal rate of interest; otherwise the stipulated rate of interest shall be paid to time of payment. If a creditor whose claim is not due refuses to accept payment as provided in this section, the executor or administrator shall set aside assets to satisfy such claim. The sufficiency of such assets and the manner and place of holding and preserving the same shall be first approved by the probate judge after notice to the creditor, and if such assets thereafter become insufficient to pay such claim in full because of depreciation or loss without fault of the executor or administrator, neither the executor nor administrator nor the remaining assets of the estate shall be liable to such creditor by reason thereof.

After setting aside such assets, the executor or administrator may proceed to make payment and distribution of the remaining assets of the estate and to settle the same without recourse by such creditor to the assets so distributed.

HISTORY: GC § 10509-124; 114 v 320 (429); 116 v 385 (400), § 1; 119 v 394 (411), § 1. **EFF** 10-1-53. Analogous to former GC § 10735.

Comment

If the creditor refuses to accept payment, the probate court shall approve the sufficiency of the assets to be set aside and the manner and place of preserving the same. The executor or administrator may then distribute the remaining assets. If the assets set aside for payment of the claim depreciate or for any other reason become insufficient, the holder of the claim is without recourse to other assets or to other creditors who have received distribution.

This section applies to claims which are in existence at the date of death, but which are not due and payable. It does not apply to claims which are contingent at the date of death, as to which provision is made in RC § 2117.37 et seq.

Forms

1 A&H Probate FORM 2117.28a et seq.

Research Aids

Debts not due:

O-Jur2d: Executors and Administrators §§ 326, 352

ALR

Claims for expenses of last sickness as within statute requiring presentation of claims against decedent's estate. 120 ALR 275.

Unliquidated claim for damages arising out of tort as a contingent claim within statute relating to presentation of claim against decedent's estate. 125 ALR 871.

CASE NOTES AND OAG

1. This section applies only to claims which are not disputed, and which have been allowed but are not due: *In re Method*, 10 OO 489 (PC).

3. Under this section, if a creditor whose claim is not due refuses to accept payment as therein provided, the executor or administrator shall set aside not only the principal then due, but also all interest at the stipulated rate up until the time of payment, i.e., the date of setting aside the assets. When this has been done, the claim is paid so far as the executor or administrator is concerned, and the court then shall order the estate released from the obligation, and order the fiduciary to cancel the same, as provided by GC § 10510-22 (RC § 2117.25): *Meiser v. Kissinger*, 26 OO 146, 11 OSupp 80 (PC).

5. In the absence of default under a ninety-nine year lease renewable forever, assigned by the lessee with the knowledge and consent of the lessor, mere privity of contract in the absence of privity of estate would not render the lessor's asserted claim for future rent against the estate of the deceased original lessee a debt not due as contemplated under this section, nor justify impounding such estate; such a claim is no more than a contingent claim which may never be due: *Meek v. City Nat. Bank & Co.*, 32 OLA 201.

6. Property may be sold by an administrator to pay debts not yet due, especially where it appears that the creditor is willing to accept the money: *Hunter v. Yocum*, 18 NP(NS) 14, 27 OD 31.

7. The common pleas court has no jurisdiction to compel an administrator to receive payment of an unmatured note from an executor of another estate under this section: *Denmead v. Sharp*, 14 OD 300.

§ 2117.29 Beneficiary taking subject to mortgage. (GC § 10509-132)

When the only debts of an estate remaining unpaid are secured by liens on property of the estate, the devisees, legatees, or heirs entitled to

receive such property may be permitted to take the same subject to such liens, if all the lienholders consent and waive recourse to all the other assets of the estate in the event such property so taken is insufficient to pay the debts secured by such liens.

HISTORY: GC § 10509-132; 114 v 320 (430); 119 v 394 (412), § 1. Eff 10-1-53; 129 v 582 (737). Eff 1-10-61.

Comment

A note and mortgage being a debt, it must in some way be paid or canceled as against the decedent. Sometimes a sale of the mortgaged land to pay the debt is very detrimental to an heir or legatee and yet the duty of the executor or administrator requires him to absolve the estate from all liability as to this mortgage indebtedness. The above section provides that the heir or legatee may take such land subject to the mortgage if he or she so desires and the mortgagee consents. Executors and administrators must see to it, however, that the estate is fully released from all liability, and it is suggested that proof thereof be filed in the probate court by the executor or administrator.

General Code § 10509-132, as amended in 8-22-41 (119 v 412), differed from the former GC § 10509-132 in that (a) it applied to personal property as well as real property, (b) it applied to all liens and not mortgage liens only, and (c) it applied where two or more liens existed while the former statute was limited to a single lien.

Forms

1 A&H Probate FORM 2117.29a et seq.

Research Aids

Beneficiary taking subject to lien:

O-Jur2d: Executors and Administrators § 352

ALR

Mortgage or other encumbrance as affecting duty of executor of administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale. 116 ALR 910.

[SUITS AGAINST EXECUTOR OR ADMINISTRATOR]

§ 2117.30 Suits against executor or administrator.

No suit shall be brought against an executor or administrator by a creditor of the decedent or by any other party interested in the estate until after five months from the time of the appointment of the executor or administrator, or the expiration of the further time allowed by the probate court for the collection of the assets of the estate, except in the following cases:

- (A) On claims rejected in whole or in part;
- (B) For the enforcement of a lien against or involving title to specific property;
- (C) For the recovery of a claim that would not be affected by the insolvency of the estate;
- (D) On account of fraud, conversion, or concealment of assets;
- (E) Any other action as to which a different rule is prescribed by statute.

When an executor or administrator dies, resigns, or is removed without having fully administered the estate of the deceased, the time between his death, resignation, or removal and the appointment of a successor shall be excluded in computing the five months or longer period provided in this section. In any event, his successor shall not be held to answer the suit until after the expiration of four months from the date of the successor's appointment, or a further time allowed him by the court for the collection of the assets of the estate.

HISTORY: GC § 10509-138; 114 v 320 (432); 116 v 385 (400); 119 v 394 (413); 133 v S 135 (Eff 1-1-71); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10740.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2117.30 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2109.56 which refers to this section.

Comparative Legislation

Period of protection from suit after qualification:

Ind.—Burns' Stat, § 29-1-14-2

Ky.—KRS, § 395.270

Pa.—Purdon's Stat, Tit. 20, § 3391

Fla.—FSA, § 733.705

Research Aids

Action for enforcement of lien excepted:

O-Jur2d: Mortgages § 316

Actions against executors or administrators:

O-Jur2d: Executors and Administrators § 591 et seq.

Am-Jur2d: Executors and Administrators § 730 et seq.

ALR

Right of creditors to maintain action in interest of decedent's estate. 158 ALR 729.

Payment or delivery of legacy or distributive share before decree of distribution as defense to action by legatee or distributee against personal representative. 121 ALR 1069.

Executor's or administrator's right to set up, as defense to action by servant or agent of decedent, grounds for discharge existing during life of employer but unknown to him. 109 ALR 474.

Constitutionality, construction, and application of statute forbidding suit against representative of estate until expiration of prescribed period. 104 ALR 892.

Law Reviews

Mortgage foreclosure in Ohio when fee owner is deceased. Article by Leonard C. Hirsch of the St. Marys bar. 36 OLR 330.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. A legacy bears interest after one year from notice of the appointment and qualification of the executor, unless the will, or the relationship of the parties shows a contrary intention: *Webster v. American Bible Society*, 50 OS 1, 33 NE 297; *Gray v. Case*

School, 62 OS 1, 56 NE 494 [affirming Case School v. Gray, 15 CC 488, 8 CD 241]; Ebersole v. Cole, 19 NP(NS) 507, 27 OD 175.

2. Under former GC § 10753 (repealed, 114 v. 320) where the appointment of an administrator is revoked by the probate court; but on appeal the administrator is restored to his office and duties, the period during which he was suspended from his office is to be deducted in fixing the two years' limitation for the bringing of an action against him as such administrator: Badger v. Orr, 1 App 293, 17 CC(NS) 312, 24 CD 328.

3. When an action is brought by the filing of a complaint, within the statute of limitations, complainant has one year thereafter in which to cause the appointment of a suitable personal representative and obtain service of summons against him. (Paragraphs 5 and 6 of syllabus of Wrinkle v. Trabert, 174 OS 233, 20 OO(2d) 248, supplanted by Civ.R. 3(A) and 4(A), (B) and (C).): Hayden v. Ours, 44 OMisc 62, 73 OO(2d) 224, 337 NE(2d) 183 (1975).

4. Failure of plaintiffs to aver when administrator was appointed does not violate this section: Roberts v. Hickerson, 11 OO 471, 26 OLA 616, 46 NE(2d) 803.

5. The requirement of this section that nine months shall elapse before action can be brought, may be waived by failure on part of executor or administrator to object either by demurrer or answer in civil action: Burkhardt v. Burkhardt, 12 OO 359 (PC).

6. Where an action in personal injury is filed two days prior to expiration of the statute of limitations against the administrator, such petition can be demurred to: Parrish v. McKee, 59 OO 316, 73 OLA 65, 135 NE(2d) 486.

7. When the language of RC §§ 2117.06, 2117.07 and 2117.30 is compared and the literal language applied, it will be noted there is no specific prohibition against the bringing of an action within the nine-month period of time from the date of appointment of the administrator: Simmons v. Bartley, 19 OO(2d) 335, 177 NE(2d) 77 (CP).

8. Alleged owners may not ordinarily bring replevin actions in common pleas courts against executors or administrators in the course of administration: In re Service Transport Co., 63 OLA 236, 108 NE(2d) 741.

9. Absence of a fiduciary against whom the federal government may bring an action to collect unpaid taxes tolls the six year statute of limitations: United States v. Besase, 57 OO(2d) 51, 29 OMisc 166, 319 FSupp 1064 (1970).

§ 2117.31 Estate of deceased joint debtor. (GC § 10509-139)

When two or more persons are indebted in a joint contract, or upon a judgment founded on such contract, and either of them dies, his estate shall be liable therefor as if the contract had been joint and several, or as if the judgment had been against himself alone. This section shall not affect the rights of a surety, when certified as such, in a judgment rendered jointly against him and his principal.

HISTORY: GC § 10509-139; 114 v. 320 (432). Eff 10-1-53
Analogous to former GC §§ 10733, 10734.

Research Aids

Claims against estate of joint debtor:

O-Jur2d: Executors and Administrators § 276;
Parties § 35; Partnership §§ 73, 120

Law Reviews

The uniform partnership act—its effect upon Ohio probate practice. Address by Justin H. Folkerth. 24 OBar (No. 34) 532.

CASE NOTES AND OAG

INDEX

Administrator as co-maker, 12
Common law, 1, 8, 9
Partnerships, 2, 6, 7, 10, 11, 13
Surety for co-administrators, 3
Surviving joint tenant, 5

1. This section abrogates the common law rule, and the estate is made liable in the same manner as if the contract had been joint and several; and the survivor and the personal representative of the deceased obligor can be joined in the same action, whether the contract or obligation is in terms joint or several, or both, or is made so by this section; and it authorizes a several judgment to be rendered against each of them: Burgoyne v. Ohio Life Ins. Co., 5 OS 586; Bank of Chillicothe v. Yoe, 4 O 125; Buell v. Cross, 4 O 327.

2. Where partners are indebted for services rendered to them, the indebtedness is joint, and under the former practice, on the death of one, the only remedy of the creditor at law was a suit against the surviving partner; but by the statute the debt becomes a joint and several obligation, and the creditor has his election to sue the surviving partner, or the administrator of the deceased partner, or both the surviving partner and the administrator: Weil v. Guerin, 42 OS 299; Williams v. Bradley, 5 CC 114, 3 CD 58; 7 CC 227, 4 CD 570.

3. Where two administrators give a joint bond, with surety, for the faithful administration of the estate that may come to their possession, and thereafter all the property of the deceased comes into their joint possession, if waste is committed by one of the administrators after the death of the other, the surety can require that the estates of both be exhausted before he shall be subject for the surviving administrator's default: Eckert v. Myers, 45 OS 525, 15 NE 862; see also Horner v. Koons, 63 OS 559, 60 NE 1131.

5. A surviving spouse, who owned real property with her husband as a joint tenant with the right of survivorship, is entitled to receive contribution from her husband's estate where she has since sold the property and discharged all liability on a joint and several mortgage note which had been signed by both herself and the decedent: Pietro v. Leonetti, 30 OS(2d) 178, 59 OO(2d) 186, 283 NE(2d) 172.

6. This section affects a partnership contract as well as other joint contracts: Union Properties, Inc. v. Anzalone, 23 OO 206 (CP).

7. Unless there is a contrary provision in the partnership articles, the death of one partner dissolves the firm and upon the death of one of two or more joint defendants, the right of action becomes joint and several and one may maintain an action either severally or jointly: Fechheimer v. Kiefer, 5 OLA 265.

8. The common law liability of surviving joint obligors is in no way affected by former GC § 10733 (see now RC § 2117.31), such statute merely creating a liability against the estate of a deceased obligor which did not theretofore exist: Yoder v. Medbury-Ward Co., 10 OLA 493.

9. This section abrogates the common law rule which made joint liability on contract cease as to joint liability on death and makes the estate of such decedent jointly liable: Griffith v. Bender, 19 OLA

135; *Simon v. Rudner*, 43 App 38, 182 NE 650; *Cornfeldt v. Rihacek*, 39 App 292, 177 NE 522; *In re Fouts*, 103 App 313, 3 OO(2d) 353, 145 NE(2d) 440.

10. Where a surviving partner carries on the partnership business for two years after the death of the deceased partner for the joint benefit of the latter's estate and himself, in accordance with the will of the deceased partner, the latter's individual estate is not liable for debts contracted by the surviving partner during that time: *Covington City Bank v. Wight*, 4 NP 173, 6 OD 350.

11. In an action on a contract against a partnership, where one of the partners dies, plaintiff has his election to make the personal representative of deceased a party, or proceed against the survivor: *Gaines v. Thurman & Co.*, 8 NP(NS) 521, 20 OD 95.

12. The death of a joint maker does not make his estate liable solely for such note as between such estate and the surviving joint maker. Accordingly, if a joint maker dies and the other joint maker is appointed his administrator, and the administrator pays such joint note out of the funds of the estate, such administrator cannot have credit for the full amount thus paid. He must be charged with his proportionate share of the amount due upon such note: *In re Lones*, 57 Bull 122.

13. Under GC § 10733 (see now RC § 2117.31) a claim against a deceased partner's estate, for joint firm obligations, may be filed or sued upon without first exhausting the firm assets or establishing the surviving partner's insolvency: *Lackner v. McKechney*, 252 Fed 403, 164 CCA 327 [writ of certiorari denied, 247 US 510].

§ 2117.32 Liability of new administrator. (GC § 10509-154)

If notice of the appointment of a former executor or administrator was not given as prescribed in section 2113.08 of the Revised Code, any new administrator shall be liable to the actions of creditors whose claims were not presented to the former executor or administrator, as if no executor or administrator had been previously appointed.

HISTORY: GC § 10509-154; 114 v 320 (435); 116 v 385 (401), § 1. Eff 10-1-53. Analogous to former GC § 10756.

Comment

General Code § 10509-154, as effective January 1, 1932, was substantially the same as former GC § 10756 except that the former section provided that the action might be brought within two years from the date of the bond, whereas the amended section provided that action might be brought within two years from the date of his appointment.

The failure of the legislature to reduce the period of time that the new administrator, or executor shall be liable to actions of creditors, was evidently an omission, as there is no reason why such administrator or executor should be liable to actions longer than an original administrator.

General Code § 10509-154 was amended in 1935 so as to correct the omission of the legislature, effective January 1, 1932.

The comment of the probate code committee of the Ohio state bar association with reference to the amendment to this section was as follows:

"This was formerly GC § 10756 and was included in the new probate code without change through

oversight. The amendment suggested puts it in harmony with the existing scheme of administration."

Research Aids

Liability of new administrator:

O-Jur2d: Executors and Administrators § 536

CASE NOTES AND OAG

1. In order that a lapse of time may bar a claim against an estate, it is necessary that notice of the appointment of an administrator or executor must be given in accordance with the provisions of GC § 10509-158 (RC § 2113.09) and this section: *Swearingin v. Rendigs*, 5 OO 457 (App).

§ 2117.33 Claims previously barred. (GC § 10509-156)

No law relating to limitation of actions against a new administrator shall revive a claim which is barred, during the continuance in office of the original executor or administrator, or of a former administrator de bonis non.

HISTORY: GC § 10509-156; 114 v 320 (435). Eff 10-1-53. Analogous to former GC § 10758.

Research Aids

Claims previously barred not revived against new administrator:

O-Jur2d: Executors and Administrators § 604

CASE NOTES AND OAG

1. The resignation of an administrator who had failed to file a claim against an estate within the three month statutory period, does not revive this right in the next administrator: *In re Grindle*, 23 OO(2d) 442, 88 OLA 289, 182 NE(2d) 887.

§ 2117.34 Execution; limitations. (GC § 10509-140)

No execution against the assets of an estate shall issue upon a judgment against an executor or administrator unless upon the order of the probate court which appointed him. If an account has been rendered by such executor or administrator and settled by the court, such execution shall issue only for the sum that appeared, on settlement of such account, to be a just proportion of the assets applicable to the judgment. The order of the court allowing such execution shall fix the amount for which the same shall issue.

HISTORY: GC § 10509-140; 114 v 320 (432); 119 v 394 (414), § 1. Eff 10-1-53. Analogous to former GC § 10736.

Comment

General Code § 10509-140 was the same as former GC § 10736 except that the words "twelve months" in the former section were changed to "nine months" in the present section to harmonize with the time schedule.

Committee comment on 1941 amendment (119 v 414) to GC § 10509-140 was as follows:

Execution shall not issue against an executor or administrator unless the probate court authorizes it, and the order of the court shall fix the amount for which such execution shall issue. These concepts

are new. Under the former statute, execution might issue at any time after the expiration of nine months. The revisions are in harmony with the committee's policy of conferring upon the probate court complete authority to direct and control the administration of the estate. The committee believes that the probate court should dispose of all matters of a probate nature, and that courts of general jurisdiction should dispose of such matters as would be litigated in courts of general jurisdiction if the decedent were alive. Thus, a claimant whose claim has been rejected should sue the executor or administrator in the court of common pleas (or municipal court or justice's court), rather than litigate the issue on exceptions to the schedule of debts. Having obtained his judgment against the executor or administrator, however, the creditor should not be permitted to seize by levy of execution a substantial part of the assets of the estate, to the prejudice of other creditors whose claims have been allowed or established by judgment, and the probate court is empowered to prevent such action.

Forms

1 A&H Probate FORM 2117.34a et seq.

Research Aids

Execution on judgment:

O-Jur2d: Executors and Administrators § 640

Am-Jur2d: Executors and Administrators § 766

CASE NOTES AND OAG

1. Judgment creditor cannot enforce execution against estate where execution did not issue on order of probate court, and year after judgment had not expired: *Buerhaus v. Adams*, 35 App 347, 172 NE 440.

2. The bringing of suit in aid of execution against an administrator before the expiration of eighteen months, which suit was dismissed as premature, is not a bar against an adjudication of the same issues between the same parties, subsequent to the expiration of the eighteen months, under former GC § 10736 (see now RC § 2117.34), no further time having been allowed by court for the collection of the assets: *Lauer v. Smith*, 1 CC(NS) 121, 14 CD 47 [affirmed, without report, 65 OS 563].

§ 2117.35 Executions against executor or administrator. (GC § 10509-141)

All executions against executors and administrators for debts due from the deceased shall run against the goods and estate of the deceased in their hands.

HISTORY: GC § 10509-141; 114 v 320 (432). **Eff** 10-1-53. Analogous to former GC § 10738.

Research Aids

Property subject to execution:

O-Jur2d: Executors and Administrators §§ 640, 641

CASE NOTES AND OAG

1. Executions against executors or administrators, for debts due from the deceased, shall, except in cases provided for, run against the goods and estate of the deceased in their hands: *Thomas v. Chamberlain*, 39 OS 112.

2. Where a claim is rejected by an administrator or executor, suit must be brought within six months

to recover a judgment upon the claim, which is to be satisfied out of the assets of the deceased in his hands: *Louderman v. Judy*, 2 CC 351, 1 CD 526 [case reversed, *Judy v. Louderman*, 48 OS 562].

3. The statutory provisions for proceeding in aid of execution by action apply to an action against the estate of a decedent: *Lauer v. Smith*, 1 CC(NS) 121, 14 CD 47 [affirmed, without report, 65 OS 563].

4. The omission of the provision, in a judgment against one as administrator, that it shall be levied on the goods and estate of the decedent, does not limit the judgment to the administrator individually: *Kemper v. Apollo Bldg. &c. Co.*, 5 NP(NS) 403, 18 OD 484.

§ 2117.36 Real estate not liable for debts. (GC § 10509-159)

No real estate of a deceased person which has been aliened or encumbered by the decedent's heirs prior to the issuing of letters testamentary or of administration shall be liable while in the hands of a bona fide purchaser for value or to the prejudice of a bona fide lessee or encumbrancer for value for debts of the deceased person unless letters testamentary or of administration are granted within four years from the date of death of such deceased person. No real estate of a deceased person which has been aliened or encumbered by the decedent's heirs or devisees after the issue of letters testamentary or of administration shall be liable while in the hands of a bona fide purchaser for value or to the prejudice of a bona fide lessee or encumbrancer for value for debts of a deceased person unless suit is brought to subject such real estate to the payment of such debts prior to the settlement of the executor's or administrator's final account or what purports to be his final account; provided that if such final account is not filed and settled within four years after the granting of letters testamentary or of administration, but excluding for the purposes hereof the time that any action is pending against the executors or administrators for the establishment or collection of any claim against the deceased, such real estate so aliened shall not be liable for the debts of the deceased unless suit is brought to subject such real estate thereto within such four-year period. The heir or devisee aliening such real estate shall be liable for the value thereof with legal interest from the time of alienation, to the creditors of the deceased in the manner and within the limitations provided by law. This section does not enlarge or extend the right of the creditors of any deceased person against his real estate, or repeal any limitations contained in other sections of the Revised Code, or apply to mortgages or liens of record at the time of the death of such deceased person.

HISTORY: GC § 10509-159; 114 v 320 (436). **Eff** 10-1-53. Analogous to former GC § 10774-1.

Comment

The analogous section to GC § 10509-159 was former GC § 10774-1. In 1925, the legislature enacted former GC § 10774-1 which was substantially the same as GC § 10509-159 which protected bona fide purchasers, mortgagees and lessees for value, of real estate, who obtain their title through heirs of a deceased owner, when such purchase is made more than four years after the death of such owner and no administration of the estate has been commenced. The reason for this statutory enactment was that creditors having had the right to apply for administration for four years, and not having exercised such right, were barred from holding decedent's real estate for their debts. The heirs or devisee who sold or aliened such property was, however, still liable to creditors of the decedent, up to the value of such property. General Code § 10509-159 did not affect mortgages or liens which are of record at the decease of the owner, so that in such cases administration will undoubtedly still be necessary. General Code § 10509-159 also exempted property from creditors' claims, if such property has been sold, encumbered or leased by the heirs after administration was commenced, unless such creditors have sued to subject such real estate prior to settlement of the executor's or administrator's final account, or, if the final account was not filed within four years after letters of administration are granted, then suit must have been brought by such creditors to subject the real estate within such four-year period.

Title experts and title companies generally refuse to certify title in the first purchaser from an heir or devisee, their reason being that such a purchaser cannot be a bona fide one since he knows or ought to know that he is not obtaining his deed from the record owner of the title but from an heir or devisee. They have, therefore, restricted their certification of title to subsequent purchasers from the first one.

Comparative Legislation

Real estate not liable for debts:

- Ill.—Rev Stat, ch 3, § 24-3
- Ind.—Burns' Stat, § 29-1-17-9
- Ky.—KRS, § 396.110
- Mich.—MCLA, § 709.2
- N.Y.—SCPA, § 1903
- Fla.—FSA, § 733.805

Research Aids

Lands aliened or encumbered by decedent's heirs or devisees:

O-Jur2d: Executors and Administrators § 162

CASE NOTES AND OAG

1. Under this section the time that any action is pending against an executrix on a claim against her decedent extends to that extent the four-year period, provided for in that section, within which an action may be commenced to subject real estate of a decedent to the payment of his debts: Kohn v. Kohn, 67 App 404, 21 OO 348, 36 NE(2d) 1009.

[PROCEEDINGS BY CREDITORS AGAINST HEIRS, DEVISEES, ETC.]**§ 2117.37 Presentation of contingent claims.**

If a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues thereon, such claim must be presented

to the executor or administrator, in the same manner as other claims, before the expiration of three months after the appointment of the executor or administrator or before the expiration of two months after the cause of action accrues, whichever is later, except as provided in section 2117.39 of the Revised Code. The executor or administrator shall allow or reject such claim in the same manner as other claims are allowed or rejected. If the claim is allowed, the executor or administrator shall proceed to pay such claim. If the claim is rejected, the claimant shall commence an action thereon within two months after such rejection or be forever barred from maintaining an action thereon.

HISTORY: GC § 10509-216; 114 v 320 (448); 119 v 394 (417); § 1 (EF 10-1-53); 136 v S 145. EF 1-1-76.

Analogous to former GC § 10876.

See provisions, § 3 of SB 145 (136 v____) following RC § 2101.01.

For text of RC § 2117.37 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

General Code §§ 10509-216 to 10509-223 related to contingent claims. The Ohio statutes have provided for many years that if a cause of action accrues on a claim after the settlement of an estate, the heirs and distributees shall be liable to the extent of the property received by them from the estate. They have not distinguished, however, between unmaturing claims and contingent claims, i.e., claims upon which there is no liability, present or future, until the happening of a future event which may or may not happen. Under the 1941 amendments, unmaturing claims and contingent claims were carefully distinguished. Unmaturing claims must be presented as provided in RC § 2117.06. Contingent claims are governed by RC § 2117.37 et seq.

[For additional comment, see Addams and Hosford's Ohio Probate Practice, Davies' Revision.]

Cross-References to Related Sections

See RC §§ 2117.38, 2117.40, 2117.41 which refer to this section.

See RC §§ 2117.06, 2117.07 which refer to RC § 2117.37 et seq.

Comparative Legislation

Suit by creditors against heirs:

- Ind.—Burns' Stat, § 29-1-14-1
- Ky.—KRS, § 396.060
- Mich.—MCLA, § 708.22
- N.Y.—SCPA, § 1804

Forms

1 A&H Probate FORM 2117.37a et seq.

Outline of Procedure

Claims of creditors, contingent claims. Leyshon No. 56; A&H No. 26.

Research Aids

Actions against heir, legatee, etc:

O-Jur2d: Executors and Administrators § 648 et seq.

Allowance or rejection of contingent claims:

O-Jur2d: Executors and Administrators §§ 310, 312, 327

Am-Jur2d: Executors and Administrators § 303

Necessity of presenting contingent claims:

O-Jur2d: Executors and Administrators § 299

Am-Jur2d: Executors and Administrators § 283

Time for presentation of contingent claims:

O-Jur2d: Executors and Administrators § 303

Am-Jur2d: Executors and Administrators § 283

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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1. Upon the decease of a debtor, his estate by law stands for the payment of his general creditors alike, and one creditor cannot acquire a superior right to such estate: *McDonald v. Aten*, 1 OS 293.

3. Nature of creditor's lien: *Gill v. Pinney*, 12 OS 38.

5. The debts of a decedent are a lien upon his real estate; and the purchasers from his heirs take the same cum onere, and subject to the application of the maxim "caveat emptor": *Faron v. Robinson*, 17 OS 242.

7. A judgment in personam, under which no specific lien on real estate was acquired during the lifetime of the judgment debtor, cannot be revived and enforced against the heirs: *Miller v. Taylor*, 29 OS 257.

8. Where the sole devisee of lands is appointed executor of the will of the testator and sells such lands in his individual capacity as devisee the proceeds of such sale come into his hands as executor, and where the personal estate is insufficient to pay the debts of the testator he must apply the proceeds of the sale of such lands to the payment thereof: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, AnnCas 1914A, 190.

9. Former GC § 10876 (see now RC § 2117.37) et seq, limiting the time within which creditors of an estate may maintain an action against heirs, devisees, etc., applies to an action to recover a specific legacy which was paid under a will which was subsequently set aside: *Bermont v. Gotshall*, 110 OS 425, 144 NE 137.

11. The claim of a surety for reimbursement for payment of his principal's obligation constitutes a contingent claim within the meaning of this section: *Keifer v. Kissell*, 83 App 133, 38 OO 224, 75 NE(2d) 692.

12. A claim for damages from an auto accident not presented to the executor within nine months of appointment cannot be revived even if plaintiff is a minor: *Overman v. Yake*, 68 OLA 248, 109 NE(2d) 697 (App).

12.1 Failure to file a claim against decedent's estate within four months of administrator's appointment bars the claim: *Lewis v. Knight*, 75 OLA 589, 144 NE(2d) 551.

13. By "contingent claims," as used in this section the legislature means claims contingent at the time of decedent's death, upon which a cause of action

subsequently accrues: *In re Robbins*, 28 OO(2d) 399, 200 NE(2d) 735 (PC).

14. Former GC §§ 10876 and 10877 (see now RC §§ 2117.37 and 2117.41) provided the only cases where an heir is liable, and unless the estate has been settled the liability does not arise: *Arbaugh v. Millett*, 5 CC 295, 3 CD 146.

15. An express trust is, until openly disavowed or repudiated by the trustees, and the disavowal or repudiation is brought home to the cestui que trust, a continuing and subsisting trust, and an action for its desecration is not barred by statute of limitations: *Central Trust Co. v. Burke*, 1 NP 169, 2 OD 96.

16. Where a cause of action accrues before the expiration of the time in which the executor may be sued, suit cannot be maintained against the heirs under former GC §§ 10876 and 10877 (see now RC §§ 2117.37 and 2117.41): *Bevitt v. Diehl*, 12 OD (NP) 383.

17. Where the estate of surety has passed into the possession of the heir and distributee, although it had not been fully settled, a judgment against the administrator is the proper proceeding, and not judgment against the heir and distributee as provided for in this and next section: *McClaskey v. Barr*, 38 Fed. 165, 10 OFD 69.

Parties and procedure

20. The creditor must first exhaust his remedy against the personal representative: *Stiver v. Stiver*, 8 Q 217; *Donley v. Shields*, 14 O 359.

21. In the action herein provided for, the same defenses may be made as in an action against the personal representatives: *Camp v. Bostwick*, 20 OS 337.

§ 2117.38 Assets from which payment to be made. (GC § 10509-216a)

If an executor or administrator has made a partial distribution of the assets of the estate at the time a claim is presented under section 2117.37 of the Revised Code, and if the claim is allowed or after rejection is found to be due from the estate, but the assets remaining in the possession of the executor or administrator are insufficient to pay the claim in full, the assets remaining shall first be exhausted before proceeding to recover against the distributees of the assets of the estate. If a contingent claim is allowed or if after rejection it is found to be due from the estate, the creditor may bring an action thereon to recover from the distributees of the decedent's estate as provided in sections 2117.41 and 2117.42, inclusive*, of the Revised Code, within two months after the final payment on account thereof by the executor or administrator, if such recovery is necessary for the payment of the claim in full.

HISTORY: GC § 10509-216a; 119 v 394 (424), § 9. EF 10-1-53.

* So in enrolled bill.

Comment

This section relates to claims which must be presented to the executor or administrator as provided

in RC § 2117.37. It has no relation to claims which fall within the provisions of RC § 2117.39. The assets in the hands of the executor or administrator must be exhausted before the creditors proceed against the distributees. Within two months after the executor or administrator makes final payment on account of the claim, the creditor may proceed against the distributees to recover the unpaid balance. The burden is upon the creditor to determine when he has received final payment from the executor or administrator. If he is in doubt as to whether a particular payment is the final payment, and cannot ascertain the true fact, the prudent creditor will institute his action against the distributees within the period of two months.

Research Aids

Assets subject to contingent claims:

O-Jur2d: Executors and Administrators §§ 649-651

Am-Jur2d: Descent and Distribution § 139 et seq.

CASE NOTES AND OAG

1. Where a contingent claim against an estate accrues after distribution, the remedy lies against the distributee and not in vacating the order of distribution: In re Robbins, 28 OO(2d) 399, 94 OLA 561, 200 NE(2d) 735.

§ 2117.39 Contingent claims not to be presented. (GC § 10509-216b)

If at the time a cause of action accrues on a contingent claim against a decedent's estate, or if within two months thereafter an account of final distribution has been filed, no claim need be presented to the executor or administrator and the claimant may proceed by civil action against the distributees of the decedent's estate as provided in sections 2117.41 and 2117.42 of the Revised Code.

HISTORY: GC § 10509-216b; 119 v 394 (424), § 9. **EF** 10-1-53.

Comment

This section creates an exception to RC § 2117.37. It describes the circumstances under which a contingent claim need not be presented to the executor or administrator. Generally speaking, a contingent claim which gives rise to a cause of action after the final account is filed, or within two months prior thereto, need not be presented.

Cross-References to Related Sections

See RC § 2117.37 which refers to this section.

Research Aids

Civil action against distributees:

O-Jur2d: Executors and Administrators §§ 299, 648 et seq.

Am-Jur2d: Descent and Distribution § 139 et seq.

§ 2117.40 Estate of deceased in the hands of heirs. (GC § 10509-216c)

If a cause of action on a contingent claim accrues after the settlement of an estate or at

such time that a claim thereon does not have to be presented to the executor or administrator, or if a contingent claim is presented to the executor or administrator as provided by section 2117.37 of the Revised Code, but the assets of the estate are insufficient for payment of the claim in full, then the heirs, next of kin, surviving spouse as next of kin, devisees, and legatees shall be liable for the payment of such claim or the unpaid balance thereof in an action in the court of common pleas as provided in sections 2117.41 and 2117.42 of the Revised Code.

HISTORY: GC § 10509-216c; 119 v 394 (424), § 9. **EF** 10-1-53.

Comment

This section and those following define the conditions upon which the holder of a contingent claim may proceed against the heirs and distributees. The heirs and distributees are liable (a) if a cause of action accrues after settlement of the estate, (b) if a cause of action accrues within two months preceding the filing of the account or final distribution, or (c) if a cause of action accrues and a claim is presented before the estate is settled and the assets of the estate are not sufficient for payment thereof.

[For additional comment, see Addams and Horsford's Ohio Probate Practice, Davies' Revision.]

Research Aids

Liability of beneficiaries:

O-Jur2d: Executors and Administrators § 648 et seq.

Am-Jur2d: Descent and Distribution § 141; Executors and Administrators § 283

§ 2117.41 Payment of contingent claims after settlement of estate. (GC §§ 10509-217, 10509-218, 10509-219)

A claimant whose cause of action accrues as provided in section 2117.37 of the Revised Code may bring suit to recover thereon against the heirs, next of kin, surviving spouse as next of kin, devisees, and legatees under the decedent's will, each of whom shall be liable to the claimant in an amount not exceeding the value of the real and personal estate that he received under the will or on distribution of the estate. If, by the will of the deceased, any part of the estate or any one or more of the devisees and legatees is made exclusively liable for the debt, in exoneration of the residue of the estate or of the other devisees or legatees, the terms of the will shall be complied with in that respect and the persons and estate so exempt by the will shall be liable for only so much of the debt as cannot be recovered from those first chargeable therewith.

No such suit shall be maintained unless commenced within six months next after the time when the cause of action first accrues, except in case the suit is for the balance due after a pay-

ment by the executor or administrator, in which case suit shall be brought within two months after the final payment by the executor or administrator. If the person entitled to bring such suit is under legal disability, he may bring such action within one year after his disability is removed.

If any of such heirs, next of kin, surviving spouse as next of kin, devisees, or legatees, dies without having paid his just proportion of such debt, his executors or administrators shall be liable therefor to the extent he would have been if living.

HISTORY: GC §§ 10509-217, 10509-218, 10509-219; 114 v 320 (448, 449); 119 v 394 (417, 418), § 1. EF 10-1-53. Analogous to former GC §§ 10877 to 10879.

Comment

General Code §§ 10509-217 to 10509-223 (RC §§ 2117.41, 2117.42) were not materially modified, but their scope has been limited by virtue of the revision in 1941 (119 v 424) of GC § 10509-216 (RC § 2117.37) and the addition of GC §§ 10509-216a, 10509-216b and 10509-216c (RC §§ 2117.38, 2117.39, 2117.40). In other words, GC §§ 10509-217 (RC §§ 2117.41, 2117.42) et seq are now limited to suits for the enforcement of contingent claims.

Cross-References to Related Sections

Devisees or legatees' contribution for payment of debts, RC § 2107.54 et seq.

See RC §§ 2117.38, 2117.42 which refer to this section.

Research Aids

Extent of liability:

O-Jur2d: Executors and Administrators § 651

Am-Jur2d: Descent and Distribution § 139 et seq.

Time for bringing action:

O-Jur2d: Executors and Administrators § 650

Law Reviews

Ohio statutes of limitation on claims against estates. Francis J. Eberly, 16 OS LJ 206.

CASE NOTES AND OAG

Limitations

1. Since GC § 11218 (RC § 2305.03) et seq do not apply, by the provision of GC § 11218 (RC § 2305.03), to cases where a different limitation is prescribed by statute, the ten year limitation prescribed by GC § 11226 (RC § 2305.12) does not apply to actions against the heirs, widow and next of kin of a decedent, for liability upon an executor's bond; but by the provision of this section such action must be brought within one year: Roth v. Hummel, 1 App 361, 17 CC(NS) 252, 25 CD 355.

5. Beneficiaries under a trust cannot maintain an action against the heirs and legatees of the deceased trustee or enforce a claim against their interest in the trust property, where no claim was asserted against his estate within the time fixed by the laws of administration: Robson v. Evans, 3 App 248, 20 CC (NS) 122, 25 CD 510 [on appeal from 13 NP(NS) 326, 24 OD 503, and affirmed, without opinion, Evans v. Robson, 92 OS 540].

6. Heirs who set aside a will over one year after administration of the estate cannot recover back

money received: Swetland v. Miles, 2 OLA 187. [See also, 139 OS 501, 130 NE 22].

7. A right of action in favor of a testamentary trustee against the next of kin of an obligor of a depository bond securing trust deposits in a bank which became insolvent is barred by the provisions of GC § 10509-218 (RC § 2117.41), where the debt could have been sued for against the executrix of the obligor's estate but the action was not begun until more than a year after it accrued: Rogers v. Schuller, 27 OLA 449.

8. A claim for damages from an auto accident not presented to the executor within nine months of appointment cannot be revived even if plaintiff is a minor: Overman v. Yake, 68 OLA 248, 109 NE(2d) 697.

9. Neither the limitation in former GC § 10746 nor that in former GC § 10878 applies to a suit for specific performance of a contract to execute a will in favor of plaintiff: Ohlendiek v. Schuler, 299 Fed 182.

Heirs, etc., to contribute to pay claims after settlement of estate

11. The right of action, on a guardian's bond, to recover from the heirs of the sureties the amount remaining in his hands, first accrues to the ward, when such amount is ascertained by the probate court on the settlement of the guardian's final account. Mere delay of the ward, on arriving of age, to compel settlement, does not discharge the sureties: Newton v. Hammond, 38 OS 431.

12. From a study of RC §§ 2117.37 et seq., relating to contingent claims, it is apparent that if an executor has lawfully distributed a part or all of the estate assets, the distributee is not required to return them, and the claimant's remedy for any deficiency is by an action against the distributee: In re Robbins, 28 OO(2d) 399, 200 NE(2d) 735 (PC).

Estate of an heir liable after his death

16. The record of a judgment against the administrator, and the return of nulla bona by the sheriff to an execution issued thereon, is not evidence to show the want of assets in the hands of the administrator in an action against the heir to subject his real estate to the payment of the ancestor's debts: Donley v. Shields, 14 O 359; see also Meehan v. Burr, 58 OS 689, 51 NE 1099.

§ 2117.42 Creditors may proceed against all in one action. (GC §§ 10509-220, 10509-222, 10509-221, 10509-223)

If, in the cases specified in section 2117.41 of the Revised Code, more than one person is liable for the debt, the creditor shall proceed by one action to recover such debt against all so liable, or as many of them as are within the reach of process. Thereupon, by the verdict of a jury if either party requires it, the court must determine what sum is due to the plaintiff. They also, according to the equities of the case, shall decide how much each of the defendants is liable to pay toward the satisfaction of the debt and the court shall render judgment accordingly.

No suit shall be dismissed or debarred for not making all the persons defendants who might have been included as such. In any stage of the

cause the court may award process to bring in other parties and allow amendments necessary to charge them, as defendants, upon such terms as it deems reasonable.

If any of the persons who were originally liable for the debt is insolvent or unable to pay his proportion, or is beyond the reach of process, the others nevertheless shall be liable to the creditor for the whole amount of his debt; except that no one shall be compelled to pay more than the amount received by him from the decedent's estate.

If, in consequence of insolvency, absence or other cause, any of the persons liable for such debt fails to pay his just proportion to the creditor, he shall be liable to indemnify all who, by reason of such failure on his part, have paid more than their just proportion of the debt, such indemnity to be recovered by all of them jointly or in separate actions, by any one or more for his or their parts respectively, at their election.

HISTORY: GC §§ 10509-220, 10509-222, 10509-221, 10509-223; 114 v 320 (449). Eff 10-1-53. Analogous to former GC §§ 10880, 10881, 10882 and 10883 respectively.

Cross-References to Related Sections

See RC § 2117.38 et seq which refers to this section.

Comparative Legislation

Contribution among heirs:

Cal.—Probate Code, § 753

Ill.—Rev Stat, ch 3, § 24-3

Ind.—Burns' Stat, § 29-1-17-4

Ky.—KRS, § 394.420

Mich.—MCLA, § 708.24

Pa.—Purdon's Stat, Tit. 20, § 3542

Fla.—FSA, § 733.608

Research Aids

Determination and apportionment of liability:

O-Jur2d: Executors and Administrators § 654

Am-Jur2d: Executors and Administrators § 134 et seq.

Parties:

O-Jur2d: Executors and Administrators § 653

CASE NOTES AND OAG

Creditors may proceed against all in one action

1. A joint action under § 43 of the act of 1831 (3 Chase's Stat 1784), "defining the duties of executors and administrators" cannot be sustained against several heirs or devisees, where there is no joint contract, either express or implied: *Spicer v. Giselman*, 15 O 338.

Insolvency of heir or devisee

2. In a suit against the distributees of a bondsman's estate, based on the bondsman's obligation under a surety bond, the distributees are liable only to the extent of the value of that part of the estate actually received by them, and the plaintiff must produce proof of such value: *New Philadelphia v. Hurst*, 57 App 479, 11 OO 240, 14 NE(2d) 1021.

3. In view of the exception appearing in the last portion of GC § 10509-221 (RC § 2117.42), "that no one shall be compelled to pay more than the amount received by him from the decedent's estate," it does become material to prove the value of property inherited by a distributee, and that value is its worth when distributed to him: *New Philadelphia v. Hurst*, 57 App 479, 11 OO 240, 14 NE(2d) 1021.

CHAPTER 2119: TRUSTEE FOR ABSENTEE

Section

- 2119.01 Trustee for absentee.
- 2119.02 Notice.
- 2119.03 Powers of trustee.
- 2119.04 Mortgage, lease, or sale of real estate; sale of personal property.
- 2119.05 Termination of trust; final account.

Trustee's appointment of associate or successor under powers of trust instrument. 57 ALR2d 887.

Law Review

Recent changes in probate law. Article by James B. Danaher of the Cleveland bar. 17 OBar (No. 22) 271.

CASE NOTES AND OAG

1. On authority granted by the probate court and on a proper showing being made, a trustee for a missing person, appointed under this section, may maintain an action for equitable partition of lands in which the missing person owned a fractional interest: In re Parrett, 86 App 162, 41 OO 20, 90 NE(2d) 425.

2. Where a trustee for a missing person was appointed pursuant to this section, the authority of such trustee to act as such is not terminated with the expiration of the period of seven years absence of such missing person, but such trustee may continue to act as such until the missing person returns or an administrator or executor of his estate is appointed: In re Parrett, 86 App 162, 41 OO 20, 90 NE(2d) 425.

3. A writ of mandamus will be denied in an action to compel the public employees retirement system to continue making monthly payments to a trustee where a retirant has disappeared and has not thereafter been heard from: State ex rel. Hammond v. Public Employees Retirement System, 29 OS(2d) 192, 58 OO(2d) 403, 280 NE(2d) 904 (1972).

§ 2119.02 Notice. (GC § 10509-39a)

The probate court, before appointing a trustee for an absentee, shall cause notice of the filing of the application under section 2119.01 of the Revised Code and of the time and place of hearing thereon to be published once a week for four consecutive weeks in some newspaper of general circulation in the county and shall cause copies of such notice to be mailed to the spouse and next of kin of the absentee residing within the state, excepting the applicant, and to the absentee residing at his last known address. The court may order notice to be given to such other persons in such manner as it deems best.

HISTORY: GC § 10509-39a; 120 v 649 (655), § 1. Eff 10-1-53.

Comment

Inasmuch as the absentee may be alive, notice of the filing of the application and the hearing thereon shall be published once each week for four consecutive weeks in a newspaper of general circulation, and copies of such notice shall be mailed to the spouse, to the next of kin residing in the state, and to the absentee at his last known address.

Forms

- 1 A&H Probate FORM 2119.02a et seq.

Outlines of Procedure

Missing persons and absentees, trustee appointed. Leyshon No. 83-1; A&H No. 61

Research Aids

- Notice:
- O-Jur2d: Fiduciaries § 11

§ 2119.01 Trustee for absentee. (GC § 10509-39)

When a person owning property in this state has disappeared and has not been heard from, after diligent inquiry and for at least three months, under circumstances that afford reasonable ground to believe that he is dead, cannot return, or refuses to return to his home, and his estate requires attention, supervision, and care, or is needed for the maintenance of his dependents, the probate court may, on application of the spouse or of one of the next of kin, appoint a trustee to take possession and charge of the property of such person, other than the property with respect to which such person has made provision by written instrument designating an agent or attorney in fact. Such application shall be filed in the county in which such person last resided or if his last known residence was without this state, such application may be filed in any county in which such property is situated.

HISTORY: GC § 10509-39; 114 v 320 (411); 120 v 649 (655), § 1. Eff 10-1-53. Analogous to former GC § 11028.

Cross-References to Related Sections

See RC §§ 2119.02, 2119.03, 2119.05 which refer to this section.

See RC § 2131.02 which refers to this chapter.

Comparative Legislation

Absentee:

- Cal.—Probate Code, § 405
- Ill.—Rev Stat, ch 20, § 5702
- Ind.—Burns' Stat, § 29-2-5-1
- Ky.—KRS, § 395.410
- Mich.—MCLA, § 705.29
- N.Y.—SCPA, § 1611
- Fla.—FSA, § 734.101

Forms

- 1 A&H Probate FORM 2119.01a et seq.
- 1 A&H Probate FORM 2109.02a et seq: Fiduciaries; appointment, powers, duties.
- 1 A&H Probate FORM 2109.04a et seq: Bond of fiduciary.

Outlines of Procedure

Trustee of presumed decedent appointed. Leyshon No. 90; A&H No. 69

Research Aids

- Trustee for Absentee:
- O-Jur2d: Fiduciaries § § 10, 11, 24; Trusts § 32

ALR

Court's power to appoint additional trustees over number specified in trust instrument. 59 ALR3d 1129.

§ 2119.03 Powers of trustee. (GC § 10509-39b)

The trustee appointed under section 2119.01 of the Revised Code may proceed without order of the probate court:

- (A) To take possession of the property of the absentee wherever situated within the state;
- (B) To collect all debts due to the absentee;
- (C) To retain and invest the estate in accordance with Chapters 2113. to 2125., inclusive, of the Revised Code.

The trustee may pay such part or all of the income or principal of the estate as the court may, from time to time, direct for the maintenance and support of the absentee's dependents and may, under the order of the court, bring and defend suits on behalf of the absentee, compromise claims in favor of and against the absentee, and pay such debts of the absentee as the court finds necessary for the protection of his dependents, including insurance premiums, orders for alimony, and other obligations. The court may make such other orders as it deems proper for the care and custody of said property and its proceeds.

HISTORY: GC § 10509-39b; 120 v 649 (655), § 1. Eff 10-1-53.

Comment

Without order of the court, the trustee is authorized:

- (a) To take possession of all property of the absentee within the state.
- (b) To collect all debts due to the absentee.
- (c) To retain and invest the estate, the investments being subject to the provisions of RC §§ 2109.37 and 2109.38.

Upon order of the court, the trustee is authorized:

- (a) To pay such part or all of the income or principal of the estate as the court may direct for the maintenance and support of the absentee's dependents.
- (b) To bring and defend suits on behalf of the absentee.
- (c) To compromise claims in favor of and against the absentee.
- (d) To pay such debts of the absentee as the court finds necessary for the protection of his dependents, including insurance premiums and orders for alimony.

The court may make such other orders as it deems proper for the care and custody of the estate.

Cross-References to Related Sections

See RC §§ 2113.81, 2119.04 which refer to this section.

Research Aids

Powers of trustee:

O-Jur2d: Fiduciaries §§ 24, 150

§ 2119.04 Mortgage, lease, or sale of real estate; sale of personal property. (GC § 10509-39c)

In order to provide money for the payments authorized by section 2119.03 of the Revised Code, proceedings may be had for the mortgaging, leasing, or sale of the real estate of an absen-

tee in the same manner as provided by sections 2127.01 to 2127.43, inclusive, of the Revised Code, for sales of real estate by executors and administrators. The probate court, upon notice to the spouse and such other persons and in such manner as the court directs, may order all or any part of the personal estate to be sold.

HISTORY: GC § 10509-39c; 120 v 649 (655), § 1. Eff 10-1-53.

Comment

The estate of the absentee may be sold to provide money for making the payments authorized in RC § 2119.03. The court is authorized to order the sale of personal property, upon notice to the spouse and to such other persons and in such manner as it may determine. If the trustee wishes to mortgage, lease, or sell real estate, he must proceed under RC § 2127.-02 et seq.

Forms

1 A&H Probate FORM 2119.04a et seq.

Research Aids

Sales, leases and mortgages:

O-Jur2d: Fiduciaries § 116

§ 2119.05 Termination of trust; final account. (GC § 10509-39d)

If at any time the absentee returns and makes application to the probate court for the termination of the trust established under section 2119.01 of the Revised Code, the court shall, on notice to the trustee and other interested parties, order the trustee to file his final account and on settlement thereof shall terminate the trust and order all remaining property returned. If an executor, administrator, or guardian is appointed for the estate of such absentee, the court shall thereupon order the trustee to file his final account and on settlement thereof shall terminate the trust and order all of the property remaining in the hands of the trustee to be delivered to the fiduciary entitled thereto.

HISTORY: GC § 10509-39d; 120 v 649 (656), § 1. Eff 10-1-53.

Comment

If the absentee returns, the trustee shall file his final account and deliver the property to its owner. If the death of the absentee is established, or if a guardian is appointed for his estate, the trustee shall file his final account and deliver the property to the executor, administrator, or guardian.

Forms

1 A&H Probate FORM 2119.05a et seq.

Research Aids

Termination of trust:

O-Jur2d: Executors and administrators § 125, Fiduciaries §§ 258, 319; Death § 9

CHAPTER 2121: PRESUMED DECEDENTS' LAW

Section

- 2121.01 [Presumption of death.]
- 2121.02 [Proceedings in case of presumption of death.]
- 2121.03 [Probate court hearing.]
- 2121.04 [Date of decree; marriage dissolved.]
- 2121.05 [Proceedings for probate of will.]
- 2121.06 [Descent of real estate.]
- 2121.07 [Bond required for estate distribution.]
- 2121.08 [Administration of estate when decree vacated.]
- 2121.09 [Presumed decedent may be substituted as plaintiff or defendant.]
- 2121.10 to 2121.14 [Repealed.]

§ 2121.01 [Presumption of death.]

(A) Except as provided in division (B) of this section, a presumption of the death of a person arises:

(1) When the person has disappeared and been continuously absent from his place of last domicile for a five-year period without being heard from during the period;

(2) When the person has disappeared and been continuously absent from his place of last domicile without being heard from and was at the beginning of his absence exposed to a specific peril of death, even though the absence has continued for less than a five-year period.

(B) When a person who is on active duty in the armed services of the United States has been officially determined to be absent in a status of "missing" or "missing in action," a presumption of death arises when the head of the federal department concerned has made a finding of death pursuant to the "Federal Missing Persons Act," 80 Stat. 625 (1966), 37 U.S.C. 551, as amended and hereafter amended.

HISTORY: § 35 v S 349. Eff 9-30-74.

Partly analogous to former RC § 2121.01 (GC § 10509-25; 114 v 320; 122 v 51), repealed 135 v S 349, eff 9-30-74.

Cross-References to Related Sections

- See RC §§ 2121.02, 2121.04 which refer to this section.
- See RC § 2129.08 which refers to § 2121.01 et seq.
- See RC §§ 2121.05, 2131.02 which refer to this chapter.

Comparative Legislation

- Appointment of administrator for estate of absentee:
 - Cal.—Probate Code, § 295
 - Ill.—Rev Stat, ch 3, § 521
 - Ind.—Burns' Stat, § 29-2-5-1
 - Ky.—KRS § 395.430
 - Mich.—MCLA, § 705.1
 - N.Y.—SCPA, § 901; EPTL § 2-1.7
 - Pa.—Purdon's Stat, Tit 20, § 5701
 - Fla.—FSA, § 733.209

Forms

- 1 A&H Probate FORM 2121.02a et seq: Complaint.
- 1 A&H Probate FORM 2121.03a et seq: Hearing.

Research Aids

- Presumption of death:
 - O-Jur2d: Death §§ 8, 16
 - Am-Jur2d: Death § 305 et seq.

ALR

- Form and sufficiency of proof of death in case of insured's disappearance. 26 ALR2d 1073.
- Necessity and sufficiency of showing of search and inquiry by one relying on presumption of death from 7 years' absence. 99 ALR2d 307.

Law Reviews

Right of jury to fix the time of death where a presumption arises from seven years' unexplained absence. (Case note.) 2 OSLJ 175; 9 OBar (No. 4) 42.

Conclusiveness of finding of date of death of presumed decedent. (Case note.) 7 OBar (No. 48) 680; 1 OSLJ 126.

When is a presumed decedent dead according to law? Francis J. Eberly. 45 OO 221.

Presumed decedents' act, GC § 10509-28 (RC § 2121.04). (Case note.) 13 OO 449.

CASE NOTES AND OAC

[CONSTRUING FORMER ANALOGOUS SECTION]

1. Where an individual leaves his family and usual place of residence and goes to parts unknown or a distant state and is not heard from for a period of seven or more years, a presumption arises that he is dead: *Brunny v. Prudential Ins. Co.*, 151 OS 86, 38 OO 533, 84 NE(2d) 504.

2. Such presumption of death is not conclusive and may be rebutted by counterevidence: *Brunny v. Prudential Ins. Co.*, 151 OS 86, 38 OO 533, 84 NE(2d) 504.

3. A person, who for seven years has not been heard of by those who, had he been alive, would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not having been heard of, without assuming his death: *Doty v. Ohio National Life Ins. Co.*, 58 App 1, 10 OO 177, 25 OLA 673, 15 NE(2d) 544.

4. Where an insurance policy is issued, the amount thereof to be paid to the beneficiary upon the receipt at the home office of the company "of due notice of death of the insured during the continuance of the policy" and an action is brought against the insurance company by the beneficiary for the amount of the policy, and it is alleged that "on or about the 15th day of November, 1928, the insured disappeared from his home and usual place of residence, and that ever since said date *** he has neither been heard of, seen, or his existence or whereabouts established" and that the insured is dead, it is a question of fact for the jury to determine whether the insured, under the facts disclosed by the evidence, is actually dead: *Doty v. Ohio National Life Ins. Co.*, 58 App 1, 10 OO 177, 25 OLA 673, 15 NE(2d) 544.

5. "Due proof" required by the policy, which would entitle the beneficiary to demand payment, need only be such as could be furnished under the circumstances. The absence of the insured for a period of seven years is presumptive evidence of death and if "due proof" of this is submitted to the company and not questioned, it is sufficient to be the basis of a demand for payment under the policy: *Doty v. Ohio National Life Ins. Co.*, 58 App 1, 10 OO 177, 25 OLA 673, 15 NE(2d) 544.

6. Where due proof is alleged by the petition to have been furnished to the company and a claim for payment

made and the company denies liability, but makes no objection to the character of the "proof of death," more formal or definite proof than that furnished by a showing of the absence of an insured for a period of seven years is waived and suit may be brought for recovery on the policy, upon the refusal of the company to pay the same: *Doty v. Ohio National Life Ins. Co.*, 58 App 1, 10 OO 177, 25 OLA 673, 15 NE(2d) 544.

7. The common-law presumption arising after seven years' absence has not been abrogated by the presumed decedents' act which provides the procedure for administering an estate of one who is presumed to be dead on account of seven or more years' absence from the place of his last domicile: *White v. Industrial Comm.*, 102 App 236, 2 OO(2d) 264, 142 NE(2d) 549.

8. The common law rule as to the presumption of death arising seven years after the date of disappearance has not been abrogated by the presumed decedents' act (this section): *Blythe v. Vail*, 11 OO 393 (CP).

9. Common law rule that unexplained absence from usual place of residence for seven years raised presumption of death, held not abrogated by this section: *Morrissey v. Smith*, 39 OLR 329 (App).

§ 2121.02 [Proceedings in case of presumption of death.]

(A) When such a presumption of death arises under section 2121.01 of the Revised Code with respect to a person who at the time of disappearance was domiciled in this state, the attorney general of this state or any person entitled under the last will of such presumed decedent or under sections 2105.06 to 2105.21 of the Revised Code to any share in the presumed decedent's property within this state, or any person or entity who, under the terms of any contract, beneficiary designation, trust, or otherwise, may be entitled to any property, right, or interest by reason of the death of the presumed decedent, may file a complaint setting forth the facts which raise the presumption of death in the probate court of the county of the presumed decedent's last residence.

(B) When a presumption of death arises pursuant to section 2121.01 of the Revised Code with respect to a person who at the time of his disappearance was domiciled at a place other than within the state, and the presumed decedent owns real property within this state, the complaint may be filed in the county where any part of the real property of the presumed decedent is located by any of the persons or entities referred to in division (A) of this section, or by any domiciliary executor or administrator of the decedent. A foreign fiduciary shall include with the complaint an exemplified copy of the domiciliary proceedings pursuant to which the foreign fiduciary was appointed.

(C) In the case of a presumed decedent who was domiciled in this state, the complainant shall name as parties defendant the presumed decedent

and each of the following that do not join in the complaint:

(1) The presumed decedent's surviving spouse, if any;

(2) All persons known to the complainant who are entitled under the presumed decedent's last will and all persons who are entitled under sections 2105.06 to 2105.21 of the Revised Code to any share of the presumed decedent's property;

(3) All persons or entities known to the complainant who have or would have by reason of the presumed decedent's death any right or interest under any contract, beneficiary designation, trust, or otherwise;

(4) All contract obligors known to the complainant whose rights or obligations would be affected by a determination that the presumed decedent is in fact dead.

(D) In the case of a presumed decedent who was not domiciled in this state but who owned real estate in this state, the complainant shall name as parties defendant each of the following that do not join in the complaint:

(1) The presumed decedent's surviving spouse, if any;

(2) All persons known to the complainant who are entitled under the presumed decedent's last will and all persons who are entitled under sections 2105.06 to 2105.21 of the Revised Code to any share of the presumed decedent's real property within this state.

(E) All parties defendant, other than the presumed decedent, shall be served with summons in the same manner as provided by the Rules of Civil Procedure.

(F) The complainant shall cause to be advertised once a week for four consecutive weeks in a newspaper published in the county, the fact that the complaint has been filed together with a notice that on a day certain, which shall be at least four weeks after the last appearance of the advertisement, or after the final publication where any defendant is being served by publication, whichever is later, the probate court will hear evidence relevant to the allegations of the complaint.

(G) No guardian ad litem, trustee for the suit, or other representative shall be required to be appointed to represent the presumed decedent in the proceeding.

HISTORY: 135 v S 349. Eff 9-30-74.

Partly analogous to former RC § 2121.02 (GC § 10509-26; 114 v 320; 122 v 52), repealed 135 v S 349, eff 9-30-74.

Forms

1 A&H Probate FORM 2121.02a et seq.

Outlines of Procedure

Presumed decedent, appointment of executor or administrator, nonresidents. Leyshon No. 88; A&H No. 67

Research Aids

Presumed decedent's law:

O-Jur2d: Death § 16

Am-Jur2d: Absentees §§ 3 et seq.

Proceedings:

O-Jur2d: Executors and administrators § 570

CASE NOTES AND OAG**[CONSTRUING FORMER ANALOGOUS SECTION]**

1. Where one is appointed administrator of the estate of an individual presumed to be dead by reason of seven or more years' unexplained absence, under the presumed decedents' act (this section), and brings an action to collect the proceeds of a policy of insurance issued on the life of the presumed decedent, payable upon his death, the burden rests upon the plaintiff to establish the material averments of his cause of action by a preponderance of all the evidence, which burden never shifts: *Brunny v. Prudential Ins. Co.*, 151 OS 86, 38 OO 533, 84 NE(2d) 504.

2. The presumed decedents' act (GC § 10509-25 [RC § 2121.01] et seq), is not intended to apply when a presumed decedent leaves no estate to be administered, but is confined by its terms to the administration of the known estate of a presumed decedent: *Freiberg v. Schloss*, 50 OO 156, 112 NE(2d) 352. (PC).

3. Proceedings may be instituted under this section to have legally presumed dead an inmate of a state institution who has escaped and not been heard from for seven or more years, and money on deposit in the name of the superintendent of such state institution, as trustee for such inmate, may be closed out and distributed according to law after a legal presumption of death has been made out: 1934 OAG No. 3053.

§ 2121.03 [Probate court hearing.]

At the hearing the probate court shall hear such legally admissible evidence as is offered for the purpose of ascertaining whether the presumption of death is established. No person shall be disqualified to testify by reason of relationship as husband or wife to the presumed decedent, or by reason of an interest in the presumed decedent's property, or because of a right or interest under the terms of a contract, beneficiary designation, trust, or otherwise, arising by reason of the death of the presumed decedent.

HISTORY: 135 v S 349. Eff 9-30-74.

Analogous to former RC § 2121.03 (GC § 10509-27; 114 v 320), repealed 135 v S 349, eff 9-30-74.

Forms

1 A&H Probate FORM 2121.03a et seq.

1 A&H Probate FORM 2121.04a et seq: Decree.

Research Aids

Presumed decedent's law:

O-Jur2d: Death § 16

Am-Jur2d: Absentees § 3 et seq.

§ 2121.04 [Date of decree; marriage dissolved.]

(A) If satisfied that a presumption of death has been established, as provided in section 2121.01 of the Revised Code, the probate court shall so decree.

(B) The death of such presumed decedent shall for all purposes under the law of this state be regarded as having occurred as of the date of such decree.

(C) If the presumed decedent is married on the date of the decree, the presumed decedent's marriage is dissolved by the decree. No subsequent vacation of the decree, as provided in section 2121.08 of the Revised Code, shall affect the dissolution of the marriage.

HISTORY: 135 v S 349. Eff 9-30-74.

Partly analogous to former RC § 2121.04 (GC § 10509-28; 114 v 320), repealed 135 v S 349, eff 9-30-74.

Forms

1 A&H Probate FORM 2121.04a et seq.

1 A&H Probate FORM 2121.06a et seq: Bond for real estate.

1 A&H Probate FORM 2121.08a et seq: Vacation of decree.

Research Aids

Presumed decedent's law:

O-Jur2d: Death § 16

Law Reviews

Conclusiveness of finding of date of death of presumed decedent. (Case note.) 7 OBar (No. 48) 680; 1 OSLJ 126.

Presumed decedents' act, GC § 10509-28 (RC § 2121.04). (Case note.) 13 OO 449.

When is a presumed decedent dead according to law? Francis J. Eberly. 45 OO 221.

CASE NOTES AND OAG**[CONSTRUING FORMER ANALOGOUS SECTION]**

1. The common law rule, so far as the administration of decedents' estates is concerned, has been modified by the presumed decedents' act, GC § 10509-25 (RC § 2121.01) et seq, and under such act the presumption of death in the case of unexplained absence for seven or more years arises as of the date of the decree of the probate court authorized by this section: *In re McWilson*, 155 OS 281, 44 OO 262, 98 NE(2d) 289.

2. The provisions of the presumed decedents' act (GC § 10509-25 [RC § 2121.01] et seq) may not be applied to determine the date of death of a person, who has been absent from the place of his last domicile for more than seven years, so as to make such date subsequent to the death of another person from whom such absentee would have inherited an estate had he survived such other person, and thus make such date available as an item of evidence in the determination of the right to share in the estate of such other person: *Baker v. Myers*, 160 OS 376, 52 OO 239, 116 NE(2d) 711.

3. The provision of RC § 2121.04 that the presumption of death shall be regarded as having arisen as of the date of the decree does not mean that the presumption proves the existence of actual life prior to the decree, so as to enable a third person to receive property through or on behalf of the "missing" person: *State ex rel. Hammond v. Public Employees Retirement System*, 29 OS(2d) 192, 58 OO(2d) 403, 280 NE(2d) 904.

4. That part of this section, which provides that the "presumption of death shall be regarded as having arisen as of the date of such decree," is unconstitutional: *Blythe v. Vail*, 11 OO 393 (CP).

5. When necessary, in determining distributive rights

of devisees named in a will, the probate court, in an action brought by an executor for a declaratory judgment, where a devisee has been missing from the place of his last domicile, may declare and decree, when proven by a preponderance of the evidence, that said devisee is in fact dead, may fix the actual date of his death, and may determine what rights, if any, he has under a testator's will: *Freiberg v. Schloss*, 50 OO 156, 112 NE(2d) 352 (PC).

6. When it can be proven that a missing person died on a certain date, either within seven or more years absence from the place of his last domicile, his date of death shall be regarded as having arisen on such proven date, rather than on the date of the decree when he is merely presumed to be dead under GC § 10509-25 (RC § 2121.01) et seq.: *Freiberg v. Schloss*, 50 OO 156, 112 NE(2d) 352 (PC).

7. The date fixed by the probate court, under this section, as the date when the presumption of death arises, cannot conclude strangers to the judgment which fixes the date, and cannot prevent such other parties from asserting in an independent action that the presumption of death is complete at the end of the seven-year period specified by the common law rule: *Morrissey v. Smith*, 39 OLR 329 (App).

§ 2121.05 [Proceedings for probate of will.]

(A) Except as provided otherwise in Chapter 2121. of the Revised Code, all of the proceedings for the probate of the decedent's last will, if any, and all the proceedings, domiciliary or ancillary, for the administration of the decedent's estate that are set forth in the Revised Code for use upon the death of a decedent, shall upon the signing of the decree be instituted and carried on in the same manner as if the presumed decedent were in fact dead. All acts pursuant to these proceedings shall be as valid as if the presumed decedent were in fact dead.

(B) Following the decree the court may make such supplementary orders as in its discretion are necessary to consummate any right or interest arising by reason of the death of the presumed decedent under any contract, trust, or other non-probate property interest of any person or entity who was a party to the proceedings. The court may condition the granting of any such order by requiring any person or entity who would benefit thereby to furnish bond for a three-year period after the decree in the form and amount, with or without sureties, as the court shall order. If any supplementary order is directed to the holder of assets of the presumed decedent which were created by the decree of presumed death, the court, at the request of the party defendant to whom the order is directed, shall condition the granting of any such order by requiring any person or entity who would benefit thereby to furnish a suretyship bond for a three-year period after the decree in the amount of the assets so created by the decree with interest for the period of the bond at the rate specified in the order.

(C) The term "assets of the presumed decedent which were created by the decree of pre-

sumed death" as used in division (B) of this section and division (D) of section 2121.08 of the Revised Code, means those potential assets of the presumed decedent in which the presumed decedent had a contractual or other right, contingent upon the presumed decedent's death, to have such assets paid to his designee and the decree of presumed death would fulfill the contingency. Only that portion of the proceeds of life insurance policies on the life of the presumed decedent that exceeds any net cash surrender value of such policies on the date of the decree is within the definition of the term "assets of the presumed decedent which were created by the decree of presumed death."

(D) The bond shall provide that, if within the three-year period after the decree is entered by the court it is established that the presumed decedent is alive, such person or entity shall on the subsequent order of the court refund or return any sums, with interest as provided in the court order, or property received by virtue of such order, to the presumed decedent or to the person or entity who, by reason of the erroneous finding of death of the presumed decedent, made such payment or delivered such property. The bond shall be further conditioned on returning the fair value of the property if the same shall have been sold or otherwise disposed of in the interim.

(E) If the person or entity who would benefit by an order, as provided in division (B) of this section, fails to provide a bond for the amount of the assets of the presumed decedent which were created by the decree, with interest as specified in the order, the holder shall hold those assets for the three-year period they would have been bonded. In that event, the holder shall pay interest at the same rate specified in the order as a condition of the bond and the interest shall accumulate and be held throughout that period.

(F) Nothing in this section shall preclude such person or entity from selling, encumbering, or otherwise disposing of any property so received and any purchaser, transferee or mortgagee acquires good title to such property free and clear of any claim of the presumed decedent.

HISTORY: 135 v S 349. Eff 9-30-74.

Partly analogous to former RC § 2121.05 (GC § 10509-29; 114 v 320; 125 v 903), repealed 135 v S 349, eff 9-30-74.

Cross-References to Related Sections

See RC § 2121.08 which refers to this section.

Forms

1 A&H Probate FORM 2121.05a et seq.

Outlines of Procedure

Appointment of executor or administrator of a resident presumed decedent. Leyshon No. 87; A&H No. 66

Research Aids

Presumed decedent's law:

O-Jur2d: Death §§ 8, 16; Descent and Distribution, § 53**§ 2121.06** [Descent of real estate.]

Upon the signing of the decree establishing the death of the presumed decedent, the real estate of the presumed decedent passes and devolves as in the case of actual death and the persons entitled by will, or under sections 2105.01 to 2105.21 of the Revised Code, may enter and take possession. Persons taking the real estate may sell or mortgage it and the purchaser or mortgagee takes a good title, free and discharged of any interest or claim of the presumed decedent. The persons taking such real estate shall not sell, convey, or mortgage any part thereof within the five-year period specified in section 2121.08 of the Revised Code without first giving bond in an amount to be fixed by the probate court and with sureties to be approved by the court. In the discretion of the court the bond may be taken without sureties. Such bond shall be conditioned to account for and pay over to the presumed decedent, in case within the five-year period after the decree is entered by the court it is established that the presumed decedent is still alive, the value of the real estate sold or conveyed, or in the case of the making of a mortgage, to pay the amount of the mortgage and interest thereon, or in case of a foreclosure of such mortgage, to account for and pay over the value of the real estate mortgaged.

HISTORY: 135 v S 349, Eff 9-30-74.

Analogous to former RC § 2121.06 (GC § 10509-30; 114 v 320), repealed 135 v S 349, eff 9-30-74.

Forms

1 A&H Probate FORM 2121.06a et seq.

Research Aids

Descent of realty:

O-Jur2d: Descent and Distribution § 237; Executors and Administrators § 33

Mortgage or sale of realty:

O-Jur2d: Descent and Distribution § 262

Presumed decedent's law:

O-Jur2d: Death §§ 8, 16**§ 2121.07** [Bond required for estate distribution.]

(A) Before any distribution of personal property is made from the estate of a presumed decedent, the persons entitled to receive such property may in the discretion of the court and as a condition of distribution be required to give bond in the form and amount, with or without sureties, as the court orders, with the condition that if within a three-year period after the decree is entered by the court it is established that the presumed decedent is alive, the distributee will

upon subsequent order of the court refund or return the property to the presumed decedent, or the fair market value of property if the same shall have been sold or otherwise disposed of in the interim.

(B) Nothing in this section shall preclude a distributee from selling, encumbering, or otherwise disposing of any property so distributed and any purchaser, transferee, or mortgagee acquires good title to such property free and clear of any claim of the presumed decedent.

HISTORY: 135 v S 349, Eff 9-30-74.

Not analogous to former RC § 2121.07, (GC § 10509-31; 114 v 320), repealed 135 v S 349, eff 9-30-74.

Analogous to former RC § 2121.08

Forms

1 A&H Probate FORM 2121.07a et seq.

Research Aids

Presumed decedent's law:

O-Jur2d: Death §§ 8, 16; Executors and Administrators § 373**Am-Jur2d:** Absentees § 16**§ 2121.08** [Administration of estate when decree vacated.]

(A) The probate court may at any time within a five-year period from the date of the decree establishing the death of a presumed decedent, upon proof satisfactory to the court that the presumed decedent is in fact alive, vacate the decree establishing the presumption of his death. After the decree has been vacated all the powers of the executor or administrator of the presumed decedent cease, but all proceedings had and steps taken with respect to the administration of the estate of the presumed decedent prior to the vacating of such decree remain valid. The executor or administrator of the estate of such presumed decedent who is found to be alive shall settle his account of his administration down to the time of the vacating of the decree and shall transfer all assets remaining in his hands to the person as whose executor or administrator he has acted, or to such person's authorized agent or attorney.

(B) The title of any person to any money, property, right, or interest as surviving spouse, next of kin, heir, legatee, devisee, co-owner with right of survivorship, beneficiary or other contractual payee, successor to a trust interest, or otherwise of the presumed decedent shall be subject to this section, and upon vacating of such decree as provided in this section any property, money, right, or interest, or the fair value thereof if the same shall have been sold or otherwise disposed of, may be recovered from the person who had received any such property.

(C) Except as provided in division (D) of this section, in any action against a beneficiary

for the recovery of property or the value thereof, or upon the bond given as condition for delivery of money, other personal property, or sale or encumbrance of real property, the beneficiary may set off as against such claim, an allowance for services rendered in maintaining or preserving the property, and for any moneys or other considerations made or given by the beneficiary for the preservation, care, or maintenance of the property during the period of absence of the person erroneously presumed to be dead, and the reasonable value of any part of the property used for support by those whom the person erroneously presumed to be dead had a legal obligation to support during his absence.

(D) There shall be no set off as against those assets defined in division (C) of section 2121.05 of the Revised Code to be assets of the presumed decedent which were created by the decree of presumed death. Those assets created by the erroneous decree of presumed death shall be returned with interest to the person entitled thereto.

(E) Any net cash surrender value on any policies of life insurance on the life of a person erroneously presumed to be dead are subject to the set off provision in division (C) of this section. The person erroneously presumed to be dead, or persons claiming under him, may recover whatever remains of cash values from the person to whom paid. Such claimants have no recourse against the insurance company which made such payments, and it is discharged from liability on the policies affected.

HISTORY: 135 v S 349. Eff 9-30-74.

Not analogous to former RC § 2121.08 (GC § 10509-32; 114 v 320), repealed 135 v S 349, eff 9-30-74. The substance of former RC § 2121.08 is now contained in RC § 2121.07.

Analogous to former RC § 2121.09.

Cross-References to Related Sections

See RC §§ 2121.04-2121.06, 2121.09 which refer to this section.

Forms

- 1 A&H Probate FORM 2121.08a et seq.
- 1 A&H Probate FORM 2121.04a et seq: Decree.

Research Aids

Presumed decedent's law:

O-Jur2d: Death §§ 8, 16; Executors and Administrators § 33

§ 2121.09 [Presumed decedent may be substituted as plaintiff or defendant.]

After vacation of the decree of the presumption of death has been established, as provided by section 2121.08 of the Revised Code, the person erroneously presumed to be dead may, on motion filed of record stating the facts, be substituted as plaintiff or petitioner in all actions or proceedings brought by the executor or administrator, whether prosecuted to judgment or decree or otherwise. Such person may, in all actions or proceedings previously brought against the executor or administrator, be substituted as defendant or respondent, on motion filed by him or on his behalf, but shall not be compelled to go to trial in less than three months from the time of filing of such motion. Judgments or decrees recovered against the executor or administrator, before the vacation of the decree, may be opened on application made by the person erroneously presumed to be dead within three months after the vacating of the decree, provided it is supported by an affidavit alleging the existence of facts which would be a valid defense. If the application is not made within the three months or is made but the supporting alleged facts are adjudged an insufficient defense, the judgment or decree is conclusive to all intents, saving the defendant's right to review as in other cases on appeal.

HISTORY: 135 v S 349. Eff 9-30-74.

Not analogous to former RC § 2121.09 (GC § 10509-33; 114 v 320), repealed 135 v S 349, eff 9-30-74. The substance of former RC § 2121.09 is now contained in RC § 2121.08.

Analogous to former RC § 2121.10.

Research Aids

Effect of return of absentee:

O-Jur2d: Death § 20

Presumed decedent's law:

O-Jur2d: Death §§ 8, 16; Executors and Administrators § 33

§§ 2121.10 to 2121.14 Repealed, 135 v S 349, § 2 [GC §§ 10509-34-10509-38, 114 v 320, 125 v 903]. Eff 9-30-74.

CHAPTER 2123: DETERMINATION OF HEIRSHIP

Section

- 2123.01 When proceedings to determine heirship may be had.
- 2123.02 Petition; defendants.
- 2123.03 Service of summons.
- 2123.04 Service by publication.
- 2123.05 Finding and order.
- 2123.06 Other persons may ask for determination.
- 2123.07 Effect of determination.

§ 2123.01 When proceedings to determine heirship may be had. (GC § 10509-95)

Whenever property passes by the laws of intestate succession, or under a will to a beneficiary not named in such will, proceedings may be had in the probate court to determine the persons entitled to such property.

HISTORY: GC § 10509-95; 114 v 320 (422). **EFF** 10-1-53.

Cross-References to Related Sections

- See RC §§ 2123.02, 2123.05 which refer to this section.
- See RC §§ 2123.06, 2129.18 which refer to RC § 2123.01 et seq.
- See RC § 2131.02 which refers to this chapter.

Comparative Legislation

- Cal.—Probate Code, § 1080
- Ill.—Rev Stat, ch 3, § 5-3
- Ind.—Burns' Stat, § 29-1-6-6
- Mich.—MCLA, § 702.75
- N.Y.—SCPA, § 2113
- Pa.—Purdon's Stat, Tit 20, § 2101
- Fla.—FSA, § 733.105

Forms

- 1 A&H Probate FORM 2123.01a et seq.

Research Aids

- Proceedings to determine heirship:
 - O-Jur2d: Descent and Distribution § 210 et seq.
 - Am-Jur2d: Descent and Distribution § 104 et seq.

ALR

- Family settlement of testator's estate. 29 ALR3d 8.
- Family settlement of intestate estate. 29 ALR3d 174.

Law Reviews

- Survivorship deeds. Address by Clem H. Barsch of the Toledo bar. 22 OBar (No. 13) 184.
- See explanatory article in 4 OBar 411.

CASE NOTES AND OAG

1. In a proceeding to determine the participants in the estate of an actual decedent (GC § 10509-95 [RC § 2123.01] et seq), the provisions of the presumed decedents' act are not applicable in presumptively fixing the date of the death of one who if living would have the right to participate in the estate of the actual decedent: *Baker v. Myers*, 160 OS 376, 52 OO 239, 116 NE(2d) 711.

2. In an action under the provisions of this section to determine who is entitled to the next estate of inheritance of the adopting mother, who died prior to such declaration, leaving no issue or surviving

spouse, the adopted child is entitled to the next estate of inheritance of the deceased adopting mother: *Steiner v. Rainer*, 69 App 6, 23 OO 306, 42 NE(2d) 684.

3. As an incident to a hearing upon exceptions to an inventory pursuant to RC § 2109.58, the probate court has jurisdiction to determine the issue of a common law marriage: *In re Estate of Soeder*, 7 OApp(2d) 271, 36 OO 404, 220 NE(2d) 547.

4. A judgment of the probate court in a proceeding to construe an item of a will disposing of a specific parcel of realty, to the effect that upon the death of a life tenant the fee passed to the testator's sister, does not determine the question of the vesting of the estate in remainder and is not *res judicata* to a later proceeding brought under authority of this section to determine heirship: *Schaefer v. Gebhart*, 36 OLA 73, 42 NE(2d) 931 (App).

5. An action to determine heirship under GC § 10509-95 (RC § 2123.01) et seq, is a statutory proceeding, not a chancery case and not appealable on questions of law and fact: *Minnix v. Hague*, 69 OLA 418, 125 NE(2d) 739 (App).

6. A proceeding under this section and RC § 2123-02 is simply one to determine who may establish such relationship to the decedent as to bring him within one of the categories of the law of descent and distribution: *O'Shaughnessy v. Stofft*, 55 OO 352, 117 NE(2d) 734 (PC).

7. An action in which the court is asked to "determine who are the heirs and distributees" of a decedent, "or the devisees or legatees not named in the will," was held to be an action to determine heirship; the fact that the wording of the will required consideration being only incidental and evidential on the question to be determined: *Stewart v. Purget*, 34 OLA 343, 37 NE(2d) 549.

§ 2123.02 Petition; defendants. (GC § 10509-96)

In a situation described in section 2123.01 of the Revised Code, the executor or administrator may file in the probate court of the county where the estate is being administered a petition signed by such executor or administrator or his attorney, which petition shall be verified. The surviving spouse and the legatees and devisees, or the heirs and distributees of the decedent, including those whose names are unknown, shall be made parties defendant. The petition shall contain a concise statement of the pertinent facts and shall conclude with a prayer for the determination of the heirs and distributees of such decedent or of the devisees or legatees not named in the will and their respective interests in the estate.

HISTORY: GC § 10509-96; 114 v 320 (422); 116 v 385 (397), § 1. **EFF** 10-1-53.

Cross-References to Related Sections

- See RC § 2123.03 which refers to this section.

Forms

- 1 A&H Probate FORM 2123.02a et seq.

Outlines of Procedure

- Determination of heirship. Leyshon No. 64; A&H No. 35

Research Aids

Jurisdiction and venue:

O-Jur2d: Descent and Distribution § 213

Parties:

O-Jur2d: Descent and Distribution §§ 215, 216

Am-Jur2d: Descent and Distribution § 105

Petition:

O-Jur2d: Descent and Distribution § 218

CASE NOTES AND OAG

1. A probate court has jurisdiction to adjudicate the rights of parties in specific items of property upon the filing in such court of a pleading captioned "petition to determine heirship," under authority conferred by GC §§ 10509-95 to 10509-101, inclusive (RC §§ 2123.01 to 2123.07): *Speidel v. Schaller*, 73 App 141, 28 OO 252, 55 NE(2d) 346.

2. In a proceeding for determination of heirship the petitioner is not entitled to a jury trial: *Brawley v. Thomas*, 82 App 400, 38 OO 61, 81 NE(2d) 719.

§ 2123.03 Service of summons. (GC § 10509-97)

Upon the filing of the petition mentioned in section 2123.02 of the Revised Code the same proceedings, pleadings, and rule days as in civil actions in the court of common pleas shall apply. All parties defendant who are known to be residents of the state and whose place of residence is known shall be served with summons, as provided for the service of summons in civil actions in such court.

HISTORY: GC § 10509-97; 114 v 320 (423); 116 v 387 (397), § 1. Eff 10-1-53.

Forms

1 A&H Probate FORM 2123.03a et seq.

Research Aids

Evidence:

Am-Jur2d: Descent and Distribution § 106

Service of summons:

O-Jur2d: Descent and Distribution § 217

Trial or hearing:

O-Jur2d: Descent and Distribution § 219

Ohio Rules

See Civil Rule 73(D) and Staff Note applying the provisions of Rule 5 to probate proceedings requiring service of summons, Civil Rules Volume to Page's Ohio Revised Code Annotated.

§ 2123.04 Service by publication. (GC § 10509-98)

In a proceeding to determine heirship, non-resident defendants and defendants whose names or places of residence are unknown shall be served by publication as in civil actions in the court of common pleas.

HISTORY: GC § 10509-98; 114 v 320 (423); 116 v 387 (397), § 1. Eff 10-1-53.

Forms

1 A&H Probate FORM 2123.04a et seq.

Research Aids

Service on nonresidents:

O-Jur2d: Descent and Distribution § 217

Ohio Rules

See Civil Rule 73(D) and Staff Note applying the provisions of Rule 5 to probate proceedings requiring service of summons, Civil Rules Volume to Page's Ohio Revised Code Annotated.

§ 2123.05 Finding and order. (GC § 10509-99)

At the time assigned for the hearing of a proceeding set forth under section 2123.01 of the Revised Code, or at any time to which said hearing may be adjourned, the probate court may hear proof taken by commission, or by witnesses produced in open court, of the facts set forth in the petition, and shall, if satisfied from the evidence, find and adjudge who are or were the heirs or next of kin of the decedent, and entitled by the laws of this state to inherit the estate of the deceased, or the devisees or legatees named or unnamed in the will, which finding and adjudication shall be entered on the journal of the court, which entry, or a certified copy thereof, shall be prima facie evidence of the facts therein found.

HISTORY: GC § 10509-99; 114 v 320 (423). Eff 10-1-53.

Cross-References to Related Sections

See RC § 2123.07 which refers to this section.

Forms

1 A&H Probate FORM 2123.05a et seq.

Research Aids

Finding and Order:

O-Jur2d: Descent and Distribution §§ 220, 222

CASE NOTES AND OAG

1. In a proceeding to determine heirship, it was incumbent upon the plaintiff to establish by competent evidence the fact of her legal and valid marriage to the decedent as claimed. The basis of plaintiff's claim being that such marriage was consummated in the country now known as the Kingdom of Yugoslavia, such fact must be proved either by the testimony of competent witnesses or by documentary evidence duly collated from official public records and properly authenticated as such: *Olijan v. Lublin*, 143 OS 417, 28 OO 354, 55 NE(2d) 658.

2. A proceeding instituted in the probate court by an executor or administrator, under GC § 10509-95 (RC § 2123.01) et seq., for a determination of those persons entitled to the property of a decedent is a special statutory proceeding ancillary to the administration of an estate, is not of an equitable nature constituting a chancery case, and is appealable to the court of appeals on questions of law only and not on questions of law and fact: *Bradford v. Micklethwaite*, 163 OS 301, 56 OO 275, 127 NE(2d) 21.

3. The finding of the probate court, in a proceeding under GC § 10509-95 et seq., to determine heirship is not appealable to the court of common pleas on questions of law and fact under the provisions of GC § 10501-56 (RC § 2101.42): *In re Estate of Meier*, 65 App 425, 19 OO 38, 30 NE(2d) 365; *Stewart v. Purget*, 34 OLA 343, 37 NE(2d) 549.

4. In a proceeding to determine heirship, where the petitioner claims to be the common-law wife of the decedent and the adverse parties defend as heirs and administrator of the estate of decedent, the petitioner is incompetent to testify, over objection, as to facts tending to establish the alleged common-law marriage: *Brawley*

v. Thomas, 82 App 400, 38 OO 61, 81 NE(2d) 719.

5. An appeal to the court of appeals from a judgment of a probate court in an action seeking a determination of heirship under the provisions of RC § 2123.01 et seq. where the primary and only relief sought by all the parties is that they be determined to be the heirs of decedent, and where the other questions raised are merely incidental to the primary questions of heirship, is an appeal on questions of law only: Bradford v. Micklethwaite, 99 App 119, 58 OO 210, 131 NE(2d) 685.

6. There is no authority for escheating property to the state, where there is no finding of an absence of heirs: Maurer v. Mihalyne, 105 App 83, 5 OO(2d) 367, 151 NE(2d) 383.

7. In an action in the probate court for a determination of heirship, where the state of the record makes it impossible to intelligently determine the heirs entitled to the estate, time should be given for additional testimony and evidence pertinent to the issue of relationship, and "letters rogatory" should be issued accordingly; and an application therefore should be allowed, even where the trial court has already rendered an opinion adverse to the applicant, but on which no judgment has been entered: Maurer v. Mihalyne, 105 App 83, 5 OO(2d) 367, 151 NE(2d) 383.

8. In an action in the probate court to determine heirship, when the court, following this section, sets out in detail its finding upon and in accordance with the evidence adduced and enters the same upon the journal, no bill of exceptions is necessary to prosecute error therefrom under GC § 11564 (RC § 2321.05): In re Stewart, 37 OLA 105 (App).

9. In a proceeding to determine heirship, a person claiming to be the common law wife of decedent is incompetent to testify in support of that claim: Lynch v. Romas, 74 OLA 1, 139 NE(2d) 352 (App).

§ 2123.06 Other persons may ask for determination. (GC § 10509-100)

Whenever it is necessary for any person other than an executor or administrator to determine who are or were the heirs at law of a deceased person, on the petition of any interested party and proceedings like those set forth in sections 2123.01 to 2123.05, inclusive, of the Revised

Code, the probate court may make a determination thereof.

HISTORY: GC § 10509-100; 114 v 320 (423). Eff 10-1-53.

Research Aids

Petitioners other than administrator or executor:

O-Jur2d: Descent and Distribution § 216

Am-Jur2d: Descent and Distribution § 105

CASE NOTES AND OAG

1. This section means that whenever it is necessary for any person other than an administrator to determine who are the heirs-at-law of a deceased person, any interested party may ask the court for such a determination: Stofft v. O'Shaughnessy, 48 OO 143 (PC).

2. A petition which does not allege facts showing that it is necessary for the plaintiff to determine who are the heirs-at-law of the decedent, does not state facts sufficient to constitute a cause of action and a demurrer thereto will be sustained: Stofft v. O'Shaughnessy, 48 OO 143 (PC).

3. Necessity cannot be inferred from the mere allegation that the plaintiff is a sister of the decedent: Stofft v. O'Shaughnessy, 48 OO 143 (PC).

§ 2123.07 Effect of determination. (GC § 10509-101)

Any fiduciary may make a final distribution of an estate or take any other appropriate action respecting a trust, upon the determination set forth in section 2123.05 of the Revised Code, and shall thereupon, together with the surety, be discharged from liability arising from such determined interest, and the title to any property thereupon purchased from such fiduciary shall be free from such determined interest.

HISTORY: GC § 10509-101; 114 v 320 (423). Eff 10-1-53.

Research Aids

Effect of determination:

O-Jur2d: Descent and Distribution § 222

Am-Jur2d: Descent and Distribution § 107

CHAPTER 2125: ACTION FOR WRONGFUL DEATH

Section

- 2125.01 Action for wrongful death.
- 2125.02 Proceedings.
- 2125.03 Distribution to beneficiaries.
- 2125.04 New action.

§ 2125.01 Action for wrongful death. (GC § 10509-166)

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter. When the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person.

When death is caused by a wrongful act, neglect, or default in another state, territory, or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state, territory, or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance thereof.

HISTORY: GC § 10509-166; 114 v 320 (438). Eff 10-1-53. Analogous to former GC § 10770.

Cross-References to Related Sections

- Death from lynching, RC § 3761.04.
- Insurance payments, set off, RC § 4113.09.
- See RC § 2125.03 which refers to this section.

Comparative Legislation

- Wrongful Death Actions:
 - Cal.—Civil Code, § 377
 - Ill.—Rev Stat, ch 70, § 1
 - Ind.—Burns' Stat, § 34-1-1-2
 - Ky.—KRS § 411.130
 - Mich.—MCLA, § 702.114
 - N.Y.—EPTL, § 5-4.1
 - Pa.—Purdon's Stat, Tit 12, § 1601
 - Fla.—FSA § 768.16

Research Aids

- Action for wrongful death:
 - O-Jur2d: Death § 25 et seq
 - Am-Jur2d: Death § 1 et seq.
- Conditions precedent to right of action:
 - O-Jur2d: Death § 55 et seq.
 - Am-Jur2d: Death § 22 et seq
- Death resulting from injuries inflicted in another state:
 - O-Jur2d: Death § 281 et seq; Conflict of laws § 56; A Actions, § 32
 - Am-Jur2d: Death § 277 et seq.
- Effect of criminal responsibility for act causing wrongful death:
 - O-Jur2d: Death § 88
- Grounds for wrongful death action:
 - O-Jur2d: Death § 46 et seq.
 - Am-Jur2d: Death § 18 et seq.
- Persons liable for wrongful death:
 - O-Jur2d: Death § 74 et seq.
 - Am-Jur2d: Death § 77 et seq.
- Survival of death action against defendant's estate:
 - O-Jur2d: Abatement, Survival, and Revival § 40
- Wrongful death action by alien:
 - O-Jur2d: Aliens and citizenship § 21
 - Am-Jur2d: Aliens and citizens § 46

ALR

- Action against spouse or estate for causing death of other spouse. 28 ALR2d 662.
- Action ex contractu for damages caused by death. 86 ALR2d 316.
- Action for death of adoptive parent, by or for benefit of adopted or equitably adopted child. 94 ALR2d 1237.
- Action for death of unborn child. 15 ALR3d 992.
- Admissibility in wrongful death action of testimony of actuary or mathematician to establish present worth of pecuniary loss. 79 ALR2d 259.
- Admissibility of testimony of actuary or mathematician as to present value of loss or impairment of earning capacity. 79 ALR2d 275.
- Admissibility, in death action for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, etc., of children. 79 ALR2d 819.
- Assignability of cause of action, or proceeds of claim, for wrongful death. 40 ALR2d 514.
- Brothers and sisters of deceased as beneficiaries within state wrongful death statute. 31 ALR 3d 379.
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- Capacity of local or foreign representative to maintain death action under foreign statute providing for action by personal representative. 52 ALR2d 1016.
- Compromise or settlement by statutory beneficiaries without assent of personal representative of death action commenced by latter. 29 ALR 2d 1452.
- Conflict of laws as to limitation of amount and measure of damages in death actions. 92 ALR2d 1180.
- Conflict of laws as to survival or revival of wrongful death actions against estate or personal representative of wrongdoer. 17 ALR2d 690.

- Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for death. 25 ALR2d 1215.
- Death action by or in favor of parent against unemancipated child. 62 ALR3d 1299.
- Effect of death of beneficiary upon right of action under death statute. 43 ALR2d 1291.
- Exceptions attaching to limitations prescribed by death statutes or survival statutes allowing recovery of damages for death. 132 ALR 292.
- Fact that tortfeasor is member of class of beneficiaries as affecting right to maintain action for wrongful death. 95 ALR2d 585.
- Joinder of cause of action for pain and suffering of decedent with cause of action for wrongful death. 35 ALR2d 1377, 1384.
- Jurisdiction of federal court, based on diversity of citizenship, of representative's action under death statute of forum. 1 ALR Fed 395.
- Law of state where ticket was purchased, rather than law of state where accident occurred, as governing in action against carrier for death of passenger. 13 ALR2d 650.
- Liability of parent or person in loco parentis for wrongful death of minor child. 19 ALR2d 449, 460.
- Modern status of rule denying a common-law recovery for wrongful death. 61 ALR3d 906.
- Power of court, in action under foreign wrongful death of statute, to decline jurisdiction on ground of inconvenience of forum. 48 ALR2d 850.
- Prenatal injury as ground of action for death of child after birth. 27 ALR2d 1258.
- Proof to establish or negative self-defense in civil action for death from intentional act. 17 ALR 2d 597.
- Proper forum and right to maintain action for airplane accident causing death over or in high seas. 66 ALR2d 1002.
- Recovery of prejudgment interest on wrongful death damages. 96 ALR2d 1104.
- Release of one responsible for injury as affecting liability of physician or surgeon for wrongful death resulting from negligent treatment of injury. 40 ALR2d 1087.
- Remarriage of surviving spouse, or possibility thereof, as affecting action for wrongful death of deceased spouse. 87 ALR2d 252.
- Right of action for wrongful death as subject to claims of creditors. 35 ALR2d 1443.
- Right of personal representative appointed at the forum or in a jurisdiction where decedent was domiciled or where the tort occurred, to maintain action for death under foreign statute which provides that action shall be brought by executor or administrator. 52 ALR2d 1016.
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- Wrongful Death and Personal Injuries—Joinder of Causes of Action and Counter-claim by Robert L. Wills. 16 OSLJ 501.
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Scope and effect

1. This section is an innovation upon the principles of common law, and affords the only civil remedy for a death caused by injury: Davis v. Justice, 31 OS 359 [approved in *Kirchner v. Myers*, 35 OS 85, and *Baltimore & O. R. Co. v. Hottman*, 1 CC(NS) 17, 15 CD 140; affirmed, without report, 70 OS 475].

2. In an action for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death could not be recovered: Davis v. Justice, 31 OS 359.

3. Former GC §§ 10770, 10772 (see now RC §§ 2125.01, 2125.02, 2125.03) and 10773 (repealed, 114 v 320) give an independent right of action for the benefit of the persons named in former GC §§ 10772 (see now RC §§ 2125.02, 2125.03) and 10773 (repealed, 114 v 320), where death has resulted from the injuries, to recover for such pecuniary loss as they have sustained by the decease of the injured person, such right being subject to the condition that the act, neglect or default is such as would have entitled such person to maintain an action and recover damages in respect thereof if death had not ensued: *Mahoning Val. R. Co. v. Van Alstine*, 77 OS 395, 83 NE 601, 14 LRA(NS) 893 [see also *Cleveland Elec. R. Co. v. Hayes*, 78 OS 431]; *Wellston Iron Furnace Co. v. Rinehart*, 108 OS 117, 140 NE 623 [affirming *Rinehart v. Wellston Iron Furnace Co.*, 32 OCA 476, 35 CD 817].

4. The special provisions of former GC § 972 (see now RC § 4155.13) apply in all cases coming under the terms and provisions of GC § 898-1 et seq (RC § 4151.01) (the mining act), and the general provisions concerning rights of action in case of death by wrongful act found in former GC §§ 10770 and 10772 (see now RC §§ 2125.01, 2125.02, 2125.03) do not apply in such cases: *Harris v. Rail & c. Mining Co.*, 87 OS 450, 101 NE 923 [contra, *Rankine v. Pennsylvania & O. Coal Co.*, 15 CC(NS) 17, 23 CD 349; which was affirmed in memorandum opinion, *Pennsylvania & O. Coal Co. v. Rankine*, 88 OS 555].

5. In applying the statutes on the subject of the recovery of damages for death by wrongful act, the courts should give effect to the sound and wholesome humanitarian policies designed to be promoted by their enactment: *Ransom v. New York C. & c. R. Co.*, 93 OS 223, 112 NE 586, LRA 1916E, 704.

6. The right of action given by former GC § 10770 (see now RC § 2125.01) to persons named in former GC § 10772 (see now RC §§ 2125.02, 2125.03) is independent of the survivor action under GC § 11235 (RC § 2305.21); and a judgment for defendant in one case is not a bar to a recovery in the other: *May Coal Co. v. Robinette*, 120 OS 110, 165 NE 576; affirming *Robinette v. May Coal Co.*, 31 App 113, 166 NE 818.

7. General Code § 6278 (RC § 3761.01) et seq are cumulative to former GC § 10770 (see now RC

§ 2125.01); and the liability of a county for death by mob violence does not affect the liability of the individual whose wrongful act caused such death: *Sheet & Tin Plate Co. v. Griffith*, 98 OS 73, 120 NE 207 [affirming *Griffith v. Sheet & Tin Plate Co.*, 8 App 22, 26 CC(NS) 422].

8. A cause of action for personal injury survives the death of the injured party; and all the rights which the injured party may have had in his lifetime inure to the benefit of his personal representatives or next of kin, respectively, unless the statutes clearly provide otherwise: *Wellston Iron Furnace Co. v. Rinehart*, 108 OS 117, 140 NE 623 [affirming *Rinehart v. Wellston Iron Furnace Co.*, 32 OCA 476, 35 CD 817].

9. In order to maintain an action for damages for injuries to decedent (former GC §§ 10770 and 10772 [see now RC §§ 2125.01, 2125.02, 2125.03]), for next of kin and dependents of the person injured, it must be shown that such dependents are in existence at time of trial: *Fini v. Perry*, 119 OS 367, 164 NE 358.

10. This section creates a new cause or right of action distinct and apart from the right of action which the injured person might have had and upon the existence of which such new right is conditioned: *Karr v. Sixt*, 146 OS 527, 33 OO 14, 67 NE(2d) 331.

11. Under the wrongful death statute, this section et seq., the administrator of the estate of a child who, while viable, suffered a prenatal injury through the alleged negligent act of another and who died approximately three months after its birth as a result of such injury, has a cause of action against such other for damages for the benefit of the parents of such infant: *Jasinsky v. Potts*, 153 OS 529, 42 OO 9, 92 NE(2d) 809.

12. An executor or administrator in maintaining an action for wrongful death of his decedent acts as trustee not of the estate of his decedent but for the sole benefit of persons designated in the statute as the next of kin of the decedent. (*May Coal Co. v. Robinette*, Admr., 120 OS 110, and *Epinger, Admx. v. Wade*, 142 OS 460, 27 OO 397, approved and followed.): *Fielder v. Ohio Edison Co.*, 158 OS 375, 49 OO 265, 109 NE(2d) 855.

13. Where an alleged negligent act was such as would have, if death had not ensued, entitled a person to maintain an action therefor, a cause of action for wrongful death exists in such decedent's personal representative, and such cause of action for wrongful death can not be defeated merely by reason of the bar of limitation which would have been applicable to decedent's action: *Klema v. St. Elizabeth's Hospital*, 170 OS 519, 11 OO(2d) 326, 166 NE(2d) 765.

14. The right to sue for damages against one causing unlawful death arises from statutory liability, and is not ordinary action for tort (former GC § 10770 [see now RC § 2125.01]): *Minglewood Coal &c. Co. v. Carson*, 31 App 237, 166 NE 237.

15. Right to maintain civil action for damages for causing unlawful death is not an ordinary one to recover tort damages, but arises from a liability created by statute and recognized by the constitution: *Minglewood Coal &c. Co. v. Carson*, 31 App 237, 166 NE 237.

16. At common law no action for damages would lie for death resulting from personal injury caused by wrongful act, neglect, or default: *Demos, Admr. v. Freemans*, 43 App 426, 13 OLA 318, 183 NE 395.

17. Separate releases by husband and wife of a cause of action for personal injuries sustained by the wife, executed before the wife's death from injuries, were not a bar to action for wrongful death brought by the administratrix for the benefit of the children: *Phillips v. Community Trac. Co.*, 46 App 483, 189 NE 444, 40 OLR 92.

18. A police officer is not liable under this section for the death of one of four criminals, who was shot while fleeing: *Clark v. Carney*, 71 App 14, 25 OO 347, 42 NE(2d) 938.

19. The rights of the next of kin in an action for wrongful death begin where those of the decedent end, are rights over which decedent can have no control and are not affected by what may have happened to decedent's right of action: *DeHart v. Ohio Fuel Gas Co.*, 84 App 62, 39 OO 101, 85 NE(2d) 586, discussed in 18 CinLRev 548.

20. Two distinct rights of action in wrongful death cases are recognized in Ohio, each maintainable by the personal representative of the deceased person—one for the exclusive, pecuniary benefit of the next of kin, and the other for the benefit of the estate: *Moss v. Hirzel Canning Co.*, 100 App 509, 60 OO 397, 137 NE(2d) 440.

21. A cause of action arises for the wrongful death of a viable unborn child which is subsequently stillborn: *Stidam v. Ashmore*, 109 App 431, 11 OO(2d) 383, 167 NE(2d) 106.

22. This section and Title 45 U. S. Code § 51 create as substantive law the legal liability for the wrongful death of another: *Matz v. Erie-Lackawanna R. Co.*, 2 OApp(2d) 136, 31 OO(2d) 241, 207 NE(2d) 250.

23. An administratrix has a right of action for the death of a seaman under the Jones act (46 U.S. Code § 688), but not under the general maritime law doctrine of unseaworthiness and not under the Ohio wrongful death act: *Gillespie v. United States Steel Corp.*, 25 OO(2d) 22, 321 F(2d) 518; affirmed, 379 US 148, 13 LEd(2d) 199, 85 S Ct 308.

24. The right of action for the wrongful death of a decedent is not property of a decedent: *In re Walker*, 21 OO 220, 6 OSupp 324 (PC).

25. The wrongful death statute does not deny or abridge the common law right of action of a husband for damages, as against one who injures his wife, for loss of services, society and consortium: *Spinell v. Shaweker*, 11 OLA 289, 36 OLR 20 (App); reversed on other grounds, *Shaweker v. Spinell*, 125 OS 423, 36 OLR 421, 181 NE 896.

26. An administrator, under authority of GC § 11235 (RC § 2305.21), may maintain an action, independently of former GC § 10770 (see now RC § 2125.01), for injuries sustained by decedent in the same manner decedent could have maintained such action if he had survived. In such action damages are limited to those for injuries accruing during the lifetime of decedent: *Hillard v. Western &c. Life Ins. Co.*, 33 OLA 243.

27. The language of this section has been carried into GC § 1465-60 (RC § 4123.01), with reference to the liability of the employer for personal injuries sustained by his employees in the course of their employment, and caused by the wrongful act, neglect, or default of the employer: *Gerthing v. Stambaugh-Thompson Co.*, 1 App 176, 18 CC(NS) 496, 24 CD 385, 59 Bull 17 (Ed).

28. In an action for damages for wrongful death brought under this section it is proper to apply the provisions of paragraph two of GC § 9017 (RC § 4973.08), qualifying the liabilities of railway companies for injuries to their employees: *Pittsburgh, C., &c. R. Co. v. Francis*, 13 CC(NS) 167, 22 CD 189.

29. General Code §§ 6242 to 6245 (RC §§ 4113.03 to 4113.06), and former GC §§ 10770 and 10772 [see now RC §§ 2125.01, 2125.02, 2125.03], as amended by act 101 v 195, which modify the law regulating the liability of employers for injuries to employees, apply to actions for injuries by an employee himself and by his administrator if he fails to survive the injury incurred: *Fath Constr. Co. v. Bausmerth*, 15

CC(NS) 150, 23 CD 382, 57 Bull 401 (Ed) [affirmed, without opinion, 87 OS 509].

30. This section does not prevent an action for personal injuries from being revived by the administrator of the plaintiff after the death of the latter: *Hayes v. Cleveland Elec. R. Co.*, 21 CC(NS) 186, 33 CD 308.

31. Former GC § 10770 (see now RC § 2125.01) amended 101 v 195 was not repealed by the workmen's compensation act (102 v 524 et seq). The two statutes must be construed together and force and effect given to each, if possible; and the later statute will supersede the earlier in cases in which such later act applies specifically: *Zumkehr v. Diamond Portland Cement Co.*, 14 NP(NS) 166, 23 OD 224, 58 Bull 157 (Ed).

32. Administration is a proceeding in rem, and whether the chose in action in favor of the wife and children for wrongful death under former GC §§ 10770 and 10772 (see now RC §§ 2125.01, 2125.02, 2125.03) is a part of the estate or not, it is a trust which the statute provides shall be administered through an administrator appointed by the court: *Bucyrus Steel Castings Co. v. Farkas*, 15 NP(NS) 609, 27 OD 220.

Negligence and other wrongful acts

See also case notes 161, 162, 177, 178, 182, 185, 188, 189, 190, 200 under this section.

33. A receiver of a railroad is answerable for injuries to his employees and others, where the railroad company, if it were operating the road, would also be liable. And the administrator of the injured party may, under the above section, bring an action against such receiver, under the same restrictions and on the same grounds that the party injured, if death had not ensued, might have done: *Murphy v. Holbrook*, 20 OS 137.

34. Railroad company not liable for death of person resulting from its negligence, where such person was at a station by mere permission and sufferance and not for the purpose of transacting any business with the company: *Pittsburgh, Ft. W., B. C. R. Co. v. Bingham*, 29 OS 364.

35. A railway employee, who rides on one of its cars in the discharge of his duties, is not to be regarded as a passenger, and the railroad company is not liable for his death, caused by the negligence of an engineer: *Kumler v. Junction R. Co.*, 33 OS 150.

36. An action will lie for death by wrongful act which amounts to homicide: *Darling v. Williams*, 35 OS 58.

37. Where a druggist delivered to a customer, instead of the medicine called for and which was known to be harmless, a poisonous drug, carelessly and without inquiry as to by whom and for what purpose it was to be used, and the customer administered same to his wife, whereof she died, a cause of action arose in favor of the administrator of the wife against the druggist: *Davis v. Guarnieri*, 45 OS 470, 15 NE 350, 4 AmSt 548.

38. In action against railroad company for wrongfully causing a death at a crossing, an instruction that if deceased was misled by the absence of signals or warning, and led to believe, as a reasonable person, that he could cross the tracks in safety, and while attempting to do so, without fault or negligence on his part, he was struck and killed by the running train, solely on account of defendant's negligence, the administrator would be entitled to recover, is not erroneous: *Schweinfurth v. Cleveland, C., C. & C. R. Co.*, 60 OS 215, 54 NE 89.

39. No recovery can be had for death by wrongful act in case of a passenger who was killed while riding on a freight train with the permission of a conductor, although in violation of the rules of the rail-

road: *Baltimore & C. R. Co. v. Cox*, 66 OS 276, 64 NE 119, 90 AmSt 583.

40. Greater care and caution should be exercised to prevent injuries to children upon premises where dangerous active operations are carried on than upon premises containing a visibly dangerous static condition: *Hannan v. Ehrlich*, 102 OS 176, 131 NE 504.

41. A licensee takes his license subject to its attendant perils and risks, and the licensor owes him no duty except to refrain from wantonly or wilfully injuring him and to exercise ordinary care after discovering him to be in peril. He should not be exposed to hidden dangers, pitfalls or obstructions. This rule is not altered by the fact that the injured person is a child of tender years: *Hannan v. Ehrlich*, 102 OS 176, 131 NE 504.

42. An action for death by wrongful act may be brought where the death is due to injuries inflicted by a dog and in such a case it is not essential to aver and prove the known vicious character of the dog or negligence of the owner: *Lisk v. Hora*, 109 OS 519, 143 NE 545.

43. A contractor is liable for the death of a child caused by the negligence of the contractor in leaving an unsecured wagon across a street, as a part of a barricade to prevent travel upon a new pavement, if children are accustomed to play there, and the contractor has knowledge of such facts: *DeGroodt v. Skrbina*, 111 OS 108, 144 NE 601, 38 ALR 591.

44. When a fatal injury to a street car passenger at a railway crossing was due to the concurrent negligence of both the steam and the electric companies, the fact that a crossing gate which had been negligently raised by a watchman for the steam road was situated more than fifty feet from the crossing, and under a strict construction of the law the electric car would be bound to stop for the crossing after passing the gate, does not afford ground for relieving the steam road from liability growing out of its own negligence in raising the gate in the face of an oncoming train: *Pittsburgh, C., C. & C. R. Co. v. Pritz*, 1 App 119, 17 CC(NS) 96, 24 CD 411 [reversed in memorandum opinion, 90 OS 419].

45. Where the decedent, a boy twelve years of age, while walking along the sidewalk in the evening, was killed by being run over by a heavy electric truck which had been left for the night with the brake on and the controller removed, standing in an open space covered with a cement floor slanting toward the sidewalk and abutting thereon; in the absence of any evidence as to the agency which started the truck, the court held that the boy met his death by reason of the negligence of the defendant owner of the truck in not leaving it in a safe and proper place where it could not injure persons lawfully passing along the sidewalk: *John C. Roth Packing Co. v. Williams*, 3 App 348, 20 CC(NS) 362, 26 CD 200 [affirmed, without opinion, 92 OS 531].

46. If the death of an employee is caused by a defect in a pipe which was not intended as a means of support but which broke when he attempted to support his weight upon it, by failure to light such place adequately, there being a system of electric lights for such place which at the time of the accident was so out of repair as to leave the place in darkness, and by stretching a wire in such a way as to increase the difficulty of the workmen in moving in such place, a verdict against the employer will not be set aside, although the employer had furnished a torch which the employee did not take with him: *Larkins v. Ohio Elec. R. Co.*, 4 App 37, 22 CC(NS) 241.

47. A board of county commissioners may be joined with a municipality in an action for wrongful death resulting to a pedestrian by falling off a sidewalk of a public street which formed an abutment to a county bridge which was not protected by guard rails as

required by GC § 7563 (RC § 5591.36): Commissioners v. Shurts, 10 App 219.

48. Where a contractor has made a dangerous excavation in a street near the track of the railway, it is the duty of the railway company to see that the excavation is reasonably guarded at or near points where passengers are discharged, and to so operate its cars as not to disturb coverings placed over such excavations: *Cleveland R. Co. v. Ranft*, 12 App 397, 65 Bull 359 (Ed).

49. It is the duty of contractors who lawfully make dangerous excavations in public streets, over which people have a right and are accustomed to travel, to adopt reasonable precautions to guard the public against such dangerous excavations: *Cleveland R. Co. v. Ranft*, 12 App 397, 65 Bull 359 (Ed).

50. It is not error to refuse to give a charge that motormen are not required to exercise as great a degree of care between intersecting streets as at intersections, if the instruction does not state what degree of care is required: *Cincinnati Trac. Co. v. Cahill*, 16 App 496 [for earlier opinion, see 13 App 46].

51. In an action for the wrongful death of a child due to a motor truck backing over it, it is not error for the court to refuse to charge that the fact that children had been on the sidewalk before the truck started to back did not require employees to get off the truck and go to the rear thereof to ascertain whether any children were there, where there is nothing to show that children were known to have been on the sidewalk before the truck started back: *Shillito Co. v. Shanley*, 21 App 12, 153 NE 102.

52. Where a landlord expressly or impliedly reserves to himself, for the common use of his tenants, the control of a portion of the premises, he owes a duty to his tenants and their invitees to exercise ordinary care and prudence, to the end that such portion of the premises be maintained in a reasonably safe condition: *Foti v. Lewis*, 27 App 535, 3 OLA 69, 161 NE 365.

53. Power company, knowing of electrocution of third party by contact with sagging wires near highway, and turning on current without examining line, held negligent: *Ohio Power Co. v. Fittro*, 36 App 186, 8 OLA 617, 32 OLR 227, 173 NE 33.

54. A petition in an action for wrongful death which alleges, in essence, that defendant was the lessee of a farm containing an abandoned quarry 20 feet in depth with no outlet; that in 1952 children and adults played and swam in and about the quarry; that prior to the 11th of July, 1952, there had been a sign warning of the danger to swimmers, but that on that date no such warning sign was posted and that plaintiff's decedents were drowned about the hour of midnight on that day; followed by allegations not sounding in negligence but attempting to make the premises an "attractive nuisance," and which constitute conclusions of the pleader, does not state facts which constitute a cause of action and is subject to demurrer: *Bronikowski v. Bigham*, 75 OLA 220, 143 NE(2d) 490 (CP).

55. An action may be maintained against the county commissioners in their official capacity by an administrator of one whose death is the result of the negligence of the commissioners in failing to keep a county bridge in repair: *Rohe v. Commissioners*, 5 CC(NS) 97, 16 CD 489.

56. If the motorman could see, in the exercise of ordinary care, that a young child was about to cross the track, and the motorman could have stopped the car in time to avoid injury, if he had used ordinary care, the street railway company is liable for his failure so to do: *Cincinnati Trac. Co. v. Cahill*, 16 App 496 [for earlier opinion, see 13 App 46; distinguishing *Cincinnati Trac. Co. v. Simon*, 8 CC(NS) 515, 18 CD 780].

57. Running down a six-year-old girl, who fell upon the track one hundred fifty to two hundred feet ahead of a street car, before she could recover from her fall, indicates negligence in operation, whether in running the car at a reckless rate of speed, or inattention on the part of the motorman if he was running at reasonable speed. Proof that he did not cut out the power or apply the brakes until after passing over the child or until signaled by the conductor to stop at a regular place for passengers to alight, in the absence of a reasonable account by the motorman of the cause of the accident, warrants a verdict against the company: *Toledo R. & C. Co. v. Wettstein*, 14 CC (NS) 441, 23 CD 15 [affirmed, without opinion, 79 OS 439].

58. In an action for damages on account of fatal injury to a pedestrian from being struck by an electric car at a street crossing, it is error for the court to charge the jury that it is the duty of the company to cause a gong to be rung as a car is about to cross a street. All that is necessary is that a warning be given as a car approaches the crossing, and this duty only arises when an ordinarily prudent person would give such warning under similar circumstances: *Cincinnati Trac. Co. v. Charles*, 14 CC(NS) 506, 23 CD 437 [affirmed, without opinion, *Charles v. Cincinnati Trac. Co.*, 87 OS 475].

59. Where the evidence as to the physical cause of an accident is largely inferential and would lead to an equally natural inference precluding negligence, it is the duty of the trial judge to withdraw the case from the consideration of the jury: *Bender v. Hanna*, 16 CC(NS) 387, 31 CD 560.

60. In an action to recover for death of an employee by negligence of a railroad company, evidence to the effect that decedent was standing upon the top of a car, that a noise was heard as if cars coming together, and that one of the cars was knocked off its rear tracks, is not sufficient evidence of negligence of the railway company to justify submitting the case to the jury, if there is no evidence tending to show that decedent did not know that such cars were uncoupled, if it is possible from the evidence that he uncoupled them himself, and if the position in which decedent's body was found would lead equally to the inference that he was on the ground, stumbled and fell under the wheels while attempting to climb to the top of one of the cars: *Hawkins v. Lake Shore & C. R. Co.*, 16 CC(NS) 551, 26 CD 107 [affirmed, without opinion, 74 OS 424].

61. If the gateman at a railroad crossing opens the gates, and the pedestrian sees a caboose approaching on the track, it is said that the opening of the gates is not notice of a clear track and a safe crossing; and accordingly the administrator of such pedestrian cannot recover if he is killed by a train other than such caboose: *Cerri v. Erie R. Co.*, 17 CC(NS) 68, 32 CD 14 [affirmed, without opinion, *Midvale Goshen Coal Co. v. Cerri*, 85 OS 444].

62. The operation of a motor vehicle in violation of GC §§ 12603 (see now RC § 4511.21) and 12604 (repealed, 119 v 766), is prima facie evidence of negligence, where such operation of the motor vehicle caused a pedestrian, in order to avoid it, to step back in front of a moving street car which struck and killed her: *Taylor v. Cleveland R. Co.*, 23 CC(NS) 199, 34 CD 209.

63. If two parties are guilty of concurrent negligence, causing the death of a third party, it is reversible error for the court to charge the jury that they are to determine whether such death was caused by one of these parties or by the other: *Baus v. Cleveland, S & C. R. Co.*, 29 OCA 284, 35 CD 577.

64. A violation of a traffic ordinance which is in-

tended for the protection of the public is negligence per se: *Russo v. Cleveland*, 31 OCA 423, 35 CD 453 [for another opinion in same case, see 28 OCA 25, 29 CD 445, which was affirmed in memorandum opinion, *Cleveland v. Russo*, 98 OS 465, on authority of *Toledo v. Cave*, 41 OS 149].

65. An employee who was in the exercise of due care and diligence at the time of the accident has a right of action where his injuries resulted from defective machinery which had not been inspected with proper care and diligence, and if he dies from the injury, there is a right of action under the above section: *Clark v. Stillwell-Bierce & Smith-Vaile Co.*, 6 NP(NS) 448, 18 OD 741 [reversed by circuit court, without report; circuit court reversed and common pleas affirmed, without report, 76 OS 576].

66. The addition of the words "such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued" tends to show that the words "wrongful act, neglect or default" taken by themselves would include even slight negligence, and would not be limited to a want of ordinary care. Accordingly GC § 1465-60 (RC § 4123.01) which imposes liability in case of "wrongful act, neglect or default" imposes liability if there is even slight negligence: *Schaefer v. Cincinnati Bickford Tool Co.*, 13 NP(NS) 553, 24 OD 266.

67. It is not error for the court to instruct the jury that the druggist is bound to use ordinary care in and about the conduct of his business so as not to cause injury to persons buying by failing to give the drug asked for and giving instead some other drug or drugs which would be likely to cause injury and to further instruct the jury that if the druggist failed to give the drug asked for, but instead gave the drug asked for together with some other drug of dangerous properties, that would be failure to exercise ordinary care for which a recovery might be had in case of death resulting therefrom: *Meyer v. Flannery*, 18 NP (NS) 361, 26 OD 424 [affirmed by court of appeals, without opinion, February 8, 1916].

68. If an employee of a traction company is riding from his work along with other laborers upon a car, and while so riding he is killed by the negligence of the traction company, his administrator may bring an action against the traction company upon the theory of the relation of master and servant. A judgment in favor of the administrator will not be reversed in a proceeding in error, on the ground that the administrator did not establish the relation of passenger and carrier: *Cincinnati Trac. Co. v. Ginocchio*, 60 Bull 377 (Ed).

69. If a traction company transports more than fifty of its employees upon a flat car, so that they are obliged to sit with their feet hanging over the sides of the car, the question of whether it was exercising proper care in transporting its employees in this way, while the car was running at a high rate of speed, is a question for the jury: *Cincinnati Trac. Co. v. Ginocchio*, 60 Bull 377 (Ed).

Proximate and remote cause

70. Where a railroad conductor, lawfully and with reasonable care, expels a passenger who is afterward run over by another train and killed, the expulsion itself is not such proximate cause of the death as will make the company liable: *Railroad Co. v. Valleley*, 32 OS 345.

71. If the employee of a railroad company who has charge of the gates raises the gates and a street car passes across the track, and a passenger in such car, seeing a train close upon him, jumps from the car and is killed, his administrator may maintain an action against such railway company, even though the street

car passed in safety: *Pittsburgh, C., C. & C. R. Co. v. Pritz*, 1 App 119, 17 CC(NS) 96, 24 CD 411 [reversed in memorandum opinion, 90 OS 419].

72. Damages for alleged negligent acts causing the death of the plaintiff's decedent can be recovered only if the negligent act complained of is the proximate cause of the accident: *Cleveland Transp. Co. v. Anderson*, 12 App 286, 31 OCA 233 [motion to certify record overruled, 16 OLR 67, 65 Bull 269]; *Rohr v. Cincinnati Trac. Co.*, 12 App 275, 31 OCA 108.

73. In an action to recover damages for wrongful death, instruction to find for defendants if death was result of "unavoidable accident" held erroneous, where allegations of both petition and answer charged negligence, and "unavoidable accident" is necessarily accident occurring without apparent cause of fault attributable to any one: *Avra, Admx. v. Karshner*, 32 App 492, 168 NE 237.

74. For plaintiff to recover in action for wrongful death, negligence of defendant must be proximate cause of injury, and instruction requiring defendant's negligence to be sole and proximate cause of injury placed greater burden on plaintiff than law required and was erroneous: *Avra, Admx. v. Karshner*, 32 App 492, 168 NE 237.

75. Evidence that the employer failed to instruct the employee as to hazard of employment, and that the employee was killed by an accident in the discharge of his duty, is not sufficient to go to a jury where there is no evidence that the failure to instruct caused the accident: *Hawkins v. Lake Shore & C. R. Co.*, 16 CC(NS) 551, 26 CD 107 [affirmed, without opinion, 74 OS 424].

76. In an action to recover for death by wrongful act, it is not necessary that the injuries which were received should be the sole cause of death. Recovery may be had if such injuries were the primary cause of the death, or if they contributed to produce the disease which caused the death: *Mansfield R., Light & C. Co. v. Kiner*, 17 CC(NS) 431, 25 CD 175.

77. Where the defendant was driving upon the wrong side of the street in violation of a former statute analogous to former GC § 6310 (see now RC § 4561.17), and at a speed of ten or twelve miles an hour in violation of the city ordinances, and plaintiff's intestate, a child of seven, after dodging from behind other vehicles going in the right direction, was knocked down by the front legs of defendant's horses and killed by being run over by defendant's wagon, the question of whether or not defendant's negligence in driving so fast that he could not stop in time to avoid running over the child was the proximate cause of its death is a question for the jury: *Harris v. Williams*, 22 CC(NS) 412, 33 CD 650 [affirmed, without opinion, *Williams v. Harris*, 77 OS 633].

78. Whether the undisputed violation of two city ordinances by one of the city's employees driving a garbage wagon was the proximate cause of plaintiff's injury is a question for the jury: *Russo v. Cleveland*, 31 OCA 423, 35 CD 463 [for another opinion in same case, see 28 OCA 25, 29 CD 445, which was affirmed in memorandum opinion, *Cleveland v. Russo*, 98 OS 465, on authority of *Toledo v. Cave*, 41 OS 149].

79. Where a druggist sold poison to an intoxicated man, without labeling same, who administered it to himself, the proximate cause of the man's death was his own act and not that of the druggist, and the latter is not liable: *Ronker v. St. John*, 21 CC 39, 11 CD 434.

Contributory negligence

See also case notes 166, 171, 173, 198, 199 under this section.

80. It is error to charge the jury that if deceased, by his

own fault, contributed to his injury, defendant must then show that he was without fault himself; and that no man can be shown without fault, unless he has done all in his power to avoid the injury: *Pendleton St. R. Co. v. Stallman*, 22 OS 1.

81. Where deceased was guilty of contributory negligence, the action will not lie: *Pittsburgh, Ft. W. &c. R. Co. v. Krichbaum*, 24 OS 119.

82. Under a statute providing that the damages recoverable for death by wrongful act must be assessed by the jury in a lump sum, contributory negligence of some of the beneficiaries did not defeat the action: *Cleveland, C., C. &c. R. Co. v. Crawford*, 24 OS 631.

83. Under a statute requiring the jury to assess the damages for the beneficiaries distributively, contributory negligence of some of the beneficiaries is a defense as against them, but not as against other beneficiaries not contributorily negligent: *Wolf v. Lake Erie & W. R. Co.*, 55 OS 517, 45 NE 708, 36 LRA 812.

84. Where the defense is that defendant was not guilty of negligence, it is error to charge the jury on the subject of contributory negligence: *Cincinnati Trac. Co. v. Stephens*, 75 OS 171, 79 NE 235.

85. In an action of negligence where the answer of defendant contains a general denial and an averment that the "death of deceased was caused wholly and solely through his own fault and without any fault whatever on the part of the defendant," and evidence is introduced at the trial by each party in support of its claims, from which the jury might properly find that both defendant and deceased were negligent in such material matters as combined to produce the proximate cause of the injury, it is the duty of the court to instruct the jury as to the law governing the situation thus developed; and it is error for the court to charge the jury that contributory negligence is not in the case; if defendant caused the death of deceased through its negligence, plaintiff is entitled to a verdict; and if the death of deceased came about through his own want of ordinary care, through his own act solely, defendant is entitled to a verdict: *Rayland Coal Co. v. McFadden*, 90 OS 183, 107 NE 330.

86. An allegation of contributory negligence necessarily implies an admission that defendant has been negligent to some extent. There is no arbitrary rule of pleading which requires defendant who contends that he has not been guilty of any negligence to elect between conceding a negligence which he in fact denies, or waiving the defense of contributory negligence: *Rayland Coal Co. v. McFadden*, 90 OS 183, 107 NE 330.

87. In an action for wrongful death of a pedestrian it is error for the trial court to direct a verdict for the defendant on the ground that the decedent was guilty of contributory negligence, where the evidence shows that decedent was almost totally deaf and that the motor truck which struck him was, at the time of the accident, on the left side of the street, contrary to traffic rules; the evidence not being clear as to whether the decedent started from the curb before or after the truck turned the corner into the street decedent was crossing and there being a conflict in the evidence as to the speed of the truck and the distance of decedent from the curb at the time of the collision: *Goodrich v. Cleveland*, 15 App 15 [motion to certify record overruled, *Cleveland v. Fowler*, 19 OLR 517; for former opinion on demurrer in supreme court, see *Fowler v. Cleveland*, 100 OS 158].

88. In a negligence action for the death of a boy ten years of age, the defense of contributory negligence is available against the father and mother as beneficiaries, and is a question for the jury, under proper instructions. In case the issue is resolved against such beneficiaries, the right of recovery is not

affected, but only the amount of recovery, when there are other beneficiaries not charged with negligence: *Cleveland, C., C. &c. R. Co. v. Grambo*, 103 OS 471, 134 NE 648, 20 ALR 1214.

89. A traveler upon a street, crossing the track of an interurban railway, has a right to presume that the interurban railway company will conform to an ordinance prohibiting the running of interurban cars through its limits at a rate of speed greater than that named in the ordinance. If the traveler acts in accordance with such presumption in the absence of knowledge of the fact that the interurban railway company is exceeding such speed limit in running an interurban car, such action upon the part of the traveler will not of itself constitute an act of negligence: *Norris v. Jones*, 110 OS 598, 144 NE 274 [approving and following *Hart v. Devereux*, 41 OS 565].

90. In a wrongful death action based on negligence in selling fuel oil mixed with gasoline or naphtha, the purchaser, having asked for fuel oil, is not to be deemed guilty of contributory negligence as a matter of law in pouring such oil upon a fire in a stove, believing it to be fuel oil: *Douglas v. D.B. Coal Co.*, 135 OS 641, 15 OO 12, 22 NE(2d) 195, 123 ALR 761.

91. Where the deceased met his death while driving over a railroad crossing in the country, and the evidence shows that the train was approaching at the rate of twenty-five or thirty miles an hour, and that, if he had looked at a time when looking would have been effective, he could, in the exercise of ordinary care, have seen the engine in time to avoid injury, and no reasonable excuse exists for failing to look, the decedent was guilty of such contributory negligence as requires a reversal of the judgment rendered in favor of the plaintiff, the same being against the weight of the evidence as to contributory negligence: *Erie R. Co. v. Dump*, 2 App 210, 21 CC(NS) 300, 25 CD 425.

92. Where the testimony shows that the windows of the building where the accident occurred may be safely cleaned from the inside, but the decedent refused to clean them in that way, or to use a safety belt or other device to prevent falling, and had been threatened with discharge for his carelessness in that regard, and there is no direct proof of negligence on the part of the owners of the building or of facts from which negligence may reasonably be presumed, a judgment in favor of the administrator for damages will be reversed and the cause remanded for retrial: *Neave Bldg. Co. v. Roudebush*, 2 App 330, 18 CC(NS) 426, 24 CD 404 [for later opinion, see 28 CC(NS) 229, 26 CD 589, 61 Bull 291 (Ed); which was affirmed, without opinion, 96 OS 40, 14 OLR 56, 62 Bull 127].

93. An employee of one railroad, who is familiar with the tracks and passage of other trains and who steps off the running board of an engine upon which he is riding, immediately in front of an approaching train of another road on an adjoining track, without first looking to see whether he is safe in so doing, and after a warning of the approaching train has been given by both the engineer of the engine upon which he was riding and of the other train, is guilty of contributory negligence: *Norfolk & W. R. Co. v. Cramer*, 9 App 6, 31 OCA 167.

94. When the inference of contributory negligence does not arise from evidence offered by the plaintiff, the burden rests on the defendant to show the same by a preponderance of the evidence, and it is not established by evidence which only equals in weight that offered by the plaintiff: *New York, C. &c. R. Co. v. Aigler*, 10 App 195, 29 OCA 385, 64 Bull 61 (Ed).

95. An engineer who has the right of way on the

main track is justified in assuming that a train moving on a side-track will stop before it reaches the main track; and it is not contributory negligence for him to proceed: *New York C. & C. R. Co. v. Aigler*, 10 App 195, 29 OCA 385, 64 Bull 61 (Ed).

96. In an action for death by wrongful act, the court may refuse to charge on the question of contributory negligence of the beneficiary, if contributory negligence is not pleaded, and if there is no evidence tending to establish it: *Cincinnati Trac. Co. v. Cahill*, 16 App 496 [for earlier opinion, see 13 App 46].

97. The mere failure of a pedestrian to look to the right in crossing a street, when, according to all traffic rules, traffic would ordinarily be expected to come only from the left, is not in itself a failure to exercise ordinary care: *Goodrich v. Cleveland*, 15 App 15 [motion to certify record overruled, *Cleveland v. Fowler*, 19 OLR 517; for former opinion on demurrer in supreme court, see *Fowler v. Cleveland*, 100 OS 158].

98. In an action by a father to recover for loss of services arising from the death of his infant son, the negligence of the father in permitting the child to play in the place of danger where he was killed is a defense: *St. Bernard v. Steingrube*, 16 App 151.

99. In action for death of minor, that court charged on contributory negligence held not prejudicial to defendant: *Shillito Co. v. Shanley*, 21 App 12, 4 OLA 701, 152 NE 102.

100. In action for death of automobile passenger in collision with train at grade crossing, instruction on contributory negligence held properly given, although negligence of automobile driver was not imputable to passenger, since passenger is required to use ordinary care in exercise of own faculties in looking and listening as car approached crossing: *Tyler v. H.V. Ry. Co.*, 28 App 88, 5 OLA 546, 162 NE 623.

101. Deceased on public road, electrocuted when coming near high-voltage wires, held not contributorily negligent as matter of law: *Ohio Power Co. v. Fittro*, 36 App 186, 8 OLA 617, 32 OLR 227, 173 NE 33.

102. On motion for directed verdict, plaintiff's scintilla of evidence as to defendant's negligence must not raise presumption of contributory negligence as matter of law: *La Dow, Admr. v. B. & O. Rd. Co.*, 40 App 458, 11 OLA 491, 178 NE 697.

103. Where deceased, a boy of seventeen years, was killed while attempting to put a belt on a rapidly revolving wheel, having only been employed at that place for three weeks and having no previous experience at that kind of work, and being instructed to do the work without any warning as to its dangerous character, it is for the jury to say whether the danger was so apparent that deceased was guilty of contributory negligence: *Jackson Knife & C. v. Hathaway*, 7 CC(NS) 242, 17 CD 745 [affirmed, without report, 72 OS 623].

104. In an action against a traction company on account of the death of a boy eight years old from being struck by a car, it is prejudicial error to fail to so modify the usual charge to the jury with reference to negligence as to hold the decedent to only that degree of care and prudence which may be expected from a child of his age, capacity and intelligence: *Fritch v. Cincinnati Trac. Co.*, 14 CC(NS) 79, 22 CD 536 [affirmed, without opinion, *Cincinnati Trac. Co. v. Fritch*, 88 OS 525].

105. If the doctrine of the last clear chance is not involved in the pleadings or in the evidence, it is error for the court to charge with reference thereto: *Cincinnati Trac. Co. v. Charles*, 14 CC(NS) 506, 23 CD 437 [affirmed, without opinion, *Charles v. Cincinnati Trac. Co.*, 87 OS 475].

106. In an action for death caused by negligence, it

is error to charge: "If you find that the company's foreman was negligent and that the deceased was without knowledge of that negligence, nor of the danger to which he was exposing himself, that he would not have met his death but for that negligence, then under the statute, the decedent's representative, the plaintiff administratrix, would be entitled to recover," since the court should have added that the same result would follow if the decedent had a means of knowing equal with that of defendant: *Wellman, Seaver, Morgan Co. v. Wood*, 18 CC(NS) 65, 32 CD 597.

107. Since the jury should find in its verdict which, if any, of the beneficiaries was guilty of contributory negligence, a verdict in favor of the administrator in which there is no finding of contributory negligence on the part of any of the beneficiaries amounts to a finding that such beneficiaries were not guilty of contributory negligence: *Campbell v. Tarr*, 18 CC(NS) 323, 33 CD 66.

108. In an action for wrongful death, if the evidence of the plaintiff suggests contributory negligence on the part of the deceased, then it becomes the duty of the plaintiff, before he can recover, to remove that suggestion of contributory negligence: *Galati v. Erie R. Co.*, 23 CC(NS) 63, 34 CD 106.

109. One who steps back from one railway track to another because he is in a position of danger upon the first railway track and because he cannot cross to the other side of the street on account of an automobile, is not, as a matter of law, guilty of negligence: *Taylor v. Cleveland R. Co.*, 23 CC(NS) 199, 34 CD 209.

110. If the contributory negligence of the parents is pleaded as a defense in an action to recover for the death of their child by the wrongful act of defendant, such contributory negligence is said to be a subsequent defense which cannot be made out, nor can evidence tending to establish such contributory negligence be introduced until after plaintiff has rested his case: *Scott v. Wingenberg*, 26 CC(NS) 1, 29 CD 479.

111. The doctrine of last clear chance does not apply if it was physically impossible to avoid the injury after discovering the situation of danger: *Brierly v. Burton*, 29 OCA 545, 35 CD 563.

112. Whether or not plaintiff was guilty of contributory negligence which proximately caused his injury is a question for jury: *Russo v. Cleveland*, 31 OCA 423, 35 CD 463 [for another opinion in the same case, see 28 OCA 25, 29 CD 445, which was affirmed in memorandum opinion, *Cleveland v. Russo*, 98 OS 465, on authority of *Toledo v. Cave*, 41 OS 149].

Assumption of risk

113. An action can be maintained for the death of a woman who died as a result of an illegal abortion although she consented thereto: *Milliken v. Heddesheimer*, 110 OS 381, 144 NE 264, 33 ALR 53 [approving *Barholt v. Wright*, 45 OS 177].

114. In operating the train in violation of the rules of the railway company the engineer did not assume the extraordinary risk of the negligence of the company: *Pennsylvania Co. v. Wasson*, 3 App 458, 21 CC(NS) 481.

115. Though the employer knew that a place under the control of another was not a safe place to work, or by the exercise of ordinary care might have known it, the employee cannot recover if he also knew the same thing, or, by the exercise of ordinary care, might have known it: *Wellman, Seaver, Morgan Co. v. Wood*, 18 CC(NS) 65, 32 CD 597 [citing and follow-

ing Chicago & O. Coal &c. Co. v. Norman, 49 OS 598].

116. If the evidence shows that the injury complained of was due to an obvious risk which was equally within the knowledge of the employee and the employer, a verdict for the defendant should be directed in an action brought by the employee's administrator against the employer to recover damages after the death of such employee: Prescott v. Albrecht, 21 CC(NS) 198, 33 CD 314.

117. If trespasser voluntarily comes in contact with an electric wire, the electric company is not liable for injury resulting therefrom: Jesson v. Mansfield R., Light &c. Co., 30 OCA 170, 35 CD 657.

Imputed negligence

118. The doctrine of imputed negligence does not prevail in Ohio: Davis v. Guarnieri, 45 OS 470, 15 NE 350, 4 AmSt 548.

119. A corporation not for profit, which has as its purpose the maintenance and operation of a hospital, is, under the doctrine of respondeat superior, liable for the negligent acts of its employees, irrespective of whether those acts are administrative or medical: Klema v. St. Elizabeth's Hospital, 170 OS(2d) 519, 11 OO(2d) 326, 166 NE(2d) 765.

120. In an action against the owner of a wagon for death from wrongful act occurring through the negligence of a driver of the wagon in running over an infant playing in the street, the fact that the driver was in charge of and driving the team attached to the wagon sufficiently established his agency so as to charge the owner thereof with liability: Becker v. Howanycz, 18 CC(NS) 19, 32 CD 561.

121. In an action by a mother for damages on account of the death of her four-year-old child, for which she sues as administratrix, it is error to refuse to give a special charge, requested by the defendant before argument, to the effect that the said mother was responsible for the act of those in whose custody she had placed the child, and if it appear from the evidence that they failed to exercise ordinary care for the safety of the child under the circumstances, damages cannot be recovered by the mother for her own benefit: Eisen v. Halloran, 25 CC(NS) 29, 35 CD 158.

122. If the driver of an automobile is not under the control of a passenger, and they are not engaged in a joint enterprise, the negligence of the driver cannot be imputed to the passenger: Baus v. Cleveland, S. &c. R. Co., 29 OCA 284.

Foreign right of action

123. An administrator appointed in this state cannot maintain an action in the courts of Ohio on a cause of action arising under a similar statute in another state: Woodard v. Michigan, S. &c. R. Co., 10 OS 121; see also Brooks v. Railway, 53 OS 655, 44 NE 1131.

124. The provisions of the act of March 25, 1851 (S&C 1139), did not extend to cases where the wrongful act which caused the death was committed outside of this state: Hover v. Pennsylvania Co., 25 OS 667; see also Brooks v. Railway, 53 OS 655, 44 NE 1131.

125. Where there is an act in Indiana similar to former GC § 10770 (see now RC § 2125.01), but a subsequent act regulates the liability of railroads for injuries to employees, fixes the rules of evidence which shall govern in such cases, and provides that the decisions or statutes of other states shall not be pleaded as a defense, both acts are to be treated in *pari materia*, and the enforcement of such acts in Indiana is not the equivalent of the enforcement of the statute

of this state of like character; Ohio courts cannot hear a suit for the wrongful death of a railroad employee occurring in Indiana: Wabash R. Co. v. Fox, 64 OS 133, 59 NE 888, 83 AmSt 739 [reversing 20 CC 440, 11 CD 148].

126. Where a nonresident of the state of Ohio is killed in an automobile accident which occurs in Ohio, his personal representative may bring an action in this state against a nonresident motor vehicle operator who is alleged to have caused the death, pursuant to the provisions of RC §§ 2125.01, 4515.01 and 2703.20, which establish the right to recover for wrongful death, authorize the bringing of an action for injury arising out of the operation of a motor vehicle in the county in which the injury occurred and provide for service upon nonresident operators of motor vehicles: Ellis v. Garwood, 168 OS 241, 6 OO(2d) 22, 152 NE(2d) 100; affirming Ellis v. Garwood, 80 OLA 443, 143 NE(2d) 715 (App).

127. Under former GC § 10771 (see now RC § 2125.-07) (repealed, 101 v 195), no action could be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the state of Ohio: Baltimore &c. R. Co. v. Chambers, 73 OS 16, 76 NE 91, 11 LRA(NS) 1012.

128. The amendment to GC § 11273 (RC § 2307.-37) in 109 v 81, excludes from the jurisdiction of the state courts of Ohio all causes against the persons and companies therein referred to for injuries to person or property or for wrongful death occurring without the state of Ohio unless such claimant is a resident of this state: Loftus v. Pennsylvania R. Co., 107 OS 352, 140 NE 94.

129. In an action brought in Ohio under RC § 2125.01 by the Ohio administrator of the estate of an Ohio resident who was killed in a motor vehicle collision in another state, where there was no citizen or resident of that state involved in the collision, and there is no issue of liability, Ohio has all the substantial governmental interests and the law of Ohio is determinative of the damages recoverable: Fox v. Morrison Motor Freight, 25 OS(2d) 193, 54 OO(2d) 301, 267 NE(2d) 405.

130. Revised Code § 2125.01 which provides a right of action for death caused by a wrongful act in another state "for which a right to maintain an action and recover damages is given by a statute of such other state," does not require the application of that state's limitation of the amount of damages recoverable: Fox v. Morrison Motor Freight, 25 OS(2d) 193, 54 OO(2d) 301, 267 NE(2d) 405.

131. In suits under foreign death statutes, the Ohio courts look to the law of the state whose statute is invoked to determine questions relating to the rights and liabilities thereunder; a federal court setting in Ohio in diversity suit must do likewise: Carlson v. Glenn L. Martin Co., 48 OO 409, 103 FSupp 153.

132. A statute of Pennsylvania will be enforced in Ohio for negligently causing death in that state to a citizen of that state: Schell v. Iron and Sheet Co., 4 CC(NS) 172, 16 CD 209, but see (case note 117 above) and Chambers v. Baltimore & O. R. Co., 207 US 142, 52 LED 143, 28 Sct 34, 6 OLR 498, 16 OFD 123.

133. In an action in Ohio for wrongful death of a husband, resident of Ohio, occurring in New York, where such husband left no issue, the damages recovered are payable to his widow, notwithstanding the general rule that such damages are to be distributed in accordance with the statutes of the state in which the wrongful act was committed: Miller v. Miller, 9 CC(NS) 315, 19 CD 353.

134. The general rule that no action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state,

except where the person wrongfully killed was a citizen of Ohio, is so modified by the federal employers' liability act of April 22, 1908, regulating the liability of interstate railway carriers for the death or injury of their employees while engaged in interstate commerce, as to permit the maintenance of such action by the proper representative of a deceased employee of an interstate railway carrier, although said employee was not a citizen of Ohio and was killed in some other state: *Waring v. Baltimore & O. R. Co.*, 15 CC(NS) 33, 23 CD 194.

135. It is in violation of the constitution to permit a suit for damages for wrongful death to be maintained where deceased was a citizen of Ohio, while denying the right to maintain such suit where the deceased was not a citizen of Ohio: *Chambers v. Baltimore & O. R. Co.*, 207 US 142, 52 LEd 143, 28 S Ct 34, 6 OLR 498, 16 OFD 123.

136. The action is transitory in its character, and the courts of Ohio have jurisdiction to take cognizance of it where the injury occurred in another state: *Baltimore & O. R. Co. v. Joy*, 173 US 226, 43 LEd 677, 19 S Ct 387, 12 OFD 435; *Essenwine v. Pennsylvania Co.*, 11 DecRep 277, 25 Bull 396.

137. Under an earlier form of GC § 10770 (see now RC § 2125.01), the restrictive provision which allowed actions for death in a foreign state only in cases where such foreign state allowed in its courts the enforcement of the Ohio statute, did not apply to the federal courts, and a Michigan administrator could maintain an action in the federal court of Ohio for a death that occurred in Illinois: *St. Bernard v. Shane*, 220 Fed 852, 135 CCA 399 [reversing and remanding 201 Fed 453, 11 OLR 43].

138. The laws of Indiana govern in an action in the federal court in Ohio against a railroad company for death by reason of the company's negligence occurring in Indiana: *Cincinnati, H. & D. R. Co. v. Thieband*, 114 Fed 918, 52 CCA 538, 12 OFD 254.

Proceedings barred

139. Under the original form of this section (49 v 117, § 1), the right to commence an action for wrongfully causing death abated by the death of the wrongdoer: *Russell v. Sunbury*, 37 OS 372.

140. An action for personal injuries began by a decedent and prosecuted by his personal representative is not a bar to recovery by the representative for wrongful death: *Mahoning Val. R. Co. v. Van Alstine*, 77 OS 395, 83 NE 601, 14 LRA(NS) 893; see also *Cleveland Elec. R. Co. v. Hayes*, 78 OS 431, 85 NE 1123.

141. Where the widow as administratrix brought the action, but died during its pendency, and there were no next of kin, the action cannot be maintained thereafter: *Doyle v. Baltimore & O. R. Co.*, 81 OS 184, 90 NE 165, 135 AmSt 775.

142. An individual whose act as a member of a mob causes a death, and the county which is liable therefor by statute, are not jointly liable; and the fact that the executor has brought an action against the county is not a bar to a subsequent action against the wrongdoer: *Sheet & Tin Plate Co. v. Griffith*, 98 OS 73, 120 NE 207 [affirming *Griffith v. Sheet & Tin Plate Co.*, 8 App 22, 26 CC(NS) 422].

143. An application to the industrial commission for compensation, which was refused on the sole ground that the deceased employee was not in the employ of his alleged employer, and was not killed in the course of employment, does not prevent the representative of such deceased employee from bringing an action for death by wrongful act: *Conrad v. Youghiogheny & O. Coal Co.*, 107 OS 387, 140 NE 482, 36 ALR 1288.

144. An action under this section by an administrator to recover damages for the wrongful death of his decedent, and an action theretofore instituted by the decedent in his lifetime against the same defendant to recover damages for the injuries ultimately resulting in his death, which action was settled and dismissed, are not actions "upon the same matter between the same parties": *Gorman v. Columbus &c. Elec. Co.*, 144 OS 593, 30 OO 194, 60 NE(2d) 700.

145. Where, during the pendency of an action for wrongful death brought under favor of GC § 10509-166 (RC § 2125.01), the only heir and next of kin of the decedent, who has sustained pecuniary injury by reason of such death, dies, no one remains within the purview of this section, in whose behalf the action may be further prosecuted, and the sustaining of a motion by the defendant for a directed verdict or for a dismissal of the action is proper: *Danis v. New York Cent. R. Co.*, 160 OS 474, 52 OO 356, 117 NE(2d) 39.

146. Negligence of administrator suing for death of boy could not bar right to recover: *Fach v. Canton Yellow Cab Co.*, 36 App 247, 9 OLA 189, 173 NE 245.

147. A judgment denying recovery for personal injuries is not a bar to an action, under this section and GC § 10509-167 (RC § 2125.02), for the benefit of the next of kin of the injured person who died as a result of such injuries: *DeHart v. Ohio Fuel Gas Co.*, 84 App 62, 39 OO 101, 85 NE(2d) 586, discussed in 18 CinLRev 548.

148. A release executed by an injured person, discharging a tort-feasor from all claims for damages resulting from the latter's wrongful act, is not a bar to a wrongful death action brought by the personal representative of the injured person; but a settlement agreement between the tort-feasor and next of kin of the injured person, during the latter's lifetime, is a bar to the administrator's action for wrongful death: *Pilkington v. Saas*, 25 OLA 663.

149. A settlement made by the wrongdoer with the next of kin and a general release executed and delivered by the next of kin to the wrongdoer after the death of the decedent constitutes a bar to an action by the administrator of the decedent's estate for the benefit of the next of kin under the wrongful death statute: *Featherolf v. Casserly*, 75 OLA 332, 144 NE(2d) 114 (App).

150. An action for damages for personal injuries caused by wrongful act does not abate by the death of the plaintiff, even though the wrongful act complained of was the direct cause of the death, but may be revived in the name of the administrator: *Hayes v. Cleveland Elec. R. Co.*, 21 CC(NS) 186, 33 CD 308.

151. Where an action for personal injuries had been begun by a decedent and prosecuted to judgment by his administrator after his death, it is a bar to another action by the administrator for wrongful death of decedent resulting from the same injuries as those upon which the previous suit was predicated: *Johnson v. Cleveland, C., C. &c. R. Co.*, 22 CC(NS) 264, 33 CD 554 [for a former opinion, see 21 CC(NS) 268, 33 CD 341].

152. Former GC § 10770 (see now RC § 2125.01) and GC §§ 11235 (RC § 2305.21) and 11397 (RC § 2311.21), are to be construed in *pari materia*, and where a party who has been injured by another's negligence brings suit in his lifetime to recover for such injury, and, pending suit, died of said injury, said action cannot be revived in the name of the administrator. Former GC § 10770 (see now RC § 2125.01) then provides the exclusive remedy. General Code §§ 11235 (RC § 2305.21) and 11397 (RC § 2311.21) do apply, however, where death results from other causes than the negligent injury: *Gallagher v. Furnace and Dock Co.*, 2 NP(NS) 661, 15 OD 789; but see *Mahon-*

ing Val. R. Co. v. Van Alstine, 77 OS 395, 83 NE 601, 14 LRA(NS) 893.

153. When a workman has been killed by the actionable negligence of a third person, the fact that his personal representative has already received payment from the state insurance fund under the workmen's compensation act, will not prevent such representative from maintaining an action against the tort-feasor for damages for causing the death, nor will the fact that the tort-feasor himself also contributes to the state fund affect his liability: Kenning v. Interurban R. &c. Co., 18 NP(NS) 526, 30 OD 446.

154. The fact that the wife of an employee who has been killed by the negligence of a person other than his employer, has received compensation from the state insurance fund is not a defense in an action by such wife as administratrix of such employee against such wrongdoer to recover damages for such death by wrongful act: Brunk v. Cleveland, C. & C. R. Co., 20 NP(NS) 360, 28 OD 320.

154.1 Where there was a collision with defendant's train, by which the intestate was killed, and his horses and wagon destroyed, a suit by the administrator under this act, for wrongful death, is not barred by the former recovery of the value of the horses and wagon, in another suit by the administrator: Peake v. Baltimore & O. R. Co., 26 Fed 495, 5 OFD 491.

Jurisdiction and venue

155. The action herein provided may be brought in any county in the state where the defendant, or any of the defendants, reside or may be served: Drea v. Carrington, 32 OS 595.

156. The administrator of one who is killed by the negligence of the owner of an automobile, may bring an action for such injury in the county in which decedent resided: Wellston Iron Furnace Co. v. Rinehart, 108 OS 117, 140 NE 623 [affirming Rinehart v. Wellston Iron Furnace Co., 32 OCA 476, 35 CD 817].

157. Where a case that may be, is duly removed from a state to a federal court, the jurisdiction of the state court over the cause at once ceases, and it can take no further step therein: and if, thereafter, the case is disposed of in the federal court, otherwise than on the merits, the plaintiff can not recommence the action in the state court, although, under like circumstances, he might have done so had the cause not been removed: Railway Co. v. Fulton, Admr. 59 OS 575, 53 NE 265, 44 LRA 520.

158. A writ of prohibition will be issued to restrain a judge from assuming jurisdiction of a wrongful death action, since the Industrial Commission is the only body empowered by law to provide redress for the work-related death of a person employed by a complying employer: State ex rel. Allied Chemical Corp. v. Earhart, 37 OS(2d) 153, 66 OO(2d) 313, 310 NE(2d) 230 (1974).

159. In an action to recover for death by wrongful act, the administrator is the real party in interest; and accordingly if the administrator is a citizen of the same state as that of which the defendant is a citizen, the administrator cannot bring an action in the federal courts on the ground of diversity of citizenship, even though the beneficiaries are aliens: Laubsher v. Fay, 197 Fed 879, 10 OLR 456, 57 Bull 317 (Ed).

160. The procuring of an alien consul to act as the administrator of a deceased resident of Ohio does not, in an action against other residents of Ohio, present such a case of diverse citizenship as to give jurisdiction to a federal court. The appointment of such alien consul will be regarded as having been procured collusively and fraudulently if the testimony discloses that the sole purpose in having the said consul named as administrator was to give the federal court juris-

diction of the action for wrongful death thereafter brought by him: Cerri v. Akron-Peoples Tel. Co., 219 Fed 285, 13 OLR 425.

Pleading

161. It is not necessary to allege in the petition all the facts which contribute to the primary act complained of, or which tend to establish the negligence of such act: Davis v. Guarnieri, 45 OS 470, 15 NE 350, 4 AmSt 548.

162. For a defective attempt to plead negligence in permitting a child to play in a dangerous sand-bank, see Hannan v. Ehrlich, 102 OS 176, 131 NE 504.

163. For a petition in an action for wrongful death, sufficient as against demurrer, see Ford v. Cleveland, C. & C. R. Co., 107 OS 100, 140 NE 664 [approving and following Harriman v. Pittsburgh, C. & C. R. Co., 45 OS 11].

164. Failure to allege in the petition that, in addition to the widow and two children mentioned in the petition, the decedent was also the father of two other children by a divorced wife, does not invalidate the judgment recovered, where the recovery is for the entire amount permissible under the statute; but in such a case the claim of the two unnamed children may be presented to the probate court and their share apportioned to them out of the judgment: Pittsburgh, C. & C. R. Co. v. Pritz, 1 App 119, 17 CC(NS) 96, 24 CD 411 [reversed in memorandum opinion, 90 OS 419].

165. In an action to recover damages for death caused by negligence, where the petition avers that the decedent left no widow or children and that his father, mother, brother and sister are his next of kin, it is not error for the trial court to allow a child by a common law marriage to be made a party and file a pleading in which she avers that her mother, brother and herself are the next of kin of deceased, and thus enable the court to protect the rights of the true beneficiaries: Erie R. Co. v. Dump, 2 App 210, 21 CC(NS) 300, 25 CD 425.

166. Contributory negligence may arise as an inference from plaintiff's own evidence and be recognized as an issue in the case although not pleaded by defendant: Rohr v. Cincinnati Trac. Co., 12 App 275, 31 OCA 108.

167. In an action for wrongful death a defense that the death was "due solely to the careless and negligent conduct and acts of the decedent" and of a third person is immaterial and should be stricken: DeHart v. Ohio Fuel Gas Co., 84 App 62, 39 OO 101, 85 NE(2d) 586, discussed in 18 CinLRev 548.

168. The petition need not allege that the next of kin have sustained pecuniary damage by the death: Jackson Knife &c. Co. v. Hathaway, 7 CC(NS) 242, 17 CD 745 [affirmed, without report, 72 OS 623, 76 NE 1126].

169. General Code § 6245 (RC § 4113.06) as amended by 101 v 195 (the Norris law), and which modifies the rule of assumption of risk of employees as to certain defects in appliances and places of work, abrogates the rule of pleading as to denial of knowledge, actual or constructive, of defects causing the injury alleged: Fath Constr. Co. v. Bausmerth, 15 CC(NS) 150, 23 CD 382, 57 Bull 401 (Ed) [affirmed, without opinion, 87 OS 509].

170. In an action for death by wrongful act, caused by a defect in the appliances, places or ways which the employer has furnished for his employee, it is necessary to aver want of knowledge of such defect or danger on the part of the employee, and an averment that the employee did not know or appreciate the danger of the particular casualty by which he was in fact overtaken is not sufficient: Lake Erie Iron Co. v. Karpinski, 21 CC(NS) 207, 33 CD 323 [affirmed,

without opinion, *Karpinski v. Lake Erie Iron Co.*, 76 OS 621].

171. Plaintiff cannot recover for negligence which warrants the application of the rule of "last chance" without alleging it in his petition: *Galati v. Erie R. Co.*, 23 CC(NS) 63, 34 CD 106.

172. It is not error for the court, in its instructions to the jury, to call attention to a statute making it unlawful to sell a poisonous drug without labeling it "poison": *Davis v. Guarnieri*, 45 OS 470, 15 NE 350, 4 AmSt 548.

Procedure

173. If the trial court charges the jury that the question of contributory negligence is not in this case, that the plaintiff is to recover if the injury complained of was due to the defendant's negligence, and that the defendant is entitled to a verdict if the jury finds that the injury complained of was caused solely by the negligence of the injured party, defendant does not waive any objection to such charge by failing to request the court to charge that contributory negligence is an element in such case and that recovery cannot be had, even if the injury complained of was caused by the negligence of the defendant, if the plaintiff by his own negligence contributed directly thereto: *Rayland Coal Co. v. McFadden*, 90 OS 183, 107 NE 330.

174. In actions for wrongful death the amount of pecuniary injuries sustained is an issuable fact; and, when denied, must be determined from the evidence peculiar to each case. If the damages are found to be excessive by a reviewing court, such finding involves the weight of the evidence: *Schendel v. Bradford*, 106 OS 387, 140 NE 155.

175. Directed verdict on opening statement held error: *Fini v. Perry*, 119 OS 367, 164 NE 358.

176. For charge in an action for death by wrongful act against a police officer who killed the decedent in a fight which grew out of the attempt of the police officer to search the decedent to see if he was carrying concealed weapons, where there was no evidence that the officer was attempting to arrest the decedent, see *Rasey v. Ciccolino*, 1 App 194, 18 CC(NS) 331, 59 Bull 17 (Ed), sub nomine, *Rasey v. Ciccolono*, 24 CD 294.

177. It is not always incumbent upon one about to cross a street car track, either on foot or with a team, that he should look and listen for an approaching car, but it is sufficient if reasonable care is exercised, and whether or not reasonable care was exercised in a given case is a question of fact for the jury dependent upon the surrounding circumstances: *Mansfield R. Light &c. Co. v. Kiner*, 2 App 82, 17 CC(NS) 431, 25 CD 175.

178. Whether the striking by a backing car of one who has just alighted therefrom while the car was at a standstill, was due to the negligence of the company or its operatives or to the contributory negligence of the one so injured, is a question for the jury, and their finding where supported by the evidence will not be disturbed by a reviewing court: *Northern Ohio Trac. &c. Co. v. Jenkins*, 3 App 161, 19 CC(NS) 602, 26 CD 30.

179. Where it appears that the intestate, a driver who was killed at a railway crossing, was walking beside his wagon, which was between him and the railway track and was piled high with lumber so as to obstruct the view of an approaching train, and there is evidence that the whistle was blown for the crossing, it is error in an action for damages on account of his death to overrule a motion to direct a verdict for the railway company: *Pittsburgh, C. C. &c. R. Co. v. Stugard*, 3 App 344, 21 CC(NS) 396,

33 CD 370 [judgment of court of appeals rendering final judgment reversed, its judgment reversing judgment of superior court affirmed and cause remanded to superior court for new trial: *Stugard v. Pittsburgh, C. C. &c. R. Co.*, 92 OS 318].

180. In a suit by an administrator of a deceased employee for damages on account of the alleged negligence of the employer, which negligence it is charged caused such death, the law presumes at the outset of the case that both parties are free from negligence: *Cincinnati &c. Trac. Co. v. Murphy*, 6 App 1, 28 OCA 316, 30 CD 82 [motion to certify record overruled, 12 OLR 23, 59 Bull 174].

181. Where a case has been reversed and remanded by the court of appeals on the ground that the judgment is against the weight of the evidence, it is the duty of the trial court upon retrial to submit the case to the jury if there is a scintilla of variation in the evidence offered upon retrial in addition to that presented at the preceding trial. Whether or not the reversal by the court of appeals on the ground that the evidence was insufficient would control the retrial of the case, where the evidence upon retrial is without variation, was discussed but not decided: *Schaffer v. Cleveland Co.*, 10 App 76.

182. If an injury is the result of a neglect to perform a common duty resting on two or more persons, although there may be no concert of action between them, a person injured may elect to sue all parties owing the common duty, or each separately, treating the liability as joint and separate: *Commissioners v. Shurts*, 10 App 219.

183. It is reversible error for the trial court to overrule a motion for a directed verdict where the plaintiff failed to prove one of the necessary and essential facts alleged in his petition: *Gilmore v. Alberry*, 11 App 336, 29 OCA 437.

184. An instruction to the jury is not rendered erroneous by reason of the fact that standing alone and not further explained it might be construed as in effect saying to the jury that the proximate cause of the accident was as there stated, where the charge as a whole clearly explained the instruction and made it applicable to the pleadings and proved facts: *Gilmore v. Alberry*, 11 App 336, 29 OCA 437.

185. In an action for damages for alleged negligent acts causing the death of the plaintiff's decedent, the question as to whether or not ordinary care was used is a question for the jury, as is also the question whether the explanation offered by the defendants was sufficient to relieve them: *Cleveland Trans. Co. v. Anderson*, 12 App 286, 31 OCA 233 [motion to certify record overruled, 18 OLR 67, 65 Bull 269].

186. In an action for negligence growing out of a grade-crossing accident, it is proper for the court to refuse to charge the jury that there exists a license or implied invitation for the public to use a crossing constructed and maintained by the traction company where the road and crossing are private: *Rohr v. Cincinnati Trac. Co.*, 12 App 275, 31 OCA 108.

187. Under GC §§ 10214 and 11363 (RC §§ 1.11 and 2309.58), amendment of petition in action for wrongful death, to charge a willful tort as well as negligence, held not erroneous: *Coca-Cola Bottling Works Co. v. Meyer*, 28 App 468, 162 NE 826.

188. Judgment may be rendered against both of joint tortfeasors sued or against one of them: *Ohio Power Co. v. Fittro*, 36 App 186, 8 OLA 617, 32 OLR 227, 173 NE 33.

189. In an action for wrongful death the question whether or not decedent used the care which a reasonably prudent person is accustomed to use under the same or similar circumstances should have been submitted to the jury under proper instructions:

Meier v. Jos. R. Peebles Sons Co., 57 App 80, 9 OO 121, 11 NE(2d) 707.

190. Where, upon defendant's motion for a directed verdict at the conclusion of plaintiff's case in a wrongful death action, plaintiff's evidence is such that it cannot be said as a matter of law that such evidence created an inference or presumption of plaintiff's decedent's contributory negligence, it is prejudicial error for the court to direct a verdict for the defendant upon the theory that plaintiff failed to sustain the burden of dispelling or counterbalancing such inference or presumption: Long v. Maxwell Co., 118 OApp 134, 24 OO(2d) 446, 193 NE(2d) 423.

190.1 In a wrongful death action against policemen alleged to have shot plaintiff's decedent, the question whether defendants acted without right or justification is for the jury: Stevens v. Atzberger, 18 OLA 133.

191. Damages having been awarded against an interurban railway company for the death of a licensee upon its tracks who was struck by a car, the judgment will not be reversed on the weight of the evidence, where the testimony for the plaintiff was to the effect that the deceased had caught his foot and could not get off the track and others with him were signaling the motorman to stop, and the motorman himself testified that he saw persons on the track in ample time to have stopped the car but did not see any signal to stop or become aware of the peril of the decedent until too late to avoid the accident: Cincinnati, G. & P. R. Co. v. Dameron, 14 CC(NS) 49, 23 CD 123 [affirmed, without opinion, 86 OS 321].

192. The use by the court, in his instructions to the jury as to determination of damages, of the word "peculiar" as applied to injury resulting from the death of a six-year-old child by negligence, where qualified or defined in other parts of the charge relating to the same subject as "pecuniary" injuries, is not necessarily or presumably prejudicial: Toledo R. & Co. v. Wettstein, 14 CC(NS) 441, 23 CD 15 [affirmed, without opinion, 79 OS 439].

193. It is improper to suggest to the jury that expert witnesses might, through inattention, fail to comprehend the true meaning of hypothetical questions put to them: Ellis v. Twigg, 17 CC(NS) 172, 32 CD 96.

194. In an action against a physician for malpractice which is claimed to have resulted in blood poisoning, it is error to refuse to submit to the jury the following interrogatory: "When did the decedent first manifest fever or chill, as a symptom of the infection of which she died?" Such interrogatory would have tended to test the correctness of the general verdict and should have been submitted, although the most favorable answer thereto might not have justified the court in entering a verdict in favor of the defendant, if the general verdict was against him: Ellis v. Twigg, 17 CC(NS) 172, 32 CD 96.

195. The testimony indicating that the decedent had warning of his danger in time to have saved himself, the question of his contributory negligence became one for the court, and was not one to be submitted to the jury, and therefore no error in directing a verdict for the defendant: Arras v. Baltimore & O. R. Co., 20 CC(NS) 387, 26 CD 214 [affirmed, without opinion, 89 OS 420].

196. Where in an action for wrongful death, plaintiff's petition and reply seeks to establish the relationship of master and servant, and makes allegations of negligence on the part of the employer in that he failed to furnish a safe place to work and employed a servant whom he knew or should have known to be incompetent; the plaintiff's evidence simply shows negligence on the part of one who would be a fellow

servant under his theory of the case but no negligence on the part of the employer, it is the duty of the court to direct a verdict for the defendant: Snyder v. American Cigar Co., 22 CC(NS) 45, 33 CD 440 [affirmed, without opinion, 81 OS 568].

197. In an action to recover damages for death by negligence in turning steam into a boiler after an employee had been directed to enter such boiler, in which one of the defenses was that such employee was not directed to enter it, but on the contrary was forbidden to enter it until a superior servant of the defendant returned, a charge which implies that plaintiff might recover for such injury if such employee had violated such order, and the steam had been turned on by another employee with knowledge of the fact that the injured employee was in the boiler, is not necessarily erroneous, since the circumstances thus indicated might indicate wilful injury; but if such charge is in part misleading, it is cured by a subsequent portion of the charge which states expressly that plaintiff cannot recover if such employee was directed not to enter the boiler until his superior servant returned, and that, while he was in such boiler in violation of such order, steam was turned on by another employee without knowledge of his presence therein: Hollenden Hotel Co. v. Jackson, 22 CC(NS) 485, 28 CD 540 [affirmed, without opinion, 78 OS 440].

198. In an action for death by wrongful act, it is not improper to charge "If the evidence of the plaintiff suggests contributory negligence on the part of the deceased in this case, then it would be the duty of the plaintiff, before he could recover, to remove that suggestion of contributory negligence." It is not necessary to limit such instruction to cases where the evidence raises the presumption on the part of the party who is injured: Galati v. Erie R. Co., 23 CC(NS) 63, 34 CD 106 [citing Robinson v. Gary, 28 OS 241].

199. In an action by an executor or administrator of one who is employed by a railway company to work upon a ditch near the railway track, a charge, "The fact that a freight train was passing on a west bound track and making a loud noise at the time A was killed, would not excuse him from looking and listening for approaching trains, but on the contrary, since the noise of the freight train would to a certain extent prevent his hearing the noises of the bell or the whistle of the passenger train, it became A's duty to be all the more careful in looking for trains, which might approach on the track near or upon which he was killed," is not erroneous at least if the ditch was of sufficient width to have enabled him to stand where he would not have been injured by the passing of a train: Galati v. Erie R. Co., 23 CC(NS) 63, 34 CD 106.

200. A court cannot apportion negligence as between persons or agencies either in degree or as to time, but must accept the finding of the jury in that behalf where based upon the evidence and circumstances of the case: Pritz v. Pittsburgh, C., C. & Co., 12 NP(NS) 481, 22 OD 570 [affirmed, Pittsburgh, C., C. & Co. v. Pritz, 1 App 119, 17 CC(NS) 96, 24 CD 411; which was reversed in memorandum opinion, 90 OS 419].

201. Inasmuch as a fund recovered on account of wrongful death constitutes no part of the estate of the decedent, an order by the probate court apportioning such a fund between the parents of a decedent is not appealable: Parker v. Parker, 31 OLR 314.

203. Although a person may prosecute in a federal court in forma pauperis, nevertheless, an affidavit of poverty made by a plaintiff who sues as administratrix of her deceased husband to recover damages for

his wrongful death, under a state statute which gives the right of action in favor of the widow and children of the deceased, should show that neither the estate nor the beneficiaries of the action are able to prepay or secure the costs: *Reed v. Penn. Co.*, 13 OFD 782.

204. The verdict of the jury in an action for death by wrongful act, which finds that the deceased left a widow and children, and that his life was of financial value to them, is supported by sufficient evidence, if the administrator of the deceased testifies that he had corresponded with the widow in Italy, that she was left with three children, and that she had sometimes received money from the deceased: *Cincinnati Trac. Co. v. Ginocchio*, 60 Bull 377 (Ed).

Evidence

205. As to questions of pleading and evidence in questions under this section, see *Davis v. Guarnieri*, 45 OS 470, 15 NE 350, 4 AmSt 548.

206. Admissions of deceased after the injury are competent evidence: *Helman v. Pittsburgh, C., C. & C. R. Co.*, 58 OS 400, 50 NE 986, 41 LRA 860.

207. In an action to recover damages for death resulting from an injury sustained while crossing a street, it is error to admit evidence of an ordinance forbidding pedestrians to cross except at designated crossings, and then at right angles, only; and to charge that violation of such ordinance was negligence, if it was not shown that a street crossing had been designated at the crossing at which the injury occurred; but such error is cured by a finding that the injured person failed to look for vehicles before crossing the street: *Whitaker v. Luebbering*, 101 OS 292, 128 NE 76 [affirming *Luebbering v. Whitaker*, 10 App 365, 31 OCA 219].

208. A rule of the company requiring every employee to exercise the utmost caution to avoid injury to himself or to his fellows is competent evidence in the trial of an action to recover damages for the death of an employee, and it is prejudicial error to exclude the same: *Sherman v. Toledo & C. R. Co.*, 1 App 279, 20 CC(NS) 464, 25 CD 449 [affirmed, in memorandum opinion, *Toledo & C. R. Co. v. Sherman*, 88 OS 617].

209. In an action for death by reason of a defective brake and platform, evidence of the defective condition of such brake and platform, of the fact that the decedent was last seen alive at such brake while the car was making a flying switch, that his body was found mutilated on the track near the place where the switch was made a short time afterwards, and that he was a skillful brakeman and a man of good habits, is sufficient, although there was no witness of his death: *Pittsburgh, C., C. & C. R. Co. v. Stewart*, 2 App 72, 21 CC(NS) 399, 25 OCD 364 [affirming *Stewart v. Pittsburgh, C., C. & C. R. Co.*, 11 OLR 430; motion to certify record overruled, *Pittsburgh, C., C. & C. R. Co. v. Stewart*, 11 OLR 409].

210. A jury may properly accept the testimony of the decedent's own physician as to the cause of his death, as against the testimony of the physician of the company whose car struck him and that of an expert medical witness: *Mansfield R., Light & C. Co. v. Kiner*, 2 App 82, 17 CC(NS) 431, 25 CD 175.

211. For circumstantial evidence of negligence sufficient to require submission of the case to the jury, see *Grunkemeyer v. Pittsburgh, C., C. & C. R. Co.*, 3 App 62, 19 CC(NS) 366, 25 CD 230 [affirmed, without opinion, *Pittsburgh, C., C. & C. R. Co. v. Grunkemeyer*, 92 OS 524].

212. While an ordinary person may not be at all accurate in giving in figures the speed of a car or train at a given moment, yet his knowledge of speed may be sufficiently substantial to enable him to give testimony which will be an aid in determining

whether under all the circumstances of the case the speed was excessive at the time of the accident: *Cincinnati Trac. Co. v. Beebe*, 3 App 213, 21 CC(NS) 513, 28 CD 641 [affirmed, without opinion, 91 OS 418].

213. A municipal corporation is authorized by GC § 3781 (RC § 723.48) to regulate the speed of trains within its limits, and such ordinance is admissible in evidence in an action for death by negligence, if the evidence shows that the train was running at a much higher rate of speed than that fixed by the ordinance: *Cincinnati, H. & D. R. Co. v. Buxton*, 3 App 298, 20 CC(NS) 22, 26 CD 304 [affirmed, without opinion, 91 OS 423].

214. In an action to recover damages for wrongful death of a wife under former GC § 10770 (see now RC § 2125.01), the defendant may introduce evidence tending to show the relation of the deceased and her husband during her lifetime, the state of mind of the deceased towards her husband, and a different situation than that claimed by the plaintiff: *Welling v. Cincinnati Trac. Co.*, 12 App 136.

215. Alterations or repairs to equipment, machinery, and the like, made after an accident as a precaution against future accidents, are not admissible in evidence as an admission of responsibility for the past or that defendant had been negligent before the accident, or had knowledge of any defects: *Rohr v. Cincinnati Trac. Co.*, 12 App 275, 31 OCA 108.

216. The unexplained breaking of a part of the ship, such as the rail running on the top of the bulwarks and designed as a protection to seamen, unless under extraordinary or unprecedented circumstances, is sufficient proof of unseaworthiness to entitle a seaman injured thereby to recover if such breaking is the proximate cause of the accident: *Cleveland Transp. Co. v. Anderson*, 12 App 286, 31 OCA 233 [motion to certify record overruled, 18 OLR 67, 65 Bull 269].

217. Although offers of compromise and negotiations for compromise are incompetent, evidence tending to prove admissions of defendant as to the ownership of the car, and as to the alleged agency of the party driving same on the day in question is competent, although such statements were made contemporaneous with negotiations for compromise: *Weyant v. McCurdy*, 12 App 491.

218. In action for death of passenger in automobile in collision with train at grade crossing, refusal to admit in evidence rule requiring fireman to keep a careful watch on track when not otherwise engaged held not error, in that rule, if properly made and enforced, imposed no duty on fireman other than enjoined by law: *Tyler v. H.V. Ry. Co.*, 28 App 88, 5 OLA 546, 162 NE 623.

219. In an action for death by electrocution, demonstrative evidence to show distance voltage would jump from wire held properly excluded, in view of impossibility of performing experiment on facts in issue: *Ohio Power Co. v. Fittro*, 36 App 186, 8 OLA 617, 32 OLR 227, 173 NE 33.

220. In suit for wrongful death, excluding deceased's declaration made shortly after accident relating to manner he was injured held error: *Hauer v. French Bros.-Bauer Co.*, 43 App 333, 11 OLA 217, 36 OLR 51, 183 NE 186.

221. Where in a wrongful death action the plaintiff produces a witness as to facts alone, to permit the defendant, upon cross-examination, to qualify such witness as an expert and to elicit his opinion that the defendant was not negligent is prejudicially erroneous: *Long v. Maxwell Co.*, 118 OApp 134, 24 OO(2d) 446, 193 NE(2d) 423.

221.1 In an action for wrongful death, testimony that the decedent was greatly attached to his children is irrelevant, and in the case under consideration must

have been brought out for the purpose of influencing the amount of damages the said children should receive as beneficiaries, and the court being unable to say that this purpose was not accomplished, it must be assumed that prejudicial error resulted: *Roth v. Bien*, 15 CC(NS) 109, 23 CD 480 [affirmed, without opinion, *Bien v. Roth*, 87 OS 483].

222. Evidence given by men who were employed in a mine eight or nine months before the explosion in question, with reference to the condition of the mine as to means of ventilation and gas, is not too remote: *Wellman, Seaver, Morgan Co. v. Wood*, 18 CC(NS) 65, 32 CD 597.

223. Where defendant admits that death resulted from the injuries received, it is not error to admit testimony as to the nature of the injuries where such testimony may throw light on the allegations in the petition as to how the accident occurred or in what respects defendant was negligent: *Cincinnati Trac. Co. v. Moeller*, 17 OD(NP) 22.

224. In an action against a druggist for wrongfully causing the death of the plaintiff's decedent by reason of selling to the son of the decedent a package of Rochelle salts containing cyanide of potassium, where the defense is that the cyanide of potassium was not in the package containing the Rochelle salts at the time of its delivery, it is not error for the court to permit a third person to testify that he had purchased Rochelle salts shortly before and that no injurious results were manifested from the use of same: *Meyer v. Flannery*, 18 NP(NS) 361, 26 OD 424 [affirmed by court of appeals, without opinion, February 8, 1916].

Costs and attorney fees

225. Where a law firm contracted with the administratrix to prosecute the suit for a share of the judgment, and defendant, with knowledge of this, settled with the administratrix without knowledge of the attorneys, who thereupon sued the defendant in the previous suit, the administratrix as such and individually, and the guardian of deceased's children as such and individually: Held: There was no cause of action against either representative party as such, but there was a good cause against the administratrix individually, and against the railroad, and these two parties can be properly united in the case as defendants: *Connell v. Brumback*, 18 CC 502, 10 CD 149 [affirming *Hurd v. Wheeling &c. R. Co.*, 4 NP 404, 6 OD 545].

226. No action at law, for lawyer fees, in a suit brought by an administratrix for the wrongful death of her intestate, can be maintained as against the administratrix in her representative capacity: *Hurd v. Wheeling &c. R. Co.*, 4 NP 404, 6 OD 545.

227. A justice of the peace has no jurisdiction to try an action for wrongful death. Therefore, when the plaintiff recovers in the action, he is entitled to recover his costs, although the amount is less than one hundred dollars: *Sponseller v. Cleveland Term. & V. R. Co.*, 6 NP 422, 8 OD 307.

228. An attorney cannot make a contract to prosecute an action for wrongful death for a certain per cent of the amount recovered with the administratrix as such. It must be with her individually: *McMahon v. Merrill*, 37 Bull 21, 8 OD(NP) 583 [reversing *Merrill v. McMahon*, 5 NP 77, 7 OD 136].

Workmen's Compensation

See also case notes 27, 29, 31, 143, 152, 153, 158 under this section.

229. The Ohio workmen's compensation act provides an insurance fund operated by the state for the benefit of injured employees and their dependents, and in that respect it is not an award of damages for a wrong

committed by one person upon another: *Ellis v. Garwood*, 80 OLA 443, 143 NE(2d) 715 (App).

230. In Ohio an award of compensation for death of an employee paid an employee's dependents under the Ohio workmen's compensation act is not a bar to an action by such dependents against a fellow employee who caused the death: *Ellis v. Garwood*, 80 OLA 443, 143 NE(2d) 715 (App).

231. An award of compensation for death of an employee paid to a deceased employee's dependents out of the New York workmen's compensation fund for death occurring in Ohio as the result of an accident in Ohio involving decedent and a fellow employee, both residents of New York and working temporarily in Ohio for a New York employer, is not a bar to an action for wrongful death brought in Ohio by such dependents against the fellow employee who caused the death, and the provision of the workmen's compensation act of New York that "the right to compensation or benefits under this chapter shall be the exclusive remedy to an employee or in the case of death his dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ," is no defense to the action in Ohio: *Ellis v. Garwood*, 80 OLA 443, 143 NE(2d) 715 (App).

§ 2125.02 Proceedings.

An action for wrongful death must be brought in the name of the personal representative of the deceased person, but shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent. The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought, and the reasonable funeral expenses incurred as a result of the wrongful death. In its verdict the jury shall set forth separately the amount of damages, if any, awarded for reasonable funeral expenses. Except as otherwise provided by law, every such action must be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of the suit, settle with the defendant the amount to be paid.

HISTORY: GC § 10509-167; 114 v 320 (438); 125 v 903 (981) (E# 10-1-53); 133 v S 104. E# 11-21-69.

Analogous in part to former GC § 10772.

Cross-References to Related Sections

Contributory negligence no defense, when, RC § 4963.16.

See RC §§ 2117.07, 2125.03, 2125.04 which refer to this section.

Forms

1 A&H Probate FORM 2125.02a et seq.

1 A&H Probate FORM 2125.04a et seq: New action.

Research Aids

Action by foreign consul:

O-Jur2d: Diplomatic and consular officers § 5

Beneficiaries of action:

O-Jur2d: Death §§ 63, 68-73

Am-Jur2d: Death § 47 et seq.

Damages proportioned to pecuniary injury:

O-Jur2d: Death §§ 101, 121, 249, 278

O-Jur2d: Death § 248 et seq.

Injury causing death occurring in foreign state:

O-Jur2d: Conflict of laws § 54 et seq.

Am-Jur2d: Death § 277 et seq.

Limitation of actions:

O-Jur2d: Death § 111 et seq.

O-Jur2d: Death §§ 35-46, 207

Medical and funeral expenses:

O-Jur2d: Death § 130

Parties:

O-Jur2d: Death § 165; Parties § 13

Am-Jur2d: Death § 194 et seq.

Settlement by personal representative:

O-Jur2d: Death § 107

Am-Jur2d: Death § 101

ALR

Action for death of stepparent by or for benefit of stepchild. 68 ALR3d 1220.

Damages for wrongful death of husband or father as affected by social security benefits. 84 ALR 2d 764.

Negligence of one spouse as barring latter's right of recovery against third person for injury of minor child. 66 ALR2d 1325.

Power and responsibility of executor or administrator as to compromise or settlement of cause of action for death. 72 ALR2d 285.

Recovery of nominal damages in death action. 69 ALR2d 628.

Recovery, under death statute, for benefit of illegitimate child. 72 ALR2d 1235.

Parent's release or compromise of cause of action for injury to child as affecting right of child. 103 ALR 500.

Right to recover for death of unborn child. 10 ALR2d 634.

Remarriage of surviving parent as affecting action for wrongful death of child. 69 ALR3d 1038.

Time from which statute of limitations begins to run against action for wrongful death. 97 ALR 2d 1151.

Limitation applicable to action for personal injury as affecting action for death resulting from injury. 167 ALR 894.

Division among beneficiaries of amount awarded by jury or received in settlement on account of death. 112 ALR 30, 171 ALR 204.

Beneficiary's right to bring action under death statute where executor or administrator, who by statute is the proper party to bring it, fails to do so. 101 ALR 840.

Death statute that makes the question whether action shall be brought by personal representative or by beneficiary dependent upon existence or nonexistence of cause of action in estate as affecting widow's right to sue for husband's death. 105 ALR 834.

Action for death of adoptive parent by or for benefit of adopted child. 94 ALR2d 1237.

Right of action for death against tort-feasor who is one of class to whom, or for the benefit of whom, a right of action by death is given by statute. 95 ALR2d 585.

Relationship of parent and child between tort-feasor and person by whom or for whose benefit death action is brought as affecting right to maintain action under death statute. 119 ALR 1394.

Exceptions attaching to limitations prescribed by death statutes or survival statutes allowing recovery of damages for death. 132 ALR 292.

Law Reviews

Actions for causing death; persons entitled to sue. (Case note.) 7 CinLRev 189.

What price death? William A. Kelly. 25 OBar (No. 22) 403.

Actions—wrongful death—pain and suffering—joinder by administrator not permissible. (Case note.) 22 CinLRev 387.

Civil procedure—joinder of actions for pain and suffering and wrongful death. (Case note.) 5 West RLRev 109.

Damages in wrongful death actions. Stanley B. Kent. 17 ClevMarLRev 233.

Wrongful death—interpretation of "children" in wrongful death statute—status of illegitimate child. (Case note.) 16 OSLJ 127.

Law and logic: conflict in Ohio's wrongful death statute. Donald P. Traci. 4 ClevMarLRev 38.

What is a death case worth? Lloyd E. Bilger. 31 OBar (No.4) 64.

Cause of action for wrongful death of viable fetus. (Case note.) 21 OSLJ 677.

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See also case notes under RC §§ 2125.01, 2125.03, 2125.04

Construction and effect

1. The limitations imposed by former GC § 10772 (see now RC §§ 2125.02, 2125.03), upon an action for

death by wrongful act, is not modified by Art. I, § 19a of the Ohio constitution: *Kennedy v. Byers*, 107 OS 90, 140 NE 630.

2. For history of this section, see *Klema v. St. Elizabeth's Hosp.*, 170 OS 519, 11 OO(2d) 326, 166 NE(2d) 765.

3. Under former GC § 10618 (see now RC §§ 2109.-04, 2109.07), the bond of administrator shall secure the faithful performance of duties imposed on personal representative of deceased person under former GC § 10772 (see now RC §§ 2125.02, 2125.03): *Fidelity & Guaranty Co. v. Decker*, 122 OS 285, 171 NE 333.

4. Under this section a presumption of pecuniary injury ordinarily exists in favor of those persons legally entitled to services, earnings or support from the decedent: *Karr v. Sixt*, 146 OS 527, 33 OO 14, 67 NE (2d) 331.

5. The term "pecuniary injury," as used in this section, comprehends essentially injury measured by the prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded. The term does not embrace such elements as bereavement or mental pain and suffering: *Karr v. Sixt*, 146 OS 527, 33 OO 14, 67 NE(2d) 331.

6. This statute is procedural and remedial in its nature, and should be construed liberally: *Kyes v. Pennsylvania R. Co.*, 158 OS 362, 49 OO 239, 109 NE(2d) 503.

7. Action for wrongful death by administrator on behalf of wife's sisters and brother, against husband who killed wife, held not to lie: *Demos v. Freemas*, 43 App 426, 183 NE 395.

8. Where applications are made in probate court by a widow and her adult son for an order of distribution of funds received by her, as executrix, from a railroad company engaged in interstate commerce, in settlement for the death of her husband who had been killed in the course of his employment with such company, the federal employers' liability act, US Code, Title 45, c. 2, § 51 et seq, rather than this section and GC § 10509-168 (RC § 2125.03), applies as to such distribution: *In re Backus*, 73 App 262, 28 OO 432, 55 NE(2d) 811.

9. A cause of action arises for the wrongful death of a viable unborn child which is subsequently stillborn: *Stidam v. Ashmore*, 109 App 431, 11 OO(2d) 383, 167 NE(2d) 106.

10. The words "such action," used in this section, refer to both provisions of former GC § 10770 (see now RC § 2125.01): *Miller v. Miller*, 21 CC(NS) 181.

11. This section as amended in 101 v 195 was not repealed by the workmen's compensation act (102 v 524 et seq). The two statutes must be construed together and force and effect given to each, if possible; and the later statute will supersede the earlier in cases in which such later act applies specifically: *Zumkehr v. Diamond Portland Cement Co.*, 14 NP (NS) 166, 23 OD 224, 58 Bull 157 (Ed); *Bucyrus Steel Castings Co. v. Farkas*, 15 NP(NS) 609, 27 OD 220; *In re Balbo*, 16 NP(NS) 9, 29 OD 603.

Beneficiaries

For rights of beneficiaries guilty of contributory negligence, see case note 80 et seq under RC § 2125.01.

12. The action may be maintained by the administrator for the benefit of the next of kin, though deceased left no widow or children, and though the petition does not contain a statement of special circumstances rendering the death a pecuniary injury to them, as such circumstances can only affect the amount, and not the right, of recovery: *Lyons v. Cleveland & T.R. Co.*, 7 OS 336.

13. Where deceased was a woman and left a child surviving her, the question of the legitimacy or illegitimacy of the child can in no way affect the right of action in its behalf: *Muhl v. Michigan Southern R. Co.*, 10 OS 272.

14. Under this act, persons who had no legal claim for support upon the deceased, may, as next of kin, have the action herein provided for maintained for their benefit: *Grotenkemper v. Harris*, 25 OS 510.

15. A husband is next of kin, for whose benefit this action may be brought, where the wife comes to her death leaving no children or their legal representatives: *Steel v. Kurtz*, 28 OS 191.

16. The administrator may bring this action for the next of kin although the latter are alien nonresidents of this state: *Pittsburgh, C., C. & C. R. Co. v. Naylor*, 73 OS 115, 76 NE 505, 112 AmSt 701, 3 LRA(NS) 473 [affirming same case, *Naylor v. Pittsburgh, C., C. & C. R. Co.*, 4 CC(NS) 437, 16 CD 277].

17. Where the widow of deceased was his sole heir and next of kin, but deceased had some collateral heirs, and the mother of said widow survived her. Held: After the widow's death, there remained no statutory beneficiary for whose behoof the action could be maintained: *Doyle v. Baltimore & O. R. Co.*, 81 OS 184, 90 NE 165, 135 AmSt 775.

18. Under the federal statute for the recovery of damages for wrongful death by personal representatives, and also under the Ohio statutes on the same subject, the words "parents" and "children" are used without limit or qualification and include adopting parents and adopted children, as well as natural parents and natural children: *Ransom v. New York, C. & C. R. Co.*, 93 OS 223, 112 NE 586, LRA 1916E, 704.

19. A husband and wife sustained personal injuries causing the death of both, but the latter survived her husband a few hours. After the death of the wife, the husband's personal representative instituted suit, under former GC § 10772 (see now RC §§ 2125.02, 2125.03), for the benefit of the husband's father, mother, brothers and sisters, there being no children of the deceased. It was held that the action was properly brought: *Garrard v. Mahoning Val. R. Co.*, 100 OS 212, 126 NE 53 [reversing 10 App 37, sub nomine, *Gerrard v. Mahoning Val. R. Co.*, 29 OCA 241].

20. In an action for recovery of damages for wrongful death, the record did contain evidence from which reasonable minds might draw different conclusions with reference to pecuniary injury to half brothers of the deceased: *Krieg v. Cleveland R. Co.*, 136 OS 229, 16 OO 249, 24 NE(2d) 946.

21. Within the meaning of this section the phrase, "and other next of kin," is used in a broad sense and includes the brothers and sisters of a decedent as well as his parents, when both classes of kindred are in existence: *Karr v. Sixt*, 146 OS 527, 33 OO 14, 67 NE(2d) 331.

22. In an action to recover damages for death caused by negligence, where the petition avers that the decedent left no widow or children and that his father, mother, brother and sister are his next kin, it is not error for the trial court to allow a child by a common law marriage to be made a party and file a pleading in which she avers that her mother, brother and herself are the next of kin of deceased, and thus enable the court to protect the rights of the true beneficiaries: *Erie R. Co. v. Dump*, 2 App 210, 21 CC(NS) 300, 25 CD 425.

23. This section, which provides that a recovery in an action for wrongful death "shall be for the exclusive benefit of the surviving spouse, the children and other next of kin of the decedent," does not contemplate a recovery for a child born out of wed-

lock after the death of the reputed father. Such child does not fall within the classes named in the statute: *Bonewit v. Weber*, 95 App 428, 54 OO 20, 120 NE(2d) 738.

24. An illegitimate child who has been acknowledged by its putative father before or after birth should be considered as a beneficiary or dependent in a wrongful death action growing out of the death of such putative father: *Bonewit v. Weber*, 66 OLA 519, 105 NE(2d) 683 (CP); affirmed *Bonewit v. Weber*, 95 App 428, 54 OO 20, 120 NE(2d) 738.

25. The law presumes a pecuniary loss to a parent or parents entitled to the services and earnings of their minor child by the wrongful death of such child even before it has reached an age when it is actually able to render services or assistance of a pecuniary nature: *Nelson v. Horton*, 31 OApp(2d) 159, 60 OO(2d) 246, 287 NE(2d) 108 (1971).

26. A stepson is not next of kin of the decedent and, therefore, is not entitled to participate in proceeds of a wrongful death action: *In re Gorman*, 15 OO 253 (PC).

27. Adult children who are without money and have demonstrated that they have suffered a direct pecuniary loss through the death of their father, qualify for participation in the fund paid to the executor of the estate in settlement of the claim for wrongful death: *In re Miller*, 59 OO 425, 127 NE(2d) 409 (App).

28. Where a resident of this state met death by wrongful act in New York, and the claim was settled without suit, the proceeds of such settlement were distributed under former GC § 10773 (repealed, 114 v 320), and the father of deceased was not entitled to share with the wife as a distributee of the fund: *Miller v. Miller*, 9 CC(NS) 315, 19 CD 353.

29. Where an administrator, appointed by an Ohio court to administer the estate of a citizen of Ohio, recovered damages for the wrongful death of his decedent which occurred in another state, the beneficiaries to such fund were determined by former GC § 10773 (repealed, 114 v 320), and not by the laws of the state where the act which caused the wrongful death occurred: *Miller v. Miller*, 21 CC(NS) 181.

30. An action will not lie to recover damages for wrongfully and negligently causing the death of an adopted child, where such recovery is sought for the sole benefit of the adopting parent: *Boswell v. Lake Shore Elec. R. Co.*, 22 CC(NS) 251, 25 CD 522 [affirmed, without opinion, 88 OS 563].

31. The jury must determine from the evidence who the beneficiaries of decedent are, and the pecuniary loss sustained by each: *Cincinnati Trac. Co. v. Moeller*, 17 OD(NP) 22.

32. Where decedent died leaving a father and mother and brothers and sisters, the action was properly brought for their joint benefit, and not for the benefit of decedent's next of kin, excluding his parents: *Toledo, St. L. & W. R. Co. v. Connolly*, 149 Fed 398, 16 OFD 304.

33. An action may be maintained for the benefit of nonresident aliens under this act: *Toledo, St. L. & W. R. Co. v. Connolly*, 149 Fed 398, 79 CCA 218, 15 OFD 526.

34. An action against an employer for the death of a child, killed while employed in a mill or factory in violation of GC § 12993 (RC § 4109.10), cannot be maintained for the benefit of a parent who consented to such employment: *Star Fire Clay Co. v. Budno*, 269 Fed 508.

35. Ohio provides that the recovery shall be for the exclusive benefit of the surviving spouse, the children, and other next of kin of the decedent: *Satchwill v.*

Vollrath Co., 47 OO(2d) 75, 293 FSupp. 533.

Parties

36. The widow and next of kin cannot maintain this action in their own names, but it must be brought by the personal representative. And where the action is brought in the names of the former, this cannot be cured by having one of the parties, after the bringing of the action, appointed administrator and made a party to the same by leave of court, for a good petition must contain a cause of action in favor of the plaintiff: *Weidner v. Rankin*, 26 OS 522.

37. In an action for wrongful death, properly brought in a court of competent jurisdiction by the personal representative of the decedent under authority of this section, such personal representative is but a nominal party, and the designated beneficiaries for whose exclusive benefit the action is maintainable are the real parties in interest: *Gibson v. Solomon*, 136 OS 101, 16 OO 36, 23 NE(2d) 996; (affirming 30 OLA 666).

38. Under GC § 10509-167 (RC § 2125.02), an action for wrongful death must be brought in the name of the personal representative of the deceased person: *Kyes v. Pennsylvania R. Co.*, 158 OS 362, 49 OO 239, 109 NE(2d) 503.

39. The term "personal representative," as used in this statute, includes an ancillary administratrix: *Kyes v. Pennsylvania R. Co.*, 158 OS 362, 49 OO 239, 109 NE(2d) 503.

40. In such an action it is not error to permit the substitution of an administratrix as party plaintiff after the lapse of the two-year statutory period of limitation where the cause of action remains unchanged and the suit was duly instituted by an ancillary administrator within the period: *Kyes v. Pennsylvania R. Co.*, 158 OS 362, 49 OO 239, 109 NE(2d) 503.

41. In an action for wrongful death, the personal representative is merely a nominal party and the statutory beneficiaries are the real parties in interest: *Burwell v. Maynard*, 21 OS(2d) 108, 50 OO(2d) 268, 255 NE(2d) 628.

42. In a wrongful death action, the administrator instituting the action is only a nominal party, and the designated beneficiaries, for whose exclusive benefit the action is brought, are the real parties in interest: *Brinkman v. Baltimore & Ohio R.R. Co.*, 111 App 317, 14 OO(2d) 286, 172 NE(2d) 254.

43. Under the principles of *res judicata* and estoppel by judgment, a judgment in a wrongful death action that the defendant was not negligent bars the daughter of the decedent, who was a real party in interest in the action which caused the death of her father, from subsequently bringing an action against the same defendant to recover for her injuries: *Brinkman v. Baltimore & Ohio R.R. Co.*, 111 App 317, 14 OO(2d) 286, 172 NE(2d) 254.

44. The survivors of decedent in a wrongful death action are the real parties in interest and it is necessary that the personal representative, as plaintiff, name in the petition who are "the surviving spouse," or "the children," or the "other next of kin of the decedent," for if no known person comes under the classes of survivors named in the statute, there would not be any pecuniary loss to anyone and an action for wrongful death would not lie: *Fisher v. Butler*, 11 OMisc 116, 40 OO(2d) 139, 224 NE(2d) 923 (CP).

45. In an action for wrongful death under this section, the court has the power to substitute a correct party plaintiff after the statute of limitations has run, and such substitution relates back to the date of the filing of the action: *Renner v. Pennsylvania R. Co.*, 61 OLA 298, 103 NE(2d) 832 (App).

46. Former GC § 972 (see now RC § 4155.13) must

be construed in connection with former GC § 10770 (see now RC § 2125.01) et seq., and the action for death by wrongful act under former GC § 972 (see now RC § 4155.13) must be in the name of the administrator, at least, if the death resulted from an act of negligence which is not wilful: *Rankine v. Pennsylvania & O. Coal Co.*, 15 CC(NS) 17, 23 CD 349 [affirmed in memorandum opinion, *Pennsylvania & O. Coal Co. v. Rankine*, 88 OS 555, on the authority of *Saxton v. Seiberling*, 48 OS 554; contra, *Harris v. Rail & c. Coal Min. Co.*, 87 OS 450].

47. This section and GC §§ 6242 to 6245 (RC §§ 4113.03 to 4113.06) and former GC § 10770 (see now RC § 2125.01), as amended by act 101 v 195, which modify the law regulating the liability of employers for injuries to employees, apply to actions for injuries by an employee himself and by his administrator if he fails to survive the injury incurred: *Fath Constr. Co. v. Bausmerth*, 15 CC(NS) 150, 23 CD 382, 57 Bull 401 (Ed) [affirmed, without opinion, 87 OS 509].

48. A certificate by a trial judge in an action for death by wrongful act, that the fact of the representative character of plaintiff as administrator of a deceased employee was conceded by defendants, is conclusive; therefore, failure to prove such fact is not ground for reversal: *Fath Constr. Co. v. Bausmerth*, 15 CC(NS) 150, 57 Bull 401 (Ed) [affirmed, without opinion, 87 OS 509].

49. A claim for wrongful death is a chose in action, and as such is property and a part of the special estate of the decedent, to be recovered in the name of the administrator for the benefit of the beneficiaries named in the statute: *In re Arduino*, 9 NP(NS) 369, 20 OD 461.

50. In an action to recover for wrongful act, the administrator is the real party in interest: *Laubsher v. Fay*, 197 Fed 879, 10 OLR 456, 57 Bull 317 (Ed).

51. The settlement of a decedent's estate is not made by the heirs or legal representatives, but by a personal representative, which is either an administrator or executor: *Barreille v. Bettman*, 199 Fed 838.

52. The parents of a fourteen-year-old only son who was drowned while working on a boat are "claimants" within the federal statute requiring the owner of the vessel to institute a proceeding for limitation of liability within six months after claimant has given such owner written notice of the claim, although if a wrongful death action were filed to enforce the parents' claim the appointment of an administrator would be necessary to satisfy the requirements of this section: *In re Donnelly's Petition*, 60 OO 142, 138 FSupp 823, affirmed, *In re Petition of Donnelly*, 60 OO 141, 230 F(2d) 169 (6th Cir.).

53. A personal representative, under this section, is not a mere dry trustee. The federal court will not look back of the residence and citizenship of a personal representative to ascertain the citizenship of the real beneficiaries. And where the plaintiff, and administrator, and the defendant are residents of Pennsylvania, a federal court sitting in Ohio will not entertain jurisdiction thereof, notwithstanding the plaintiff administrator was appointed by a court in Ohio, and the real beneficiaries are residents of this state: *Lally v. Pennsylvania Co.*, 12 OFD 750 [for decision in state court, see 56 OS 735].

Damages

54. No damages can be given on account of bereavement, mental suffering, or as a solace on account of such death: *Steel v. Kurtz*, 28 OS 191.

55. The amount of damages recoverable for death by wrongful act must be limited to the pecuniary loss

sustained by the beneficiaries: *Steel v. Kurtz*, 28 OS 191; *Russell v. Sunbury*, 37 OS 372; *Cincinnati St. R. Co. v. Altemeier*, 60 OS 10, 53 NE 300 [affirming judgment of circuit court, which affirmed *Altemeier v. Cincinnati St. R. Co.*, 4 NP 224, 5 OD 655]; *Kennedy v. Byers*, 107 OS 90, 140 NE 630.

56. The jury must determine the amount of damages, within the limits of the law, from the proofs in the case, and should be a fair and just compensation with reference to the pecuniary injury resulting to the beneficiary from such death; and in determining this, the reasonable expectation of what the next of kin might have received from the deceased, had he lived, is a proper subject for the consideration of the jury: *Steel v. Kurtz*, 28 OS 191; *Grottenkemper v. Harris*, 25 OS 510.

57. Where an action is brought for the benefit of a surviving husband, evidence that the husband had again married, and that his second wife performed like services and duties, and contributed in like manner as the first wife to the support of the family and the accumulation of property, is not admissible in mitigation of damages: *Davis v. Guarnieri*, 45 OS 470, 15 NE 350, 4 AmSt 548.

58. It need not affirmatively appear that the next of kin sustained any loss, as where deceased lived apart from his family: *Lake Shore &c. R. Co. v. Murphy*, 50 OS 135, 33 NE 403.

59. The amount of recovery is limited to pecuniary loss and nothing can be allowed for mental suffering or punitive damages: *Cincinnati St. R. Co. v. Altemeier*, 60 OS 10, 53 NE 300.

60. It is error to permit the parent of a deceased child to give his opinion as to the value of the child's services, that being for the determination of the jury: *Cincinnati Trac. Co. v. Stephens*, 75 OS 171, 79 NE 235.

61. In an action brought to recover damages for wrongful death, damages which may be recovered are limited to the pecuniary loss sustained by the beneficiaries and do not include such elements as bereavement, or mental pain and suffering of the beneficiaries, or the loss of the society or comfort of the deceased: *Kennedy v. Byers*, 107 OS 90, 1 OLA 228, 20 OLR 610, 140 NE 630.

62. If verdict in action for unliquidated damages is, in opinion of trial court, excessive, but not influenced by passion or prejudice, court may, with assent of plaintiff, reduce verdict by remittitur to amount warranted by evidence: *Chester Park Co. v. Schulte*, 120 OS 273, 166 NE 186.

63. Where an action for the wrongful death of a minor child is brought for the benefit of his parents and his brothers and sisters as beneficiaries, the court should instruct the jury as to the considerations to be applied to each in fixing the amount of any damage award: *Karr v. Sixt*, 146 OS 527, 33 OO 14, 67 NE(2d) 331.

64. Where an action is brought under this section for pecuniary injury resulting from the wrongful death of an infant, there is no exact rule regarding the amount of damages which a jury may award. Factors for consideration by the jury are the age, sex and physical and mental condition of the child and the position in life, occupation and physical and economic conditions of the parents. It cannot be said as a matter of law that there is no pecuniary damage to the parents of an infant whose death is caused by the wrongful act of another, nor can it be said that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived: *Immel v. Richards*, 154 OS 52, 42 OO 128, 93 NE(2d) 474 [affirming 56 OLA 132 (App)].

65. The plaintiff has the burden of proving that the

tortious act was the proximate cause of the acceleration of death. In mitigation of damages the defendant may offer evidence as to the weakness, diseased condition, impaired earning power or lack of activity of the decedent or other facts tending to prove that he would have lived only a very short time had his death not been accelerated by the tortious act: *Larrissey v. Norwalk Truck Lines, Inc.*, 155 OS 207, 44 OO 238, 98 NE(2d) 419.

66. In an action under this section, based upon a tortious act which proximately accelerated the death of a decedent, the trial court should fully charge the jury as to the consideration it should give to the length of the period by which decedent's life was shortened and what damages flowed only therefrom: *Larrissey v. Norwalk Truck Lines, Inc.*, 155 OS 207, 44 OO 238, 98 NE(2d) 419.

67. In a wrongful death action, where it is claimed that the death was accelerated by the wrongful act of the defendant, recovery can be had only where it is shown by the evidence that death was accelerated by an appreciable period of time as a direct result of the wrongful act: *Lopresti v. Community Trac. Co.*, 160 OS 480, 52 OO 359, 117 NE(2d) 2.

68. This section after providing for the bringing of a wrongful death action by the personal representative of the deceased for the exclusive benefit of his next of kin, provides that "the jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit the action was brought": *Flory v. New York Cent. R. Co.*, 170 OS 185, 190, 10 OO(2d) 126, 163 NE(2d) 902, affirming 109 App 501, 12 OO(2d) 95, 163 NE(2d) 796.

69. Revised Code § 2125.01 which provides a right of action for death caused by a wrongful act in another state "for which a right to maintain an action and recover damages is given by a statute of such other state," does not require the application of that state's limitation of the amount of damages recoverable: *Fox v. Morrison Motor Freight*, 25 OS(2d) 193, 54 OO(2d) 301, 267 NE(2d) 405.

70. In an action brought in Ohio under RC § 2125.01 by the Ohio administrator of the estate of an Ohio resident who was killed in a motor vehicle collision in another state, where there was no citizen or resident of that state involved in the collision, and there is no issue of liability, Ohio has all the substantial governmental interests and the law of Ohio is determinative of the damages recoverable: *Fox v. Morrison Motor Freight*, 25 OS(2d) 193, 54 OO(2d) 301, 267 NE(2d) 405.

71. In determining what amount of damages, if any, may be awarded to parents for the wrongful death of a minor child, the jury may consider the age and sex of the child, the circumstances and condition of life of the parents, and other helpful facts existing at the time of the child's death: *Cincinnati Trac. Co. v. Beebe*, 3 App 213, 21 CC(NS) 513, 28 CD 641 [affirmed, without opinion, 91 OS 418].

72. A verdict of five thousand four hundred dollars on account of the wrongful death of a man thirty-eight years of age, who left a wife and two small children, and who was in perfect health and earning twenty dollars a month and board as a driver on a milk route, is not excessive: *Cincinnati, H. & D. R. Co. v. Buxton*, 3 App 298, 20 CC(NS) 22, 26 CD 304 [affirmed, without opinion, 91 OS 423].

73. In an action to recover damages for death by wrongful act it is not error to charge the jury that they could take into consideration the care, instruction, training, advice and guidance, if any, which the evidence shows the decedent reasonably might have been expected to give his children during their minority, and include the pecuniary value thereof in the

damages assessed, if any: *New York, C. & C. R. Co. v. Aigler*, 10 App 195, 29 OCA 385, 64 Bull 61 (Ed).

73. In an action to recover damages for death by wrongful act it is not error to charge the jury that they could take into consideration the care, instruction, training, advice and guidance, if any, which the evidence shows the decedent reasonably might have been expected to give his children during their minority, and include the pecuniary value thereof in the damages assessed, if any: *New York, C. & C. R. Co. v. Aigler*, 10 App 195, 29 OCA 385, 64 Bull 61 (Ed).

74. The amount of damages recoverable for death by wrongful act is for the jury to determine: *Welling v. Cincinnati Trac. Co.*, 12 App 136.

75. A verdict in an action for death by wrongful act will not be set aside as excessive unless it appears to be the result of passion or prejudice or a misunderstanding of the rights of the parties and the duty of the jury: *Cincinnati Trac. Co. v. Cahill*, 16 App 496 [for earlier opinion, see 13 App 46].

76. In an action for the wrongful death of a child, four years of age, a verdict of five thousand dollars is not so excessive as to indicate that it was given under the influence of passion or prejudice: *Cincinnati Trac. Co. v. Cahill*, 16 App 496 [for earlier opinion, see 13 App 46].

77. In an action for wrongful death brought under former GC § 10772 (see now RC §§ 2125.02, 2125.03) for the benefit of the heirs and next of kin of a minor decedent, it is not error for the court, in charging on damages, not to exclude any earnings the minor might have made before reaching the age of twenty-one, even though the action was not for the exclusive benefit of decedent's parents: *Shillito Co. v. Shanley*, 21 App 12, 153 NE 102.

78. The law giving right of recovery for unlawful death, not providing rule to determine amount of damages, except that "the jury may give such damages as it may think proportioned to the pecuniary injury resulting from such death," the jury may use their own experience in the conduct of human affairs in arriving at verdict, based upon facts established: *Minglewood Coal & C. Co. v. Carson*, 31 App 237, 166 NE 237.

79. Evidence showing pecuniary injuries to beneficiaries, also circumstances, age, health, and means of support of beneficiary, if parent or next of kin, and age, health, disposition, and thrift of decedent, may be shown: *Greer v. Commissioners*, 33 App 539, 169 NE 709.

80. Where the verdict of a jury and the judgment entered on it are so grossly inadequate as to shock one's sense of justice and fairness—after it is found from the record facts that a recovery should be had—it is the bounden duty of a reviewing court to set aside the verdict and grant a new trial: *Greer v. Commissioners*, 33 App 539, 169 NE 709.

81. Fourteen thousand dollars damages for death of plumber, forty-two years of age, earning fifteen hundred dollars yearly, and sole support of wife and two children, was not excessive: *Ohio Power Co. v. Fittro*, 36 App 186, 173 NE 33.

82. In an action for wrongful death brought in the name of the personal representative of the deceased person for the benefit of the surviving children, it is reversible error for the court to refuse a requested charge that the jury should consider the pecuniary injury to each beneficiary and to then mass the aggregate of their total losses into one sum in the verdict: *Wartik v. Miller*, 48 App 494, 2 OO 103, 194 NE 433.

83. In an action for wrongful death the absence of evidence that decedent supported a family does not entitle the defendant to a charge limiting recovery to nominal damages. There are elements of pecuniary loss

other than support: *Smith v. Cushman Motor Delivery Co.*, 54 App 99, 7 OO 426, 6 NE(2d) 594.

84. Collateral heirs are not entitled to recover damages for the wrongful death of a sister who at the time of her death was but eight years old, partially blind and likely to be dependent upon someone all her life, in the absence of positive proof of pecuniary loss to such heirs, which is a condition precedent to recovery: *Martin v. Pennsylvania R. Co.*, 55 App 205, 8 OO 503, 9 NE(2d) 302.

85. In an action for wrongful death brought under this section and GC § 10509-167 (RC § 2125.02), the funeral expenses of the decedent, not being a pecuniary injury to any of the specified beneficiaries, are not recoverable: *Gaus v. Pennsylvania R. Co.*, 56 App 299, 9 OO 389, 10 NE(2d) 635.

86. In an action against a corporation for wrongful death, a charge to the jury that whatever rights the decedent had because of the accident are preserved by statute to his next of kin, though inaccurate, is not prejudicially erroneous when followed by a correct charge as to the nature of the case and measure of damages: *Chowning v. Ajax Motor Service, Inc.*, 60 App 470, 14 OO 507, 21 NE(2d) 1021.

87. Generally, damages recoverable for wrongful death, under GC § 10509-167 (RC § 2125.02), are to be determined by considering the victim's life expectancy, character, health, habits, talents, prospects, prior earnings, probable future earnings, and needs of and contributions to dependents and current returns on investments: *Sutfin v. Burton*, 91 App 177, 48 OO 298, 104 NE(2d) 53.

88. Funeral and burial expenses incurred by a surviving spouse for the funeral and burial of his wife, who has sustained a fatal injury by the wrongful act of a third person, are recoverable in a direct action by the husband, on the ground that it is the husband's duty to provide for the funeral and burial of his wife; a plaintiff's petition therefor states a good cause of action; the expenses incurred thereby are not regarded as a pecuniary loss to the wife's estate or recoverable under the wrongful death statute; and a demurrer to plaintiff's petition is not well taken: *Moss v. Hitzel Canning Co.*, 100 App 509, 60 OO 397, 137 NE(2d) 440.

89. RC § 2305.21, which provides for the survival of causes of action for injuries to the property of a person, notwithstanding his death, is sufficiently comprehensive to allow a personal representative of a deceased, liable for funeral expenses of the deceased under the statute, to recover such expenses for the benefit of the estate from a tort-feasor who negligently caused the death: *Adams v. Malik*, 106 App 461, 7 OO(2d) 196, 155 NE(2d) 231.

90. As to the issue of excessiveness of a jury verdict, a reviewing court must subscribe to the sensible rule that it is not to substitute its judgment for that of the jury when there is sufficient evidence before the jury to resolve the issue: *Diener v. White Consolidated Industries, Inc.*, 15 OApp(2d) 172, 44 OO(2d) 301, 239 NE(2d) 421.

91. Where, in a wrongful death action brought under this section, on behalf of the parents of a killed son, there is no evidence that, at the time of his death, the son contributed to the support of either parent or that either parent could reasonably have anticipated contributions in the future or would need support money, or that the son was in the process of accumulating an estate which either parent might inherit; the claim that either parent suffered "pecuniary injury" is not supported, and they cannot recover for the death of such son: *Murray v. Long*, 21 OApp(2d) 194, 50 OO(2d) 332, 256 NE(2d) 225.

92. In order to support a judgment of recovery in a wrongful death action under this section, it must

be shown that the beneficiaries of such judgment received financial aid from the decedent during his lifetime and would likely have continued to receive such aid and/or would have, in reasonable probability, inherited from an accumulating estate program cut short by the death of decedent. The circumstances, age, health and means of support of such beneficiaries, and the age, health, disposition and thrift of decedent are factors to be considered in determining whether there has been "pecuniary injury" to such beneficiaries: *Murray v. Long*, 21 O App(2d) 194, 50 OO(2d) 332, 256 NE(2d) 225.

93. The damages recoverable in a wrongful death action brought for the benefit of those named in this section, must be "proportioned to the pecuniary injury" resulting from the death: *Murray v. Long*, 21 O App(2d) 194, 50 OO(2d) 332, 256 NE(2d) 225.

94. In a wrongful death action before a jury, the widow of the deceased, having remarried, is entitled to a pretrial order that she may be sworn and identified throughout the trial by her former name, and that no reference to her remarriage may be made, in order to prevent an unlawful diminution of damages: *Helmick v. Netzley*, 12 OMisc 97, 40 OO(2d) 104, 229 NE(2d) 476.

95. Funeral expenses incurred by a husband for the funeral and burial of his wife who has sustained a fatal injury by the wrongful act of a third person, are not to be considered as a pecuniary injury under the wrongful death statutes: *Barcus v. Union Hospital Assn.*, 43 OO(2d) 407, 14 OMisc 168, 236 NE(2d) 232 (CP); *Caswell v. Harry Miller Excavating Co.*, 47 OO(2d) 307, 246 NE(2d) 921 (CP).

96. Medical expenses accruing during the lifetime of a deceased wife because of an injury resulting in death sustained by the wrongful action of a third person do not constitute an element of damages in a wrongful death action: *Barcus v. Union Hospital Assn.*, 43 OO(2d) 407, 14 OMisc 168, 236 NE(2d) 232 (CP).

97. While a father may recover the necessary funeral expenses incurred by him for the funeral and burial of a minor child from a wrongdoer who causes the death of such minor child, such funeral expenses are not part of the damages recoverable for pecuniary loss for the death of said son under the wrongful death statutes: *Caswell v. Harry Miller Excavating Co.*, 20 OMisc 46, 47 OO(2d) 307, 246 NE(2d) 921 (1969).

98. Contra: Funeral expenses constitute a proper item of damage in an action for wrongful death: *Buchanan v. Battson*, 13 OLA 551.

99. A judgment for thirty-five hundred dollars in action for wrongful death of a farmer seventy years of age, in good health, is not sustained by the evidence when there is no evidence that had he lived his life would have been of pecuniary value to his children whom he had not supported for many years: *Brownlee v. Stanley*, 28 OLA 119.

100. This section does not provide for the allowance of funeral, medical and hospital expenses as the subject of award as damages: *Sprung v. E.I. du Pont de Nemours & Co.*, 16 OO 352, 30 OLA 278, 34 NE(2d) 41 (App) [appeal dismissed, 136 OS 94].

101. In an action for wrongful death it is proper for the personal representative who brings the action to set forth in his petition and prove as a part of the damages sought a funeral bill paid by the widow, for whose benefit the action has been brought: *Albers v. Great Central Transp. Corp.*, 28 OO 287 (CP).

102. Although an administrator can maintain an action for the benefit of his decedent's estate to recover the funeral expenses of his decedent, such a suit cannot be brought under the wrongful death statute, since this statute excludes funeral expenses as an item of damage in

a wrongful death action: *Hunter v. McKinney*, 46 OO 17, 69 OLA 237, 101 NE(2d) 810.

103. Funeral expenses are recoverable as damages in an action for death by wrongful act: *McManus v. Buskirk*, 21 OO(2d) 243, 89 OLA 97, 183 NE(2d) 473.

104. Except in a case involving the death of a breadwinner of a family, the amount of a verdict in every wrongful death is conjectural and, ordinarily, upon the review of the amount of a judgment in a wrongful death action, the reviewing court should not substitute its own speculation for that of the jury unless the amount be manifestly against the weight of the evidence: *Crider v. Columbus Plastic Products, Inc.*, 90 OLA 605, 190 NE(2d) 63 (App).

105. In determining the amount which may be awarded to a parent for the wrongful death of a child, the jury should consider the age and sex of the child, and the parents' mode of living: *Burns-Bowe Baking Co. v. Pakos*, 32 OLR 593.

106. The question of damages is within the discretion of the jury, and a reviewing court is not justified in disturbing the verdict unless it clearly appears that it is grossly excessive and out of all proportion to what the evidence shows could possibly be the pecuniary loss of the next of kin: *Burns-Bowe Baking Co. v. Pakos*, 32 OLR 593.

107. Where the next of kin was an invalid father, and the decedent was a son who earned \$325 a month, and was accustomed to give to his father \$100 to \$125 each month together with other help, and the father's expectancy of life was 13.82 years, a verdict of \$12,000 was not excessive and requires no intervention by a reviewing court: *Burns-Bowe Baking Co. v. Pakos*, 32 OLR 593.

108. Where the captain of a fire truck, who earned nine hundred dollars a year and was fifty-two years old, was killed by a street car, a verdict of three thousand dollars in favor of his widow and grown-up children was not excessive: *Toledo R. & C. Co. v. Ward*, 2 CC(NS) 256, 15 CD 399.

109. The measure of damages is the reasonable expectancy of what the family or next of kin might have received from the decedent and not the amount it is reasonably certain they would have received: *New York, C. & C. R. Co. v. Roe*, 4 CC(NS) 284, 15 CD 628 [affirmed, without report, 73 OS 382].

110. Under this section, prescribing the bringing of actions for death by wrongful act, the apportionment of damages therefor is of no concern or interest to the negligent party against which damages are recovered, and it follows, therefore, that an instruction to the jury in such a case to take into consideration the money value of the services of the child to the father, mother, and next of kin, although erroneous as to the "next of kin" is not prejudicial in that nobody but the father and, in some contingencies, the mother, have any pecuniary interest in such services. The jury should allow the full value for such services, and it is not to be supposed that in apportioning the damages they would multiply the value of the services by the number of beneficiaries: *Toledo R. & C. Co. v. Wettstein*, 14 CC(NS) 441, 23 CD 15 [affirmed, without opinion, 79 OS 439].

111. A verdict of one thousand dollars, under 101 v 195, for the death of a six-year-old girl, large for her age and bright and active, and a helper in a large family of moderate means where all were expected to assist, was not excessive: *Toledo R. & C. Co. v. Wettstein*, 14 CC(NS) 441, 23 CD 15 [affirmed, without opinion, 79 OS 439].

112. It is said that since this section fixed the maximum amount of recovery, GC § 972 (see now RC § 4155.13) et seq did not fix such amount, and that

this section was adopted by reference in such sections: *Rankine v. Pennsylvania & O. Coal Co.*, 15 CC(NS) 17, 23 CD 349 [affirmed, in memorandum opinion, *Pennsylvania & O. Coal Co. v. Rankine*, 88 OS 555, on authority of *Saxton v. Seiberling*, 48 OS 554; contra, *Harris v. Rail &c. Coal Min. Co.*, 87 OS 450].

113. In an action for wrongful death it is unnecessary to show more than that the deceased bore the relation of wife and mother to the persons for whose interest the action is brought, in order to authorize substantial, as distinguished from nominal, damages: *Ellis v. Twiggs*, 17 CC(NS) 172, 32 CD 96.

114. While the jury is not permitted to guess at the amount of damages, they are not restricted to absolute certainties in estimating damages in a case such as an action for death by wrongful act, where the actual damages would depend upon the length of decedent's life if the accident had not occurred, and the amount which he would have contributed to the support of his family and next of kin: *Becker v. Howanyecz*, 18 CC(NS) 19, 32 CD 561.

115. A verdict of eight hundred dollars for the death of an infant two years old will not be set aside as excessive, even though there was no evidence introduced as to the probable length of life of the infant or as to what it would probably have contributed to the support of the beneficiaries of the judgment, if it had lived: *Becker v. Howanyecz*, 18 CC(NS) 19, 32 CD 561.

116. In an action for the wrongful death of a child five years old, a judgment of one thousand eight hundred dollars will not be set aside, though there is some evidence that the mother, one of the beneficiaries, was negligent, and that the father had deserted the mother and child: *Campbell v. Tarr*, 18 CC(NS) 323, 33 CD 66.

117. In view of the fact that the legislature has removed the former limitation on the amount which may be recovered for wrongful death, an award of seven thousand dollars cannot be regarded as excessive for the death of a vigorous man, twenty-six years of age, industrious, temperate and thrifty, who had contributed toward the support of his next of kin and who left surviving him a father and mother and ten brothers and sisters: *Ohio Trac. Co. v. Flynn*, 26 CC(NS) 250, 35 CD 118.

118. Damages in the amount of twenty-five hundred dollars, under 101 v 195, were not excessive in an action for causing the death of an apparently able-bodied workman: *Williams v. Bishop*, 12 NP(NS) 7, 22 OD 401 [reversed on other grounds, *Griffith v. Williams*, 15 CC(NS) 9, 23 CD 401; which was dismissed, without opinion, *Williams v. Griffith*, 57 Bull 464].

119. Funeral expenses are not recoverable in an action brought by a widower, as administrator, for damages on account of the wrongful death of his late wife: *Harry v. Seibel*, 29 NP(NS) 81.

120. In an action to recover damages for death by wrongful act, a verdict for four thousand dollars is not excessive, if the evidence shows that the deceased was a laboring man, that he was frugal, that he was very strong, and that he left a wife and three children surviving him; and a judgment for such amount entered upon such verdict will not be reversed: *Cincinnati Trac. Co. v. Ginocchio*, 60 Bull 377 (Ed).

121. The pecuniary loss recoverable under the employers' liability act of 1908, by one dependent upon the employee wrongfully killed, must be a loss which can be measured by one standard and does not include an inestimable loss such as that of society and companionship of the deceased or of care and advice in case of a husband for his wife: *Michigan Cent. R. Co. v. Vreeland*, 227 US 59, 57 LEd 417, 33 S Ct

192, AnnCas 1914C, 176 [reversing *Vreeland v. Michigan Cent. R. Co.*, 189 Fed 495, 16 OFD 642, 9 OLR 249, 56 Bull 189 (Ed)].

122. A minor child sustains a loss from the death of a parent of a different kind from that of a wife or husband from the death of the spouse; while the former is capable of definite valuation the latter is not: *Michigan Cent. R. Co. v. Vreeland*, 227 US 59, 57 LEd 417, 33 S.Ct. 192, AnnCas 1914C, 176 [reversing *Vreeland v. Michigan Cent. R. Co.*, 189 Fed 495, 16 OFD 642, 9 OLR 249, 56 Bull 189 (Ed)].

123. A verdict, in an action for wrongful death, taking into consideration the financial interest of the wife in the wages earned by her husband, her expectancy as his sole heir to mutual and prospective accumulated savings therefrom, will not be deemed excessive when the amount adjudged if invested in an annuity for her life would not produce a greater sum than a fair share of her husband's earning capacity if living: *Vreeland v. Michigan Cent. R. Co.*, 189 Fed 495, 9 OLR 249, 56 Bull 189, 16 OFD 642 [reversed, on other grounds, *Michigan Cent. R. Co. v. Vreeland*, 227 US 59].

124. Under former GC § 10772 (see now RC §§ 2125.02, 2125.03), it is not reversible error to refuse to ask the jury to state the names of the persons sustaining legal damages by the death of the deceased, as this section does not require that the verdict or judgment state the names of the beneficiaries, but contemplates a verdict for a gross sum to be apportioned by the court appointing the representative: *Pittsburgh, C., C. & St. L. R. Co. v. Scherer*, 205 Fed 356, 123 CCA 484.

125. Ohio law controls the standard to be applied in an Ohio diversity action in determining damages under the Ohio wrongful death statute: *Blasky v. Wheatley Trucking Co.* 482 F(2d) 497 (1973).

126. Ohio law is applicable in determining the measure of damages for wrongful death pursuant to Title 28 U.S.C. § 1346(b) (1964), which provides that the United States shall be liable "in accordance with the law of the place where the act or omission occurred: *Wasilko v. United States*, 300 F.Supp 573, 50 OO(2d) 290.

127. The term "pecuniary injury" for which damages may be recovered in a wrongful death action means injury measured by the prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded; the term does not embrace bereavement or mental pain and suffering or the loss of society or comfort: *Wasilko v. United States*, 50 OO(2d) 290, 300 F.Supp. 573.

128. Proper elements in determining compensatory damages for the wrongful death of a child are chance of future support by the child of the parent, the age, sex, and physical and mental condition of the child and the position in life, occupation, and physical condition of the parents: *Wasilko v. United States*, 50 OO(2d) 290, 300 F.Supp. 573.

Compromise

129. The application of an administrator to the probate court, under former GC § 10772 (see now RC §§ 2125.02, 2125.03), for consent to make settlement for injuries resulting in the death of his decedent while in the course of employment, is not the institution of proceedings in the courts for damages, within the contemplation of GC § 1465-76 (repealed, 114 v 76): *State ex rel Trumbull Steel Co. v. Industrial Commission*, 106 OS 82, 138 NE 530.

130. The obtaining by the administrator of consent to make settlement for injuries resulting in the death of his decedent while in the course of employment, and the execution of a release of damage by the dependent, do

not constitute a waiver by the latter of her claim for compensation: *State ex rel Trumbull Steel Co. v. Industrial Commission*, 106 OS 82, 138 NE 530.

131. This section provides a specific remedy for the wrongful death of another by prescribing that the cause of action must be brought in the name of the personal representative of the decedent, and that such personal representative, with the consent of the court making the appointment of such personal representative, may settle with the defendant the amount to be paid as damages: *Matz v. Erie-Lackawanna R. Co.*, 2 OApp(2d) 136, 31 OO(2d) 241, 207 NE(2d) 250.

132. The statutory procedure under this section providing for the settlement of a claim for wrongful death is exclusive in the personal representative of the deceased person, subject to the approval of the probate court making the appointment of such personal representative: *Matz v. Erie-Lackawanna R. Co.*, 2 OApp(2d) 136, 31 OO(2d) 241, 207 NE(2d) 250.

133. A settlement by the widow and administratrix of a decedent, killed by a wrongful act, is void as against the minor children of the deceased, where it does not appear that the probate court consented to and approved the settlement: *Baltimore & O. R. Co. v. Hottman*, 1 CC(NS) 17, 15 CD 140 [affirmed, without report, 70 OS 475].

134. A release executed by an employee in full for all claims for damages growing out of an injury received by him while in said employment, bars his estate from further recovery in the event of his subsequent death in consequence of said injuries, but leaves intact any claim for loss sustained by the widow or next of kin: *Maguire v. Cincinnati Trac. Co.*, 14 CC(NS) 431, 23 CD 24 [affirmed, without opinion, *Cincinnati Trac. Co. v. Maguire*, 87 OS 512].

135. An agreement to pay a widow a specified sum of money in full settlement of her claim for the wrongful death of her husband, and also to pay her lawyer a stipulated sum under his agreement with her when he took the case, or to protect her against the claim of the lawyer, is so far repudiated by a subsequent refusal to settle with the lawyer as to justify the party of the first part in tendering back the amount she had received and declaring the whole agreement at an end: *Farley v. Cleveland, C., C. & C. R. Co.*, 24 CC(NS) 12, 34 CD 446.

136. Under former GC § 10772 (see now RC §§ 2125.02, 2125.03), a settlement obtained with the consent of the probate court cannot be invalidated by a later withdrawal of the consent: *Bragg v. Ohio Elec. R. Co.*, 23 NP(NS) 140, 31 OD 125.

137. Settlement with the injured party in his lifetime is a bar to an action on behalf of his beneficiaries after his death, under the federal employers' liability act: *Connors v. New York Cent. R. Co.*, 20 NP(NS) 573, 29 OD 64.

138. If one who is injured in a railway accident enters into a compromise with the railway company during his lifetime, in settlement of his claim for such injury, and he subsequently dies, such compromise is not a defense in an action brought by the administrator for the benefit of the widow and surviving children; and it is error to exclude evidence thereof: *Cincinnati Trac. Co. v. Ginocchio*, 60 Bull 377 (Ed).

Pleading and procedure

139. Where, in an action under this section, the administrator, though appointed, failed to qualify until more than two years after the death, his qualification at that time relates back to the time of his appointment, as regards acts done for the benefit of the estate, and the

commencement of the suit by him, being for the benefit of the estate, was the valid commencement of an action: *Archdeacon v. Cincinnati Gas & C. Co.*, 76 OS 97, 81 NE 152 [reversing 3 NP(NS) 45, 15 OD 585, and 3 NP(NS) 606, 16 OD 775].

140. In an action for wrongful death (former GC § 10770 [see now RC § 2125.01] et seq), plaintiff's opening statement admitting inability to prove that the next of kin in Italy were living and dependent, did not warrant a directed verdict against plaintiff: *Fini v. Perry*, 119 OS 367, 164 NE 358.

141. Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute: *Douglas v. D.B. Coal Co.*, 135 OS 641, 15 OO 12, 22 NE(2d) 195, 123 ALR 761.

142. As a general rule, a person can not in the same action sue in more than one distinct right or capacity, and, in the absence of an enabling statute, an executor or administrator is precluded from joining a cause of action for personal injury to his decedent with a cause for the decedent's wrongful death: *Fielder v. Edison Co.*, 158 OS 375, 49 OO 265, 109 NE(2d) 855, 35 ALR(2d) 1365.

143. Where from the averments of a petition it is apparent that the action is for wrongful death instead of for personal injuries suffered before death, and, as such, the court rules the petition defective because it does not name the next of kin entitled to receive the amount recoverable, an amendment adding the names of the beneficiaries does not plead a new and separate cause of action, and is proper although made after the period of the statute of limitations: *Brown v. Bauman*, 49 App 49, 2 OO 210, 195 NE 69.

144. Where an action for wrongful death arose prior to the effective date of this section, but the petition was filed after such date, such section replacing former GC § 10772 (see now RC §§ 2125.02, 2125.03), and including additional beneficiaries and changing the amount of damages collectible, it is error for the court to charge according to this section, thereby giving it retroactive effect: *Cincinnati v. Bachmann*, 51 App 108, 3 OO 271, 199 NE 853.

145. Where an administrator brings an action under this section to recover for the wrongful death of his decedent in an automobile collision, he acts as a trustee for the sole benefit of decedent's next of kin. A counterclaim interposed in that action by defendant to recover for personal injuries sustained by defendant in the same collision, presents a claim against the estate of the decedent. In such a situation the administrator acts in different capacities as to each cause of action, there is no mutuality of parties as required by the rule governing counterclaims, and an order requiring the counterclaim of defendant to be docketed as an independent action is proper: *Epinger v. Wade*, 73 App 231, 28 OO 358, 55 NE(2d) 679.

146. In a wrongful death action by the administrator of the decedent, the petition alleging that plaintiff's decedent died leaving *** his mother, a dependent, and that by reason of his wrongful death resulting from the negligence of defendant's decedent, the estate of plaintiff's decedent has been damaged in the sum of \$10,000," sets forth such mother's dependency and pecuniary loss occasioned by the death of her son and states a cause of action: *Ebeling v. Harman*, 83 App 519, 38 OO 567, 52 OLA 78, 80 NE(2d) 704.

147. In a wrongful death action, it is within the

discretion of the trial court to exclude from the courtroom the children of the decedent who are of tender years: *Long v. Maxwell Co.*, 118 OApp 134, 24 OO(2d) 446, 193 NE(2d) 423.

148. The survivors named in the wrongful death statute need not be named in an action under RC § 2305.21 (the so-called survivor statute): *Fisher v. Butler*, 11 OMisc 116, 40 OO(2d) 139, 224 NE(2d) 923 (CP).

Limitations

149. The proviso in the act of March 25, 1851 (S&C 1139), that the action must be commenced within two years after the death, was a condition qualifying the right of action, and not a mere limitation on the remedy. The amendment of the section during the existence of the right of action, and the omission of the proviso in the amended section did not extend the time within which the action could be brought: *Pittsburgh, C. & C. R. Co. v. Hine*, 25 OS 629.

150. The provision of this section, that "except as otherwise provided by law, every such action [for wrongful death] must be commenced within two years after the death of such deceased person," is a restriction qualifying the right of the action and is not merely a time limitation upon the remedy: *Sabol v. Pekoc*, 148 OS 545, 36 OO 182, 76 NE(2d) 84.

151. Where a petition in an action for wrongful death shows upon its face that the action was not commenced within two years after such death, a cause of action is not stated and a demurrer to the petition should be sustained: *Sabol v. Pekoc*, 148 OS 545, 36 OO 182, 76 NE(2d) 84.

152. Where the administrator for the estate of the deceased airplane passenger failed to present the statutory beneficiary's claim for wrongful death to the administratrix of the estate of the deceased pilot within the four-month provision of RC § 2117.06, and the nine-month provision of RC § 2117.07, but, in his capacity as next friend for the minor and sole heir of the deceased passenger, did present the minor's claim within nine months after the appointment the presentation is sufficient compliance with the provisions of RC §§ 2117.06 and 2117.07: *Burwell v. Maynard*, 21 OS(2d) 108, 50 OO(2d) 268, 255 NE(2d) 628.

153. Where wife of deceased employee brought civil action under GC § 1465-76 (repealed, 114 v 76) against employer while her application under workmen's compensation law was pending before industrial commission, and obtained a judgment, such judgment is not wholly void and may not be collaterally attacked, even though it was not brought within the two years required by former GC § 10772 (see now RC §§ 2125.02, 2125.03); trial court had jurisdiction to determine whether wife had right of action under former GC § 10772 and that determination, whether erroneous or not, cannot be attacked in another action following disposition of case by industrial commission: *Straka v. Cleveland R. Co.*, 34 App 252, 170 NE 611.

154. Where a cause of action in favor of a decedent for personal injuries resulting from malpractice was not barred at the time of his death by the one-year period of limitation provided by GC § 11225 (RC § 2305.11), applicable to such action, his administrator has, under the provisions of this section, two years from the date of death to bring an action for wrongful death originating in the same wrongful act: *Naticcioni v. Felter*, 54 App 180, 7 OO 55, 6 NE(2d) 764.

155. The language used in the wrongful death statute, this section, providing for the term within which such action must be commenced after the death of the deceased person, must be construed so that the first day of the period named is excluded and the last-named day included. The provisions of GC

§ 10216 (RC § 1.14) are applicable to this section: *Young v. New York Cent. R. Co.*, 64 App 362, 18 OO 149, 28 NE(2d) 687.

156. Amended GC § 1465-70 (RC § 4123.74) is an exception to the two-year limitation fixed by this section: *Bryson v. American Tool Works Co.*, 18 OO 1 (CP).

157. Where no cause of action existed against defendant by reason of lapse of two-year period (former GC § 10772 [see now RC §§ 2125.02, 2125.03]), court had power to dismiss action on motion to quash service: *Knight v. Schlachter*, 28 App 70, 162 NE 455.

158. The limitation contained in former GC § 10773 (repealed 114 v 320), that every action based on a claim for wrongful death shall be brought within two years, was a part of the right of action itself, and not merely a limitation on the remedy; and the saving clause of GC § 11233 (RC § 2305.19), relating to causes commenced or attempted to be commenced in due time, but which have failed for some reason other than on the merits, was without application in such a case: *Collins v. Baltimore & O. R. Co.*, 11 NP(NS) 251.

159. Where an alleged negligent act was such as would have, if death had not ensued, entitled a person to maintain an action therefor, a cause of action for wrongful death exists in such decedent's personal representative, and such cause of action for wrongful death cannot be defeated merely by reason of the bar of limitation which would have been applicable to decedent's action: *Klema v. St. Elizabeth's Hosp.*, 170 OS 519, 11 OO(2d) 326, 166 NE(2d) 765.

160. If the beneficiaries of a claim for death by wrongful act are nonresident alien enemies, the right of action is suspended during the period of the war; and the action may be brought after peace is declared as long as the period elapsing between the death and the time of bringing the action, less the period during which the state of war existed, does not exceed the period limited by statute: *Borovitz v. American Hard Rubber Co.*, 287 F 368, 1 OLA 342, 21 OLR 175.

161. Where a purported service of summons fails because it is quashed, it is a nullity and does not serve as the commencement of or an attempt to commence an action so as to authorize an extender of one year in addition to the two years within which an action may be brought under GC § 10509-167 (RC § 2125.02), for wrongful death: *Bronikowski v. Bigham*, 76 OLA 65, 145 NE(2d) 331 (App).

162. Where a petition in an action for wrongful death shows upon its face that the action was not commenced within two years after such death, a cause of action is not stated, and a demurrer thereto should be sustained: *Bronikowski v. Bigham*, 75 OLA 220, 143 NE(2d) 490 (CP).

163. The provision of RC § 2305.17 (a general limitation of action statute), that "an attempt to commence an action is equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt is followed by service within sixty days" applies not only to the general limitation of action statutes enumerated in such section but also any special statutory limitation such as that prescribed in the wrongful death statute: *Bakin v. Marti*, 118 App 244, 25 OO(2d) 87, 194 NE(2d) 145.

164. Where the petition in a wrongful death action is filed, and summons thereon is issued, within the two-year limitation prescribed by this section, but service of summons is not obtained, the voluntary appearance by the defendant within sixty days thereafter is equivalent to service of summons and the action is deemed "commenced" within the time prescribed for commencement of the action: *Bakin v.*

Marti, 118 App 244, 25 OO(2d) 87, 194 NE(2d) 145.

§ 2125.03 Distribution to beneficiaries.

The amount received by a personal representative in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them, and unless the share of each is adjusted among themselves, the court making the appointment shall adjust such share in such manner as is equitable, having due regard to the pecuniary injury to each beneficiary resulting from such death and to the age and condition of such beneficiaries. The court shall distribute the amount of funeral expenses awarded or received by settlement by reason of the death, to the personal representative of the deceased to be expended by the personal representative in payment thereof or reimbursement therefor.

HISTORY: GC § 10509-168; 114 v 320 (439); 133 v S 104. Eff 11-21-69.

Analogous in part to former GC § 10772.

Comparative Legislation

Distribution to beneficiaries:

Ill.—Rev Stat, ch 70, § 2

Ind.—Burns' Stat, § 29-1-10-17

Ky.—KRS § 411.130

Mich.—MCLA, § 702.115

N.Y.—EPTL, § 5-4.4

Pa.—Purdon's Stat, Tit 12, § 1602

Fla.—FSA, § 733.808

Forms

1 A&H Probate FORM 2125.03a et seq.

Research Aids

Distribution:

O-Jur2d: Death § 160

Am-Jur2d: Death § § 182, 186

ALR

Action for death of stepparent by or for benefit of stepchild. 68 ALR3d 1220.

Adopted child as beneficiary of action or settlement for wrongful death of natural parent. 67 ALR2d 745.

Retroactive effect of statute changing distribution of recovery or settlement for wrongful death. 66 ALR2d 1444.

Division among beneficiaries of amount awarded by jury or received in settlement upon account of wrongful death. 171 ALR 204.

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See also case notes under RC §§ 2125.01, 2125.02, 2125.04

1. The amount recovered in such action is for the exclusive benefit of the widow and next of kin, and is to be distributed among them in the proportions provided by law in relation to the distribution of personal estates of persons dying intestate. The risk of ascertaining the persons entitled to the benefit of the recovery, and the duty of making the distribution, are not imposed on the defendant, but on the personal representatives of the deceased: *Weidner v. Rankin*, 26 OS 522.

2. The administrator is only a trustee for the beneficiaries and has no interest for himself or the estate he represents: *Wolf v. Lake Erie &c. R. Co.*, 55 OS 517, 45 NE 708, 36 LRA 812.

3. Where an attorney representing an administrator in the enforcement of a claim for wrongful death files a report in the probate court with regard to distribution of the proceeds of a settlement of that claim and showing a payment to such attorney of \$525 for counsel fees and where the rules of that probate court require that the court shall be advised as to the arrangement for and shall review such fees and where at the time of the filing of such report such attorney has already been paid \$975 for such counsel fees, the filing of such report may constitute a contempt of the probate court, regardless of whether the foregoing rules of court are or are not valid: *In re La Penta*, 167 OS 536, 5 OO(2d) 211, 150 NE (2d) 404.

4. Although such report may have correctly represented the facts at the time it was executed and sworn to by the administrator before payment of or any agreement to pay to such attorney any amount in excess of \$525 for his fees, the attorney, by his conduct in later filing that report with the court after receiving \$450 more for his fees and without any disclosure to the court as to his receipt of such additional \$450, thereby misrepresents the facts as to the amount of his fees: *In re La Penta*, 167 OS 536, 5 OO(2d) 211, 150 NE(2d) 404.

4.1. Neither former GC § 10859 (analogous GC § 10509-190 repealed, 120 v. 649), nor former GC § 11206 (see now RC § 2101.42) authorizes appeal from apportionment of net amount realized by administratrix under wrongful death statute: *Parker v. Parker*, 35 App 321, 172 NE 450.

5. Evidence in action for wrongful death of plumber held sufficient to show pecuniary loss or dependency of next of kin: *Paul A. Sorg Paper Co. v. Hayes*, 43 App 140, 182 NE 886.

6. Where one of the beneficiaries for whose benefit the action was brought, by his own negligence contributed toward the injury which caused the death, damages cannot be awarded on account of the pecuniary loss to such beneficiary, and such beneficiary is not entitled to share in the proceeds of the action by reason of his having incurred funeral expenses: *Gaus v. Pennsylvania Rd. Co.*, 56 App 299, 9 OO 389, 25 OLA 24, 10 NE(2d) 635.

7. By the terms of Section 10509-168, General Code (now RC § 2125.03), the Probate Court, in making a distribution of the proceeds of such action among the beneficiaries, may consider funeral expenses incurred by any of the beneficiaries by reason of the death: *Gaus v. Pennsylvania Rd. Co.*, 56 App 299, 9 OO 389, 25 OLA 24, 10 NE(2d) 635.

8. In an action for wrongful death brought under GC §§ 10509-166 and 10509-167 (RC §§ 2125.01 and 2125.02), the funeral expenses of the decedent, not being a pecuniary injury to any of the specified beneficiaries, are not recoverable: *Gaus v. Pennsylvania R. Co.*, 56 App 299, 9 OO 389, 10 NE(2d) 635.

9. A father, as administrator of the estate of a deceased son, having received a sum of money in settlement of an action for the wrongful death of that son, by agreement with two children of the full blood of the decedent under authority of this section, orally approved by the probate judge appointing the administrator, may apportion said sum one-half to himself and one-half to such children, and when pursuant to the agreement he invests the sum apportioned to the children in land, the title to which is placed in the name of one of the children, one-half interest therein being held by her as trustee for the other child, a minor brother, a court of equity will not, at the instance of the trustee in bankruptcy of the father's estate, order a reconveyance of the land to the father, even though the probate court in its journal entry apportions the entire amount of the settlement to the father who was adjudged a bankrupt within four months thereafter: *Harry v. Russell*, 68 App 877, 23 OO 67, 41 NE(2d) 424.

10. Where applications are made in Probate Court by a widow and her adult sons for an order of distribution of funds received by her, as executrix, from a railroad company engaged in interstate commerce, in settlement for the death of her husband who had been killed in the course of his employment with such company, the Federal Employers' Liability Act, Title 45, Chapter 2, Section 51 et seq., U.S. Code, rather than Sections 10509-167 and 10509-168, General Code (now RC §§ 2125.02 and 2125.03) applies as to such distribution: *In re Backus*, 73 App 262, 28 OO 432, 55 NE(2d) 811.

11. In an action to determine the apportionment among a widow and three adult children of a part of the settlement of a wrongful death claim it is error to refuse to allow one of such children to testify whether he is in need of money: *In re Estate of Miller*, 102 App 493, 59 OO 425, 72 OLA 546, 127 NE(2d) 409.

12. The presumption that there is a pecuniary injury to persons legally entitled to care and support from a decedent, in an action for wrongful death, is negated as to a widow where such widow was accorded no care and support, and none was expected or required by her from her husband, and her income is adequate for her needs; and where the adult children of such decedent are without money and living on a hand-to-mouth basis and the decedent had permitted them to live on certain of his properties rent free, and where it is probable that they will have to pay rent for the future use of such properties, such children have suffered a direct pecuniary loss through the death of the decedent and qualify for participation in the proceeds from such wrongful death claim: *In re Estate of Miller*, 102 App 493, 59 OO 425, 72 OLA 546, 127 NE(2d) 409.

13. Where an adult child is deceased there is no presumption of pecuniary injury or loss, and any claimant seeking to participate in the distribution of the wrongful death proceeds must prove actual pecuniary loss: *In re Cline*, 1 OMisc 28, 30 OO(2d) 221, 202 NE(2d) 736 (PC).

14. This section gives the probate court discretion in apportioning distributive shares in a wrongful death judgment in accordance with established principles of equity, without regard to the statute of descent and distribution, and without regard for any precise mathematical formulae: *In re Cline*, 1 OMisc 28, 30 OO(2d) 221, 202 NE(2d) 736 (PC).

15. Under this section the amount which is recovered is apportioned among the beneficiaries by the court which appointed the administrator, and neither

the court of common pleas nor the jury in such court has anything to do with such apportionment: *Campbell v. Tarr*, 18 CC(NS) 323, 33 CD 66.

16. Ohio law applies as to distribution to beneficiaries, where wrongful death occurs in Wisconsin and heirs of decedent are Ohio citizens since Ohio has the greater interest in the resolution of this issue: *Satchwill v. Vollrath Co.*, 293 FSupp 533 (E.D. Wis 1968)

§ 2125.04 New action. (GC § 10509-169)

In every action for wrongful death commenced or attempted to be commenced within the time specified by section 2125.02 of the Revised Code, if a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, and the time limited by such section for the commencement of such action has expired at the date of such reversal or failure, the plaintiff or, if he dies and the cause of action survives, his representative may commence a new action within one year after such date.

HISTORY: GC § 10509-169; 114 v 320 (439). Eff 10-1-53. Analogous to former GC § 10773-1.

Forms

1 A&H Probate FORM 2125.04a et seq.

Research Aids

Failure otherwise than upon merits:

O-Jur2d: Death § 115; limitation of actions §§ 145, 146, 153

Am-Jur2d: Death § 44

Limitation of actions, generally:

O-Jur2d: Death § 111 et seq.

Am-Jur2d: Death § 35 et seq.

Where personal representative dies and cause of action survives:

O-Jur2d: Death § 168

ALR

Substitution or addition of assignee, or trustee in bankruptcy, as plaintiff, after limitation period, in action commenced by assignor or bankrupt within limitation period but after assignment of bankruptcy. 105 ALR 610.

Amendment after limitation period of allegations of negligence as stating new cause of action. 171 ALR 1087.

Change in party after statute of limitations has run. 8 ALR2d 6.

CASE NOTES AND OAG

See also case notes under RC §§ 2125.01, 2125.02, 2125.03

1. Where an action for wrongful death has been brought within two years after the death, and after two years have elapsed and the action has been disposed of otherwise than upon the merits, this section does not permit the commencing of a new action based on the same death against a different person, within one year after the date of disposition of the former action: *Sabol v. Pekoc*, 148 OS 545, 36 OO 182, 76 NE(2d) 84.

2. When an action for wrongful death has been commenced in due time, and is thereafter voluntarily dismissed by the plaintiff after the time limit for the commencement of the action has expired, a new action for the same cause is barred although brought within one year after the dismissal of the former:

Stone v. Siegel, 32 OO 411, 17 OSupp 131 (CP).

3. A plaintiff by the voluntary dismissal of his first action does not fail otherwise than upon the merits, within the purview of this section: Stone v. Siegel, 32 OO 411, 17 OSupp 131 (CP).

4. Where petitioner in a wrongful death action fails to get service on the defendant because the summons is quashed, such does not constitute commencement of an action or an attempt to commence an action and the extender provision of this section does not come into play: Bronikowski v. Bigham, 76 OLA 65, 145 NE(2d) 331 (App).

5. General Code § 10509-169 (RC § 2113.45), authorizing an extender of one year in addition to the two years within which the action may be brought under GC § 10509-167 (RC § 2125.02), for wrongful death, is in the alternative; the requisites to the right to extender are (1) that the action be commenced or (2) attempted to be commenced, in due time, or when

(1) or (2) has been observed, the petitioner has failed otherwise than upon the merits: Bronikowski v. Bigham, 76 OLA 65, 145 NE(2d) 331 (App).

6. The savings statute is without application where the first suit was filed in federal or state court in another state: Andrew v. Bendix Corp., 452 F(2d) 961 (6th Cir. 1971).

7. This saving statute was enacted when it was held that GC § 11233 (RC § 2305.19) did not apply to actions for wrongful death: Collins v. Baltimore & O. R. Co., 11 NP(NS) 251, 22 OD 245.

8. This section as enacted in 101 v 195 was not repealed by the workmen's compensation act (102 v 524 et seq). The two statutes must be construed together and force and effect given to each, if possible; and the later statute will supersede the earlier in cases in which such later act applies specifically: Zumkehr v. Diamond Portland Cement Co., 14 NP (NS) 166, 23 OD 224, 58 Bull 157 (Ed).

CHAPTER 2127: SALE OF LANDS

Section

[WHEN EXECUTORS OR ADMINISTRATORS SHALL SELL REAL ESTATE]

2127.01 Sale of lands by executors and administrators.
[2127.01.1] 2127.011 [Conditions for disposal of real estate.]

2127.02 Payment of debts.
2127.03 Payment of legacies.
2127.04 Action commenced with consent or upon demand of beneficiaries.

[WHEN GUARDIANS MAY SELL REAL ESTATE]

2127.05 Guardian may sell.

[PROVISIONS GOVERNING EXECUTORS, ADMINISTRATORS AND GUARDIANS]

2127.06 [Successor fiduciary shall complete sale proceedings.]

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2127.08 Fractional interests; sale of entire interest.
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[REAL ESTATE FRAUDULENTLY CONVEYED]

2127.40 Sale by executor or administrator of real estate fraudulently conveyed by decedent.

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2127.42 Sale of the lands of foreign wards.
2127.43 Sale of real estate by trustees of nonresidents.

[WHEN EXECUTORS OR ADMINISTRATORS SHALL SELL REAL ESTATE]

§ 2127.01 Sale of lands by executors and administrators. (GC § 10510-1)

All proceedings for the sale of lands by executors, administrators, and guardians shall be in accordance with section[s] 2127.01 to 2127.43, inclusive, of the Revised Code, except where the executor has testamentary power of sale, and in that case the executor may proceed under such sections or under the will.

HISTORY: GC § 10510-1; 114 v 320 (451); 119 v 394 (418), § 1. EF 10-1-53.

Comment

General Code § 10510-1 et seq, effective January 1, 1932, grouped the following former land sale statutes, with a number of minor and important changes:

1. Executors and administrators, GC §§ 10774 to 10811, 10816 to 10819.
2. Guardians of minors, GC §§ 10945 to 10952, 10955, 10956.
3. Guardians of persons confined in state, benevolent, or penal institutions, GC § 10989-2.
4. Guardians of idiots, imbeciles, and lunatics, GC §§ 10994 to 10996.
5. Guardians of intemperate, improvident, and habitually drunken persons, GC §§ 11011, 11012.

It will be noted that this chapter does not include sales of land by trustees. Article IV, § 8, of the Ohio constitution expressly confers on the probate court "such jurisdiction . . . for the sale of land by executors, administrators and guardians . . . as may be provided by law." There is accordingly some question whether it is within the power of the general assembly to authorize the probate court to control the sale of land by trustees. Jurisdiction in the sale of land by trustees is now in the common pleas court under RC § 5303.21 et seq, and no effort was made in the new probate code to bring any of this jurisdiction into the probate court. It will be noticed, however, that RC § 2127.43 vests in the probate court jurisdiction in sales of lands by trustees of nonresident. The provisions of this chapter, prior to the 1941 amendment, were not available to an executor upon whom a power of sale was conferred by the will. After such amendment, GC § 10510-1 permitted an executor in such case to proceed under the statute or under the provisions of the will, at his option.

Cross-References to Related Sections

Property of county charge or inmate of city infirmary, RC § 5155.23.

Sale of property owned by county charge, RC § 337.23.

See RC §§ 2111.29, 2111.34, 2119.04, 2127.06, 2127.07, 2127.11, 2127.15, 2127.42, 2129.13, 2129.25 which refer to RC § 2127.01 et seq.

See RC §§ 2105.09, 2127.43, 2131.02 which refer to this chapter.

Research Aids

Sale of real estate by executors and administrators:

O-Jur2d: Executors and Administrators § 421

Am-Jur2d: Executors and Administrators § 344 et seq.

Sale under testamentary power of sale:

O-Jur2d: Executors and Administrators § 512

Forms

1 **A&H Probate FORM 2127.01.1a** et seq.

ALR

Power of sale conferred on executor by testator as authorizing private sale. 11 ALR2d 955.

Right or duty of executor or administrator as to contest of order directing sale of real estate for payment of debt. 126 ALR 903.

Liability in respect of sale of property of estate which is invalid. 106 ALR 429.

Sale without order of court. 108 ALR 936.

Liability for debts of decedent's estate or property which has passed out of hands of beneficiary of estate, in whose hands it was liable, as affected by absence of consideration. 103 ALR 1009.

Mortgage or other encumbrance as affecting duty of executor or administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale. 116 ALR 910.

Statutory provisions permitting sale of homestead for purpose of paying decedent's debts or legacies. 116 ALR 85.

Confirmation by court as affecting void or voidable character of sale made in violation of statute providing that no representative making sale shall be interested therein. 111 ALR 1362.

What constitutes public sale. 4 ALR2d 575.

CASE NOTES AND OAG

1. In a proceeding to sell a decedent's real estate to pay his debts under GC § 10510-1 (RC § 2127.01) et seq, the spouse of an heir is neither a proper or necessary party: *Carmack v. Carmack*, 7 OO 313 (PC).

2. An administrator in conducting a judicial sale of real estate at public sale may employ an auctioneer for a fee when such employment is authorized or approved by the court: 1957 OAG No.969.

3. A person specifically employed by an administrator for a fee to auction or sell by public outcry at a judicial sale must be a licensed auctioneer notwithstanding the exceptions provided in RC § 4707.02: 1957 OAG No.969.

[§ 2127.01.1] § 2127.011 [Conditions for disposal of real estate.]

(A) In addition to the other methods provided by law or in the will and unless expressly prohibited by the will, an executor or administrator may sell at public or private sale, grant options to sell, exchange, re-exchange, or otherwise dispose of any parcel of real estate belonging to the estate at any time at prices and upon terms as are consistent with this section and may execute and deliver deeds and other instruments of conveyance if all the following conditions are met:

(1) The surviving spouse, all of the legatees and devisees in the case of testacy, and all the heirs in the case of intestacy, give written consent to a power of sale for a particular parcel of real estate or to a power of sale for all the real estate

belonging to the estate. Each consent to a power of sale provided for in this section shall be filed in the probate court.

(2) Any sale under a power of sale authorized pursuant to this section shall be made at a price of at least eighty per cent of the appraised value, as set forth in an approved inventory.

(3) No power of sale provided for in this section is effective if the surviving spouse, any legatee, devisee, or heir is a minor. No person may give the consent of the minor that is required by this section.

(B) A surviving spouse who is the executor or administrator may sell real estate to himself pursuant to this section.

HISTORY: 136 v S 145 (Eff 1-1-76); 136 v S 466. Eff 5-26-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.01.1 applicable to estates of decedents dying between January 1, 1976 and May 25, 1976, see Appendix B.

Forms

1 **A&H Probate FORM 2127.01.1a** et seq.

Research Aids

Conditions for disposal of real estate:

O-Jur2d: Executors and Administrators § 393.5

Am-Jur2d: Executors and Administrators §§ 382, 344 et seq.

Sale upon consent:

O-Jur2d: Executors and Administrators §§ 393.5, 414, 416

Spouse may sell to self:

O-Jur2d: Executors and Administrators §§ 209, 393.5; *Fiduciaries* § 129

Am-Jur2d: Executors and Administrators § 383

§ 2127.02 Payment of debts.

As soon as an executor or administrator ascertains that the personal property in his hands is insufficient to pay all the debts of the deceased, together with the allowance to the surviving spouse and children, and the costs of administering the estate, he shall commence a civil action in the probate court for authority to sell the decedent's real estate.

HISTORY: GC § 10510-2; 114 v 320 (451); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10774, 10775.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.02 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

When real property subject to sale:

Cal.—Probate Code, § 780

Ill.—Rev Stat, ch 3, § 20-4

Ind.—Burns' Stat, § 29-1-15-3

Ky.—KRS, § 395.515

Mich.—MCLA, § 709.2

N.Y.—SCPA, § 1902

Pa.—Purdon's Stat, Tit. 20, § 3351
 Fla.—FSA, § 733.613

Forms

- 1 A&H Probate FORM 2127.02a et seq.
- 1 A&H Probate FORM 2127.03a et seq: Sale to pay legacies.

Research Aids

Jurisdiction:

O-Jur2d: Executors and Administrators § 426 et seq.
 Proceedings for authority to sell:

O-Jur2d: Executors and Administrators § 421 et seq.
Am-Jur2d: Executors and Administrators § 358 et seq.

Purposes for which real estate can be sold:

O-Jur2d: Executors and Administrators §§ 407 et seq., 417 et seq.

Am-Jur2d: Executors and Administrators § 351 et seq.

Sale of real estate by executors and administrators:

O-Jur2d: Executors and Administrators § 396

ALR

Mortgage or other encumbrance as affecting duty of executor or administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale. 116 ALR 910.

Law Reviews

Sale of real estate, construction of wills, and inheritance taxes discussed. Article by Judge Nelson J. Brewer. 11 ClevBJ (No. 8) 121.

Mortgage foreclosure in Ohio when fee owner is deceased. Article by Leonard C. Hirsch of the St. Marys bar. 36 OLR 330.

Land sales by executors and administrators in Ohio. Article by Chas. C. White of the Cleveland bar. 2 CinLRev 134.

Ohio Rules

See Staff Note to Rule 73(B), Civil Rules volume to Page's Ohio Revised Code.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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Generally

1. This section construed and applied in *Campbell v. Lloyd*, 162 OS 203, 55 OO 102, 122 NE(2d) 695.

Power of sale at common law

1.1 Independent of statute there is no power of sale: *McCall v. Pixley*, 48 OS 379, 27 NE 887; *Ferguson v. Wentz*, 20 NP(NS) 13, 27 OD 462.

2. The courts had no power to order a sale of a decedent's property before 1795, or between 1805 and 1808. There has been such power at all other times: *Ludlow v. Johnston*, 3 O 553, 17 AmDec 609; *Paine v. Skinner*, 8 O 159; *Gray v. Askew*, 3 O 466.

Descent pending sale

8. Real estate, unlike personal property, goes to the heirs and devisees immediately and directly upon death: *Nimmons v. Westfall*, 33 OS 213; *Clyde v. Simpson*, 4 OS 445.

9. Real estate descends directly to heirs or devisees, and is not "assets" of estate to be administered by executor or administrator, except when a sale is necessary to pay debts: *Nolan v. Kroll*, 37 App 350, 174 NE 750.

10. At the ancestor's death, lands descend to the heir, and are his, charged with the ancestor's debts, until the representative of the personal estate of the deceased proceeds to convert them into money to pay debts: *Piatt v. St. Clair*, 6 O 227.

11. The right to charge decedent's lands in the hands of heirs no longer exists. Such land must be converted into personalty by the administrator to pay debts. The heir holds the lands free from the ancestor's debts, if the creditor does not assert his claim within the statutory period: *Piatt v. St. Clair*, 6 O 227.

12. Lands thus descended, though subject to the rights of the creditors through the personal representative of the estate, can, however, be sold on execution, awarded against the heirs, but subject to such rights: *Douglass v. Massie*, 16 O 271.

13. Lands descend to the heir at once, upon intestate's death, and are his, charged, however, with the ancestor's debts. But until sold by the personal representative, the heir is entitled to the possession, rents, and profits thereof, and should pay all taxes levied thereon after the ancestor's death. Further, he cannot, by bidding in such lands at a tax sale, divest the ancestor's creditors of their lien thereon: *Overturf v. Dugan*, 29 OS 230.

14. The owners of the fee in land subject to sale

by the executor to pay the debts of the estate have an interest in the subject of an action to recover damages for wrongful destruction of the market value of the premises, and in obtaining the relief demanded; and they may be joined with the executor as parties plaintiff under the provisions of GC § 11254 (RC § 2307.18). The amount recovered will be apportioned by the court among the different plaintiffs: *Clark v. McClain Fire Brick Co.*, 100 OS 110, 125 NE 877.

15. Lands of an intestate descend not to the administrator, but to the heir, subject to the ancestor's debts: *Bank of Hamilton v. Dudley*, 27 US (2 Pet) 492, 1 OFD 233.

Debts for which land sold

20. In payment of intestate's debts, the personal estate must first be applied and then the realty; and even if a debt is secured by mortgage on realty, if it is the personal debt of the intestate, it is to be paid primarily out of the personalty: *Foreman v. Medina County Nat. Bank*, 119 OS 17, 162 NE 42.

21. One who advances money to pay intestate's debts does not thereby acquire a lien upon lands in possession of the heirs, of which the intestate was seized at the time of his death: *Lieby v. Park*, 4 O 469.

22. Where there is not enough personal property to pay taxes levied on property of decedent prior to his demise, his personal representative may apply for and obtain an order to sell lands for that purpose: *Welsh v. Perkins*, 8 O 52.

23. Debts of deceased are a lien on his land, whether the lands be devised or cast by descent, which can be removed only by payment of the debts or the lapse of time: *Ramsdall v. Craighill*, 9 O 197.

24. The allowance for support of widow and minor children for twelve months is a debt due from the estate, for the payment of which real estate may be sold: *Allen v. Allen*, 18 OS 234.

25. Lands of intestate descend to heirs, subject to payment of debts, the year's allowance to the widow and minor children, and charges of administration incident to a sale of the land. They cannot be sold to pay the costs of administration alone: *Carr v. Hull*, 65 OS 394, 62 NE 439, 87 AmSt 623, 58 LRA 641.

25.1 Realty assets of an estate may be sold only when personal property is insufficient. Such debts may include not only actual debts of decedent, but expenses arising out of medical treatment, the funeral, and administration of the estate: *Miller v. Bigelow*, 67 App 371, 21 OO 324, 36 NE(2d) 860.

25.2 Allowances made to a widow out of her husband's estate, particularly for her support, have the same category and status as approved claims against the estate: *Fox v. Holcomb*, 71 OLA 334, 132 NE (2d) 130 (App).

25.3 Where there is one residuary clause applicable to personal property and another to real property, the personal property is primarily liable: *Ginder & Smith v. Ginder*, 72 OLA 277, 59 OO 320, 134 NE(2d) 603.

26. Expense incurred by a third person in the burial of the testator's wife, was not a "debt of the deceased" within this section, although testator's will provided that funeral expenses be paid at the death of his wife: *Kingrey v. Oldfather*, 10 OO 524 (PC).

27. Under GC § 5336 (RC § 5731.17), the administrator has power to file an action to sell so much of the estate as will enable him to pay inheritance taxes, which action is similar in character to one brought by virtue of this section, for the purpose of paying

the debts of the decedent: *Kingrey v. Oldfather*, 10 OO 524 (PC).

28. The succession tax due and payable is a "debt" within the meaning of this section relative to the sale of realty to pay debts: *In re Saviers*, 23 OLA 166.

29. Under this section, as soon as an executor or administrator ascertains that the personal property in his hands is insufficient to pay all the debts of the deceased, together with the allowance of the widow and children for twelve months and the cost of administering the estate, he must commence a civil action in the probate court or court of common pleas for authority to sell the decedent's real estate: *Yates v. Yates*, 27 OLA 633.

30. When an executor or administrator ascertains that personal property is insufficient to pay the debts against the deceased, together with the allowance to the widow, it is his duty to bring an action to sell the real estate, under this section: *Kincaid v. Dawson*, 57 OLA 193, 93 NE(2d) 731 (App).

30.1 A specifically willed item of personalty must be reached before the proceeds of a real estate sale may be used: *Guerra v. Guerra*, 25 Misc 1, 54 OO(2d) 14, 265 NE(2d) 818.

31. Property may be sold by an administrator to pay debts not yet due, especially where it appears that the creditor is willing to accept the money: *Hunter v. Yocum*, 18 NP(NS) 14, 27 OD 31.

32. An administrator is barred from sale of land to pay concealed indebtedness to an heir, where said claim was not proved until after the heir had participated in the proceeds of partition proceedings: *Riley v. Arnold*, 19 NP(NS) 273.

33. General Code § 10509-121 (RC § 2117.25) and this section were enacted at the same time and must be construed together with an intention to make both of them operative: *McDonald v. McDonald*, 5 OO 132 (PC).

34. Action cannot be maintained to pay a mortgagee's debt, etc., where personalty is sufficient to pay unsecured debts, and mortgagee and heirs do not desire a sale: *In re Marhower*, 22 NP(NS) 46.

Legacies for which land sold

39. Where the devisee of land, charged by the testator with the payment of legacies and the costs of administration, paid the legacies and tendered to the executors the amount of costs of administration, the executors were not entitled to an order for the sale of the land to pay a per cent on the legacies. In such case, the executors are not entitled to a per cent on the legacies: *Williams v. Williams*, 8 OS 300.

40. Power to sell land, given in a will, ceases to exist when an executor, after accepting his trust, resigns. But the power may be transferred to an administrator with the will annexed. In case the administrator then resigns, his power under such will wholly ceases, and a deed made by him afterwards, of land sold by him while in office, conveys no title: *Elstner v. Fife*, 32 OS 358.

41. Where a testator makes no disposition of his real estate, other than directing that it be sold, and the proceeds paid to a trustee for the benefit of certain legatees, the legal title descends to his heirs subject to the execution of the power conferred on the executors; but the right of possession passes with the will to the executors, to enable them to effect the objects of the testator: *Elstner v. Fife*, 32 OS 358.

42. Where a testator's personalty is not sufficient to pay his debts and cost of administration and the legacies provided for in his will are not made a charge on his real estate, proceeds from sale of realty do not fall into the residuum, but pass to the heirs, and the

legacies fail for want of a fund out of which they may be paid: *Ferguson v. Wentz*, 20 NP(NS) 13, 27 OD 462.

Priority

47. A mortgage indebtedness on the land sold must be paid from the proceeds of the sale before the payment therefrom of funeral expenses: *Nolan v. Kroll*, 37 App 350, 174 NE 750.

48. Where administrator filed suit in probate court to sell real estate of decedent to pay debts of estate, and thereafter decedent's mortgagee brought foreclosure proceedings, and parties to both actions are the same, the action in probate court will prevail: *Fairfield Federal Sav. &c. Co. v. Pickering*, 23 OLA 591.

Land subject to sale

54. The executor cannot withdraw realty from the assets of the estate, by collusion with the heirs: *Stiver v. Stiver*, 6 O 217.

55. If an executor has sold the land at private sale and received the proceeds, he cannot claim that he did not receive them as executor: *Stiver v. Stiver*, 6 O 217.

56. Where a wife joins her husband in a mortgage containing a renunciation of dower, a sale of the land by the administrator of the husband to pay debts extinguishes the right of dower, and transfers an unencumbered title to the purchaser: *St. Clair v. Morris*, 9 O 16.

57. Power to sell real estate ceases when the estate is fully settled and all claims presumptively satisfied by lapse of time: *Ward v. Barrows*, 2 OS 241.

58. Where the administrator has used up all personal estate to pay debts, and afterward, an action is brought against him on a debt contracted by intestate, resulting, though properly contested, in a judgment against such administrator, the latter is entitled to an order for the sale of enough of the real estate as may be necessary to satisfy the judgment, even though it has already been partitioned among the heirs, and by them sold to other parties. The debts of decedent are a lien on his realty, and purchasers from his heirs take same cum onere: *Faran v. Robinson*, 17 OS 242.

59. It is an abuse of the provisions of this statute to institute such proceedings for the mere purpose of settling disputes regarding the title of lands. Must be actual necessity for selling the land for payment of bona fide debts: *Wood v. Butler*, 23 OS 520.

60. The fact that an heir has, without order of court, sold lands of decedent at private sale, and applied the proceeds in satisfaction of preferred claims, does not bar the administrator from selling the land to pay debts: *Sidener v. Hawes*, 37 OS 532.

61. Where, in an action by the heirs for the partition of real estate, the administrator is made a defendant, and he files an answer and cross-petition, asking for the sale of such property to pay debts, the administrator is entitled to such order of sale, and statutes of limitation have no application in favor of such heirs: *Lafferty v. Shinn*, 38 OS 46.

62. A homestead having been assigned by metes and bounds, an order of court in a proceeding to sell land to pay debts, directing and confirming a sale of the real estate so assigned, subject to the homestead, is not merely voidable, but void: *Wehrle v. Wehrle*, 39 OS 365.

63. Right of administrator to subject land to payment of debts is superior to the right of the heirs to have partition. As soon as the administrator finds that the personal estate will be insufficient to pay debts, it is his duty to apply to the probate or common pleas court for authority to sell the land, and the heirs

can prevent a sale and have partition of the lands only by giving bond for the payment of debts, etc.: *Stout v. Stout*, 82 OS 358, 92 NE 465, 137 AmSt 785.

Limitations

68. The proceeding herein provided for is subject to the statute of limitations and must be brought within six years from the discovery by the administrator that the personalty is not sufficient to pay debts: *Ling v. Strome*, 12 CC(NS) 161, 21 CD 569.

69. The right to sell lands is barred in six years from the time the administrator ascertains that the personal estate in his hands is insufficient to pay all the debts, and such knowledge will be attributed to him not later than the filing of his account: *Kemper v. Apollo Bldg. &c. Co.*, 5 NP(NS) 403, 18 OD 484.

Power and liability of executor

74. If administrator pay out all the personal estate to one creditor, where the estate is solvent by selling the realty, and does not apply for such sale, it is a devastavit: *Abbott v. Cole*, 5 O 86.

75. An administrator, in selling lands of his decedent, which he conveys without covenants of warranty, cannot render the estate of deceased liable in damages, by false representations as to the condition of the title, or the extent of existing encumbrances: *Dunlap v. Robinson*, 12 OS 530.

76. Where the administrator, instead of selling the real estate, collected the rents and applied them to the satisfaction of the ancestor's debts, his action was upheld: *White v. Turpin*, 16 OS 270.

77. Sale by an executor for a manifestly inadequate price will make the executor liable for the loss: *Brown v. Reed*, 56 OS 264, 46 NE 982.

78. Where lands are sold by an executor at private sale for their full value, such executor must account for the total amount of the purchase price received by him, if necessary for the payment of debts. If sold for less than the full value, he must nevertheless account for the full value thereof: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, AnnCas 1914A, 190.

79. Where an order has issued out of the probate court, directing an executor to sell lands to pay debts of the estate, the executor may maintain an action to recover damages for the wrongful destruction of the market value of such premises, where it appears that rights of creditors will be prejudiced thereby: *Clark v. McClain Fire Brick Co.*, 100 OS 110, 125 NE 877.

80. The administrator assumes the risk of the fund realized from the sale being insufficient to pay his own fees and those of his attorney and the court costs incident to the general administration. They cannot be paid from the fund to the prejudice of a mortgagee: *Sherman v. Millard*, 6 CC(NS) 338, 17 CD 175.

81. An administrator who files a petition to sell realty to pay debts represents that the decedent died seized of the realty described in the petition, and he repeats such representations during the whole proceeding. Accordingly he is personally liable to one who has purchased such realty and paid therefor if the decedent had no title thereto: *Fisher v. Fisher*, 15 CC(NS) 273, 23 CD 525 [affirmed, without opinion, 86 OS 365].

82. Where an administrator is sued by the heirs of a decedent for rentals from real estate collected by him subsequent to the death of the decedent and it appears that the real estate in question has been sold by order of the court and the administrator directed to pay the taxes thereon accrued after decedent's death from the proceeds, he is entitled to set off the amount of such payment against the claim of the heirs for the rentals of the real estate collected by him:

Warner v. York, 16 CC(NS) 369, 31 CD 543 [affirmed, without opinion, York v. Warner, 75 OS 595].

Bond

88. Where an administrator gives his administration bond, and later, in a proceeding to sell real estate, gives another bond as required by statute, the sureties on both bonds are jointly liable for the proceeds of such sale; the last bond does not supersede the first: *Kehnast v. Daum*, 4 NP 366, 6 OD 401.

Jurisdiction

92. Where, in an action for the partition of the real property of a deceased person brought in the court of common pleas within one year from the decedent's death, it is disclosed that the personal property is insufficient to pay debts of the estate and that the administrator has instituted an action in the probate court to sell the real property to pay debts of the estate, the court of common pleas is without jurisdiction to grant partition of such lands: *Burrier v. Kiefer*, 90 App 571, 48 OO 210, 107 NE(2d) 565; *Retterer v. Retterer*, 4 OO 333 (App).

93. In a proceeding by an administrator to sell real estate to pay debts, there is no general equity power in the probate court which will permit of a determination of the rights of judgment creditors of the estate in land claimed by the widow by virtue of a lost deed which she caused to be restored after her husband's death; but the proper forum for judgment creditors thus situated is in the common pleas court, where they may file an action in the nature of a creditors' bill asking to have the deed in question set aside and the land sold to satisfy their judgments: *Fleming v. McGuffey*, 12 NP(NS) 19, 21 OD 387.

94. If the land is encumbered by mortgage or other liens, the court must settle priorities and order a sale free from such liens. Probate court not authorized to make an order to sell land subject to mortgage or other liens: *Stone v. Strong*, 42 OS 53.

95. The probate court has jurisdiction to try any question of fact arising in the action herein provided for, or it may afford the parties a trial by jury when appropriate, and all persons claiming an interest in the land should be brought before the court, and all questions of title adjudicated: *Doan v. Bitely*, 49 OS 588, 32 NE 600 [affirming *Bitely v. Doan*, 4 CC 7, 2 CD 388]; see also *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

96. In proceedings to sell the real estate of a decedent to pay debts, the jurisdiction of the probate court is limited by statute, former GC § 10783 (see now RC § 2127.18), and it is not authorized, on distribution of the proceeds in such proceeding, to render a personal judgment against a legatee of the estate, who has been made a party thereto: *State ex rel Voight v. Lueders*, 101 OS 211, 128 NE 72.

97. A question arises as to jurisdiction where a foreclosure and a land sale are pending. The general rule of law is that where two courts have concurrent jurisdiction, the one first acquiring it will retain it: *Keating v. Spenk*, 30 OS 105; *State v. Marietta*, 35 OS 154.

98. It has been held that a foreclosure takes precedence over a previous assignment for the benefit of creditors, because the remedy in probate court was inadequate: *Robinson v. Williams*, 62 OS 401, 57 NE 55; *Dwyer v. Carlough*, 31 OS 158. However, see *Havens v. Horton*, 53 OS 342, 41 NE 253; also *Vandenbark v. Mattingly*, 62 OS 25, 56 NE 473.

99. Under the law of 1795 for settling intestates' estates, the orphans' court could not direct sales of land by administrators, except of lands lying in the county where the court sat: *Ludlow v. McBride*, 3

O 240.

100. Administrator's power to sell real estate of intestate for payment of debts is strictly a legal power. If a sale be made, the question is triable at law, and when, at law, it has been decided that no authority existed, equity cannot set it up: *Lieby v. Park*, 4 O 469.

101. Decree of a foreign court is inoperative to transfer title to lands in Ohio: *Salmond v. Price*, 13 O 368; *Blake v. Davis*, 20 O 231; *Price v. Johnson*, 1 OS 390; *Nowler v. Coit*, 1 O 519.

102. Although a sale under order of a foreign court is void, it may be made valid by the assent of the parties in interest: *Beall v. Price*, 13 O 368.

103. The probate court and the common pleas court have concurrent jurisdiction of an action to foreclose a mortgage on the real estate of a deceased mortgagor of whose estate an administrator or executor has been appointed and qualified, when it is necessary to sell the real estate to pay decedent's debts, and the court which first acquires jurisdiction thereof retains it to the exclusion of the other: *People's Sav. Assn. v. Sanford*, 59 App 294, 13 OO 86, 18 NE(2d) 126.

104. Where the probate court has acquired jurisdiction of the subject matter of a proceeding brought by an administrator to sell the real estate of a decedent to pay the debts of the estate, the common pleas court is without jurisdiction in an action subsequently brought by a mortgagee to foreclose a mortgage on the same property: *Home Bldg. &c. Co. v. Sanford*, 59 App 302, 13 OO 90, 18 NE(2d) 127.

105. In a proper action brought for that purpose, the probate court of the county appointing a testamentary trustee has jurisdiction to order the sale of real estate belonging to the trust located in another county of the state: *Boals v. Clingan*, 6 NP(NS) 609, 16 OD 267.

106. The court of common pleas is without jurisdiction to grant an order upon petition of an administrator to sell real estate to pay debts, where it appears from the records of the probate court that the said administrator has filed a final account which disclosed no debts and the estate has been closed: *Hunter v. Yocum*, 18 NP(NS) 14, 27 OD 31.

Parties

111. This act must be strictly construed. And a judgment creditor of an heir or devisee is not a necessary party to a suit to pay debts of the deceased ancestor or deviser: *Kummer v. Lake*, 1 NP(NS) 209, 13 OD 491.

112. Sale of decedent's real estate on the joint petition of the administrator and guardian cannot be ordered: *Newcomb v. Smith*, 5 O 447.

113. Only the personal representative of the decedent may bring an action to sell the realty of the decedent to pay his debts. A creditor cannot maintain such action: *Rheinfrank v. Hurr*, 98 OS 439, 121 NE 645.

Waiver of Claims

114. A sole heir or devisee under a will, by accepting transfer of all the assets of the estate, necessarily waives payment of any claims he may have against the estate: *Kaczinski v. Kaczinski*, 118 App 225, 25 OO(2d) 68, 193 NE(2d) 731.

Insufficiency of funds to pay debts

115. In the payment of testator's debts specific devisees and legatees share equally in any loss resulting from the insufficiency of funds to pay the testator's debts: *McArther v. McArther*, 29 OO(2d) 137 (PC).

Procedure

118. Scire facias against heirs and terre-tenants to

make lands liable for the payment of decedent's debts: *Miami Exporting Co. v. Halley*, 7 O (ptl) 11.

119. A debtor dies after judgment against him, subsisting as a lien upon his real estate. The administrator makes a sale that for irregularity passes no title. The judgment creditor may proceed, by scire facias, against the heirs and purchasers in possession, to revive the judgment, and to have execution awarded against the lands: *Miami Exporting Co. v. Halley*, 7 O (ptl) 11.

120. Where one of the heirs assents to a decree of a foreign court purporting to transfer title to lands in Ohio, acts as one of the commissioners to execute it, and assents to the sale, he thereby passes his own title in equity: *Salmond v. Price*, 13 O 368.

121. There was no right to appeal from a land sale proceeding in common pleas court under the statute of 1850: *Steinbarger v. Steinbarger*, 19 O 106.

122. The Code formerly did not make a land sale proceeding a civil action, and minor defendants, not served with process but for whom a guardian ad litem was appointed and answered, were bound by the decree: *Robb v. Irwin*, 15 OS 689; *Sheldon v. Newton*, 3 OS 494; *Snively v. Lowe*, 18 O 368; *Benson v. Cilley*, 8 OS 604; *Biggs v. Bickel*, 12 OS 49.

123. It is now settled that the action brought by an administrator or executor to sell real estate to pay debts is a civil action, adversary in its character: *Holloway v. Stuart*, 19 OS 472.

124. In a proceeding by an administrator to sell real estate to pay judgments entered upon awards of arbitrators, it is competent for the heir, upon a cross-petition in the same proceeding, to attack said judgments for fraud: *Conway v. Duncan*, 28 OS 102.

125. A testator devised his estate to his five children in equal shares, and authorized and empowered his executor to sell and convey all the real estate of which he died seized. A creditor of one of the devisees caused an attachment to be levied on an undivided fifth part of said real estate. Afterward, the executor, in execution of the power, sold and conveyed all said real estate. Held, that the purchaser acquired title to the land conveyed, unaffected by the levy of the attachment: *Smith v. Anderson*, 31 OS 144.

126. When the creditor's claim is in the nature of a judgment, it need not be presented to the administrator: *Ambrose v. Byrne*, 61 OS 146, 55 NE 408.

127. A partition suit which is brought seven years after the death of the ancestor, is not suspended by an action, brought five months later by the administrator of such ancestor, to sell such land for the payment of debts: *Ferenbaugh v. Ferenbaugh*, 104 OS 556, 136 NE 213.

128. In sale of realty to pay debts, sale will not be set aside for slight error in description of realty, when it can be corrected on purchaser's motion for confirmation: *Watson v. Watson*, 24 App 45, 156 NE 241.

129. An order of the probate court ordering the sale of real estate may not be stopped by way of collateral attack: *Doughty v. Beard*, 72 OLA 188, 59 OO 320, 132 NE(2d) 288.

130. When the sale of lands of an ancestor is necessary to pay debts, the filing of a suit in partition by an heir does not prevent the administrator from proceeding to sell the lands: *Myers v. Myers*, 9 CC(NS) 449, 19 CD 396 [for opinion disallowing attorney fees, see 5 NP(NS) 85, 17 OD 551].

131. It seems that under our statute the administrator or executor is to judge in the first instance whether or not the personal property is insufficient to

pay the debts. But the court will not order the sale unless it is satisfactorily shown that such is a true state of facts. The insufficiency must be alleged in the petition: *Baen v. Walker*, 12 OD 128.

132. In a proceeding by an administrator to sell real estate to pay debts, there is no general equity power in the probate court which will permit of a determination of the rights of judgment creditors of the estate in land claimed by the widow by virtue of a lost deed which she caused to be restored after her husband's death; but the proper form for judgment creditors thus situated is in the common pleas court, where they may file an action in the nature of a creditor's bill asking to have the deed in question set aside and the land sold to satisfy their judgment: *Fleming v. McGuffey*, 12 NP(NS) 19, 21 OD 387 [for former opinion, see 8 NP(NS) 430, 19 OD 521].

133. The proceeding to sell real estate as well as one to determine heirship are civil actions by statute: In re *Murphy*, 29 NP(NS) 183; *Doan v. Bitely*, 49 OS 588, 32 NE 600, affirming 4 CC 7, 2 CD 388; *Levy v. Cinn*, 61 OS 644, 57 NE 1133; *Cooper v. Cooper*, 3 OO 431 (PC).

Decree

138. Unless authorized by the will, an executor can, in no case, sell real estate without first obtaining an order of court, and an administrator cannot convey title to real estate without first obtaining an order to sell same in the manner prescribed by law; for to divest the heirs of their title to real estate by sale through the personal representative, the sale must be made in substantial compliance with the law: *Goforth v. Longworth*, 4 O 129.

139. Whether administrator can release equity of redemption in lands, except under a decree of court, is so doubtful that it is sufficient ground for the decree: *Bank of United States v. Piatt*, 5 O 540.

140. An order of sale can only exist as a matter of record, and is provable only by its production. Parol evidence cannot be received for proving the same: *Newcomb v. Smith*, 5 O 447.

141. In absence of fraud, the buyer buys at his own risk as to title. Executor cannot bind estate by verbal warranty of title, unless authorized by will or order of court: *Arnold v. Davidson*, 46 OS 73, 18 NE 540.

142. Where there is an order to sell decedent's property to pay debts and title is not in the decedent, the action should be dismissed: *Piatt v. Piatt*, 65 OLA 284, 114 NE(2d) 441.

Sale

146. Where wrong lands have been included in the appraisal and in the administrator's deed by mistake, a court of general jurisdiction in equity may correct the mistake in the probate court as well as that in the deed: *Gill v. Pelkey*, 54 OS 348, 43 NE 991.

147. Where an executor, after resignation, bought in the property at his own sale, such sale will not be set aside when it does not appear that he did anything to stifle competition, and where he paid a fair value for the property: *Woodward v. Curtis*, 19 CC 15, 10 CD 400 [affirmed, without opinion, 63 OS 575].

148. One who goes into possession of premises, purchased at an administrator's sale of lands to pay a decedent's debts, is liable for the value of the use of the premises, if the sale is afterwards set aside: *Christ v. Lay*, 16 CC(NS) 38, 27 CD 312 [affirmed, without opinion, *Lay v. Christ*, 82 OS 417].

149. No interest passes under an executor's sale if the proceedings are not entered on the record: *Longworth v. Goforth*, W 192 [for opinion in action for judgment, see *Goforth v. Longworth*, 4 O 129].

150. A legal purchaser of a deed from an administrator

or executor through probate procedure who makes application to the appropriate county auditor for transfer is entitled to that auditor making mandatory transfer: 1936 OAG No. 6120.

Appeal and error

154. Under the statute of 1850, no appeal lay from the court of common pleas on a petition to sell lands: *Steinbarger v. Steinbarger*, 19 O 106.

155. An action by an executor for the construction of a will, which prays also for an order to sell lands for the payment of legacies, is appealable: *Swing v. Townsend*, 24 OS 1.

157. The finding made on confirmation of appraisal, and confirmation of sale, is also a final order: See *Evans v. Dunn*, 26 OS 439; *Kelley v. Standberry*, 13 O 422.

158. If there is an order of distribution included in the order of confirmation, then it might be appealable: *Spence v. Basey*, 34 OS 42.

159. However, the supreme court held that an appeal lies from the court of probate to the court of common pleas, from an order, decree or judgment confirming a sale of real estate at private sale by an assignee, reversing the inferior court: *Browne v. Wallace*, 60 OS 177, 53 NE 957 [reversing 16 CC 124, 8 CD 754].

160. An action to sell realty is a civil action, and in either court in which the suit may be brought, or on appeal, the rights of the several parties in the subject matter may be determined. But the probate court having exclusive jurisdiction to settle the accounts of executors and administrators, it is incompetent, where such suit is brought in the common pleas court, for that court to attempt to fix the costs and expenses of administration: *Tidd v. Bloch*, 4 CC(NS) 216, 16 CD 113.

161. The appellate court, in reversing an order of distribution made by the probate court, should either make the order of distribution or, in remanding the case to the probate court, specifically indicate the items to which the fund for distribution should be applied: *Sherman v. Millard*, 6 CC(NS) 338, 17 CD 175.

162. The raising for the first time on appeal an allegation that the personal property of a decedent is insufficient to pay his debts where evidence at trial shows it was necessary to sell decedent's real estate to pay his debts: *Kohn v. Kohn*, 67 App 404, 21 OO 348, 36 NE(2d) 1009.

§ 2127.03 Payment of legacies.

When by operation of law or the provisions of a will a legacy is effectual to charge real estate, and the personal property is insufficient to pay the legacy, together with all the debts, the allowance to the surviving spouse and children, and the costs of administering the estate, the executor or administrator with will annexed shall commence a civil action in the probate court for authority to sell the real estate so charged.

If the executor, administrator, or administrator with the will annexed fails to commence the action mentioned in this section or section 2127.02 of the Revised Code, the probate court in which letters testamentary have been granted, upon its own motion or upon motion by a creditor or legatee, shall order the executor, administrator, or

administrator with the will annexed to commence such an action, and proceed in the manner prescribed by sections 2127.04 to 2127.43 of the Revised Code.

HISTORY: GC §§ 10510-3, 10510-4; 114 v 320 (451); 125 v 903 (981) (EF 10-1-53); 136 v S 145. EF 1-1-76.

Analogous to former GC § 10817.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.03 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

This section should be considered with RC § 2127-39, which provides for parts of the will to be set up in the petition.

Forms

1 A&H Probate FORM 2127.03a et seq.

Research Aids

Sale of realty for payment of legacies:

O-Jur2d: Executors and Administrators §§ 396, 413
Am-Jur2d: Executors and Administrators § 396

ALR

Right or duty of executor or administrator as to contest of order directing sale of real estate for payment of debt. 126 ALR 903.

Statutory provisions permitting sale of homestead for purpose of paying decedent's debts or legacies. 116 ALR 85.

What constitutes public sale. 4 ALR2d 575.

Mortgage or other encumbrance as affecting duty of executor or administrator of insolvent estate to sell real estate to pay debts, or duty of probate court to order such sale. 116 ALR 910.

Power of sale conferred on executor by testator as authorizing private sale. 11 ALR2d 955.

Effect of appreciation or depreciation of assets of decedent's estate before final settlement, but after partial distribution or setting up of trust. 114 ALR 458.

Executor's or administrator's right to appeal from order of distribution. 117 ALR 99.

Liability for debts of decedent's estate or property which has passed out of hands of beneficiary of estate, in whose hands it was liable, as affected by absence of consideration. 103 ALR 1009.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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Construction, 11 et seq

Legacies charged on land, 1 et seq

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Legacies charged on land

1. Originally at common law, real estate was not liable for the debts of a decedent. From this followed the doctrine that real estate is not subject to the payment of a legacy, unless it appears to have been the intention of the testator to make such real estate liable therefor; and the doctrine still remains that, in the absence of anything in the will showing a contrary intention, legacies are never to be paid out of real estate: Page on Wills (2d Ed), 1268; *Koontz v. Hub-*

ley, 111 OS 414, 145 NE 590; Ward v. Worthington, 28 App 325, 162 NE 714; Geiger v. Worth, 17 OS 564.

2. A claim for reimbursement for the payment of funeral expenses of testator's wife, even though it was in the nature of a legacy, was not chargeable on the real estate so as to authorize the administrator to file a land sale proceeding under GC § 10510-3 (RC § 2127.03): Kingrey v. Oldfather, 10 OO 524 (PC).

3. A devise to a son of a certain tract of land upon consideration that he pay to a daughter a certain sum devised, is a charge on the farm, and in such case the personal property is exonerated from its payment: Lacey v. Birdsill, 15 CC(NS) 60, 23 CO 460 [affirmed, no opinion, 88 OS 606, 105 NE 767].

4. To charge legacies on land, so that the devisee is required to pay them, the intention to make it such a charge may be implied, but the intention must be clear: Clyde v. Simpson, 4 OS 445.

5. A provision that certain property, part of which is realty, is to be used for the payment of debts, clearly charges the debt upon the realty: Knepper v. Knepper, 103 OS 529, 134 NE 476; Watts v. Watts, 38 OS 480.

6. And where a testator gives legacies in excess of the amount of his personal property, this will be held to be a manifestation of his intention, that his real estate may be used for the payment of such legacies: Townsend v. Townsend, 25 OS 477; Theobald v. Fugman, 64 OS 473, 60 NE 606.

Construction

11. The right of an executor to bring an action under this section to sell real estate to pay legacies is barred if not brought within six years after the executor learns that the personalty is insufficient to pay such legacies: Kemper v. Apollo Bldg. &c. Co., 5 NP(NS) 403, 18 OD 484.

12. If the will does not contain a specific charge of legacies upon realty and if there is no blending in the residuary clause of the realty and personalty, the will is said not to be effectual to charge real estate within the meaning of former GC § 10817 (see now RC § 2127.03): Ferguson v. Wentz, 20 NP(NS) 13, 27 OD 462.

13. The word "creditor" is probably used in the broad sense in this connection and is not confined to creditors who were such at the time of the death of the deceased. In this broad sense a "creditor" is the one to whom a debt is owed and the word should be construed liberally to give effect to the purpose of the statute: Favorite v. Booher, 17 OS 548, 553; Allen v. Allen, 18 OS 234, 237; McCallip v. Sharp, 13 OD 650, 652.

14. The burial expenses and the allowance to widow and minor children for twelve months, although not debts that existed at the death of the deceased, are very likely debts in this connection: GC § 10509-121 (RC § 2117.25); Allen v. Allen, 18 OS 234.

15. This section provides that where personal property is insufficient to pay a testamentary legacy, the personal representative of an estate may obtain authority to sell real property, when by the "provisions of a will a legacy is effectual to charge real estate": Snyder v. LaDue, 100 App 526, 60 OO 407, 137 NE(2d) 432.

§ 2127.04 Action commenced with consent or upon demand of beneficiaries.

With the consent of all persons entitled to share in an estate upon distribution, the executor, ad-

ministrator, or administrator with the will annexed may, and upon the request of such persons shall, commence an action in the probate court for authority to sell any part or all of the decedent's real estate, even though not required to be sold to pay debts or legacies. In any such proceeding, a guardian may make such a request, or give consent in behalf of his ward.

HISTORY: GC § 10510-5; 114 v 320 (452); 136 v S 145. EF 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.04 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

Under this section all persons entitled to share in the estate upon distribution, acting together, may compel the sale of all or any part of the decedent's real estate, even though not required to be sold to pay debts or legacies. If the administrator or executor desires to sell real estate not needed for the above purposes, he must obtain the consent of all the above persons.

The words of the statute "all persons entitled to share in an estate upon distribution" are all inclusive and undoubtedly include not only those who are entitled to share in the distribution of the personal estate but also those who, under the law or by will, have an interest in the real estate of the deceased. In many instances, and, perhaps usually, these words would be construed as referring to those entitled to share in the distribution of the personal estate only, but to so restrict them in this instance would be to permit those who have no interest in the real estate of the decedent to compel its sale against the wishes of those who have title to the same or an interest therein. The evident meaning and scope of the section must be given effect: 3 Words and Phrases Judicially Defined, 2134; Robins v. Payne, 58 Miss 690, 707.

The word "beneficiary" is more usually used as referring to those who receive property by will or have an interest in property as the beneficiaries of a trust. In its broadest sense, however, it includes all who in any way receive a benefit or advantage: Webster's New International Dictionary. In this broadest sense it is used in this section of the statute to include all persons who are entitled in any way to the benefit of the real or personal estate of the decedent. It would undoubtedly include, as well, assignees or creditors of heirs, devisees, next of kin or legatees, who, by assignments, or by proper proceedings, have become entitled to be included in the distribution of the personal property, or who have acquired liens upon or interest in the real estate of the decedent.

This section should be especially useful where it is desired to secure a clear record title to the real estate before it is possible to settle the estate of the deceased.

Cross-References to Related Sections

See RC § 2127.03 which refers to RC § 2127.04 et seq.

Forms

1 A&H Probate FORM 2127.04a et seq.

Research Aids

Sale upon consent or demand of beneficiaries:

O-Jur2d: Executors and Administrators § 414

Am-Jur2d: Executors and Administrators § 351 et seq.

[WHEN GUARDIANS MAY SELL REAL ESTATE]

§ 2127.05 Guardian may sell.

Whenever necessary for the education, support, or the payment of the just debts of the ward, or for the discharge of liens on the real estate of the ward, or wherever the real estate of the ward is suffering unavoidable waste, or a better investment of its value can be made, or whenever it appears that a sale of the real estate will be for the benefit of the ward or his children, the guardian of the person and estate or of the estate only of a minor, person unable to manage his property because of mental illness or deficiency, habitual drunkard, confined person, or other person under disability may commence a civil action in the probate court for authority to sell all or any part of the real estate of the ward. If it appears to the advantage of the ward to lay out all or any part of the land in town lots, application for such authority may also be made in the action.

When the same person is guardian for two or more wards whose real estate is owned by them jointly or in common, the actions may be joined, and in one complaint the guardian may ask for the sale of the interest of all or any number of his wards in the real estate. If different persons are guardians of wards interested jointly or in common in the same real estate, they may join as parties plaintiff in the same action. On the hearing, in either case, the court may authorize the sale of the interest of one or more of the wards.

HISTORY: GC §§ 10510-6, 10510-7; 114 v 320 (452); 125 v 903 (981) (E# 10-1-53); 136 v S 145. E# 1-1-76.

Analogous to former GC §§ 10945, 10948, 10994.

Cross-References to Related Sections

Appointment of guardian, RC § 2111.02.

Completion of land contracts, RC § 2111.19.

Improvement of real estate by guardian, RC § 2111.33 et seq.

Lease of real estate by guardian, RC § 2111.25 et seq.

Termination of guardianship, RC § 2111.46.

Comparative Legislation

Application for change in investment:

Cal.—Probate Code, § 1557

Ill.—Rev Stat, ch 3, § 21-1.06

Ind.—Burns' Stat, § 29-1-18-34

Mich.—MCLA, § 703.22

N.Y.—SCPA, § 1723

Pa.—Purdon's Stat, Tit. 20, § 5145

Fla.—FSA, § 744.441

When guardian may sell real estate:

Cal.—Probate Code, § 1530

Ill.—Rev Stat, ch 3, § 20-4

Ind.—Burns' Stat, § 29-1-18-43

Ky.—KRS, § 387.110

Mich.—MCLA, § 709.3

N.Y.—SCPA, § 1715

Pa.—Purdon's Stat, Tit. 20, § 303

Fla.—FSA, § 744.447

Forms

1 A&H Probate FORM 2127.05a et seq.

Research Aids

Sale of real estate by guardian:

O-Jur2d: Guardian and Ward § 156 et seq.

Am-Jur2d: Guardian and Ward § 125 et seq.

Sale of realty in case of single or joint guardians of two or more wards:

O-Jur2d: Guardian and Ward §§ 159, 168, 170

Ohio Rules

See Staff Note to Rule 73(B), Civil Rules volume to Page's Ohio Revised Code.

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1. Where a guardian filed a petition for the sale of real estate of his ward and the court found that "it is for the best interests of said ward that said premises be sold" and ordered a new appraisal thereof and said order was, by proper parties, excepted to and notice of appeal filed, during the pendency of which appeal the ward died, the authority, duty and power of the guardian over the estate of the ward terminated except for the obligation to account for the property of the ward and the question before the court as to the necessity to sell such real estate became moot, and the appeal should be dismissed: *Becker v. Becker*, 69 OLA 414, 125 NE(2d) 563 (App).

1.1 The sale of real estate by a guardian, who holds office illegally because of the fact that he is also executor of an estate in which the minor ward is interested, is not a nullity, and the title to the property is good in innocent parties for value: *Easton v. Wittekind*, 27 NP(NS) 525.

DECISIONS UNDER FORMER GC § 10945

11. A guardian for minors, when all claim in one right, may institute proceedings for partition without process: *Goudy v. Shank*, 8 O 415.

12. The action to sell real estate must be brought during the existence of the guardianship. It cannot be brought after the ward arrives at the age of majority or the termination of the guardianship: *Perry v. Brainard*, 11 O 442; *Dengenhart v. Cracraft*, 36 OS 549.

13. The court that appointed a guardian may empower him to sell the minor's land situate in another county: *Maxon v. Sawyer*, 12 O 195.

14. The purchaser of the real estate is presumed to know that the statutes require a particular authority to be pursued in such transaction, and if he purchases where the authority has not been pursued, he does so at his peril. And where the guardian sold a military land warrant without authority to a person who knew the facts, the buyer held the land in trust for the minor: *Mack v. Brammer*, 28 OS 508; *Stoddard v. Smith*, 11 OS 581.

15. The only power to authorize a guardian to sell the real estate of his ward, prior to the creation of the probate court, was vested in the court of common pleas of the county in which the guardian was appointed. Now that power is vested in the probate court of the same county: *Foresman v. Haag*, 36 OS 102.

16. The power given the common pleas court under § 36 of the act of 1816 (2 Chase 935), to appoint guardians for minors and to sell their real estate, did not authorize the court to order the sale of the lands of an infant feme covert, upon the application of her husband: *Dengenhart v. Cracraft*, 36 OS 549; see also *Ream v. Ramlow*, 55 OS 680, 48 NE 1117.

17. In this state, a guardian cannot sell the land of his ward except by order of the probate court, in a proceeding properly instituted for that purpose; consequently, he has no power to give it away, even for a public use, and perfect the gift by the execution and delivery of a deed: *State v. Commissioners*, 39 OS 61.

18. Where one buys of a guardian notes bearing on their face the marks of a trust fund, he is put upon inquiry; and if he buys under circumstances fairly indicating that they were sold against the interests of the ward, he gets no title from the guardian who misappropriates the proceeds of the sale: *Strong v. Strauss*, 40 OS 87.

19. Property inherited by a minor, and which under order of the court suffers in the hands of the guardian several transmutations from realty to personalty and back to realty, and at the minor's death is in the form of realty, does not retain its original character of ancestral property, and must be treated as an acquisition of the minor: *McCammon v. Cooper*, 69 OS 366, 69 NE 658 [affirming the circuit court; for opinion below, see 1 NP(NS) 154, 12 OD 677].

20. An action by a guardian who claims a lien upon his ward's land for support, and who seeks to enforce it, to which the defendant seeks an answer seeking exoneration by compelling the application of another fund to the support of the ward, is a chancery case which may be appealed to the court of appeals: *Best v. McClure*, 108 OS 481, 143 NE 187.

DECISIONS UNDER FORMER GC § 10948

21. By the terms of former GC § 10991 (see now RC §§ 2109.04, 2111.13, 2111.14, 2111.26 and 2111.48), this section is made applicable to proceedings by a guardian of an imbecile to sell the realty of his ward: *McBride v. Bell*, 3 App 5, 22 CC(NS) 596, 25 CD 403 [affirmed, without opinion, *Case v. McBride*, 92 OS 516].

22. An action lies to set aside a sale of real estate made by a guardian if no order of appraisal is taken, and no appraisal in fact is made, and such an action may be brought by the surety on the guardian's bond without waiting indefinitely for the filing of a final account: *McBride v. Bell*, 3 App 5, 22 CC(NS) 596, 25 CD 403 [affirmed, without opinion, *Case v. McBride*, 92 OS 516].

[PROVISIONS GOVERNING EXECUTORS, ADMINISTRATORS AND GUARDIANS]

§ 2127.06 [Successor fiduciary shall complete sale proceedings.] (GC § 10510-8)

If the fiduciary who brings an action under section[s] 2127.01 to 2127.43, inclusive, of the Revised Code, dies, resigns, or is removed, or his powers cease at any time before the real estate sold is conveyed, a successor fiduciary may be substituted as a party to the action and may convey land, whether sold before or after his appointment. He may also be required to give an additional bond.

HISTORY: GC § 10510-8; 114 v 320 (452). Eff 10-1-53. Analogous to former GC § 10776.

Comparative Legislation

Procedure for sale:

- Cal.—Probate Code, § 782
- Ill.—Rev Stat, ch 3, § 20-5
- Ind.—Burns' Stat, § 29-1-15-11
- Mich.—MCLA, § 709.20
- N.Y.—SCPA, § 1901 et seq.
- Pa.—Purdon's Stat, Tit. 20, § 3353
- Fla.—FSA, § 733.613

Forms

- 1 A&H Probate FORM 2127.06a et seq.

Research Aids

Completion of sale by successor fiduciary:

- O-Jur2d: Executors and Administrators § 439;
- Guardian and Ward § 168
- Am-Jur2d: Executors and Administrators § 617

§ 2127.07 Real estate subject to sale. (GC § 10510-9)

Any interest in real estate, whether legal or equitable, which the deceased had a right to sell or dispose of at the time of his decease, or of which the ward was seized at the time the action was brought, including coal, iron ore, limestone, fireclay, or other mineral upon or under such real estate, or the right to mine them, may be sold by an executor, administrator, or guardian under sections 2127.01 to 2127.43, inclusive, of the Revised Code. This section does not give an executor or administrator with the will annexed authority to sell real estate for the payment of legacies, other than as charged by the testator or by operation of law. This section does not give a guardian authority to sell an equitable estate in real estate placed by deed of trust, beyond the power of the ward to sell, convey, or assign.

HISTORY: GC § 10510-9; 114 v 320 (452). Eff 10-1-53. Analogous to former GC §§ 10774, 10810, 10945, 10994.

Research Aids

Lands subject to sale:

- O-Jur2d: Executors and Administrators §§ 396, 398;
- Guardian and Ward § 158
- Am-Jur2d: Executors and Administrators §§ 347, 348

Sale for payment of legacies:

- O-Jur2d: Executors and Administrators § 413
- Am-Jur2d: Executors and Administrators § 356

ALR

Statutory provisions permitting sale of homestead for purpose of paying decedent's debts or legacies. 116 ALR 85.

Liability for debts of decedent's estate or property which has passed out of hands of beneficiary of estate, in whose hands it was liable, as affected by absence of consideration. 103 ALR 1009.

CASE NOTES AND OAG

1. When an administrator makes a beneficial arrangement to rescind an unexecuted contract of the intestate for the purchase of land a court of equity will not interfere to aid the heirs to revive and enforce the rescinded contract: *Howard v. Babcock*, 7 O (pt2) 73.

2. A perfect equity in lands held by an intestate passes to the heirs and may be sold by the personal representative for the payment of the debts of the estate: *Avery v. Dufrees*, 9 O 145.

3. As a general rule, the personal representative of the estate may in his own discretion perform or rescind any personal contract of his intestate imposing an obligation on him, as may be for the best interests of the estate, but subject to the approval of the court: *Gray v. Hawkins*, 8 OS 449.

4. A conveyance in trust, with a proviso for reconveyance, is an equitable estate, which may be sold by the personal representative of the decedent under this section: *Biggs v. Bickel*, 12 OS 49.

5. Fractional and equitable interests are subject to land sale proceedings: *Weaver v. Crommes*, 109 App 470, 12 OO(2d) 15, 167 NE(2d) 661.

6. The probate court has jurisdiction to order the sale of an equitable interest of a decedent in real estate to pay his debts: *Rice v. James*, 21 OO 60, 6 OSupp 244 (PC).

§ 2127.08 Fractional interests; sale of entire interest. (GC § 10510-10)

When the interest of a decedent or ward in real estate is fractional and undivided, the action for authority to sell such real estate shall include only such undivided fractional interest, except that the executor, administrator, or guardian, or the owner of any other fractional interest, or any lien holder may, by pleading filed in the cause setting forth all interests in the property and liens thereon, require that the action include the entire interest in the property, and the owner of said interests and liens shall receive his respective share of the proceeds of sale after payment has been made of the expenses of sale including reasonable attorney fees for services in the case, which fees must be paid to the plaintiff's attorney unless the court awards some part thereof to other counsel for services in the case for the common benefit of all the parties, having regard to the interest of the parties, the benefit each may derive from the sale, and the equities of the case. The fees of the executor, administrator, or guardian shall be a charge only against such portion of the proceeds of sale as represents the interests of the decedent or ward.

HISTORY: GC § 10510-10; 114 v 320 (453); 123 v 460 (465), § 1. Eff 10-1-53.

Forms

1 A&H Probate FORM 2127.08a et seq.

1 A&H Probate FORM 2127.02a et seq: Sale to pay debts.

1 A&H Probate FORM 2127.22a et seq: Appraisement order.

Research Aids

Commissions of executor and attorney:

O-Jur2d: Executors and Administrators §§ 496, 501 et seq.; Guardian and Ward § 193

Distribution of proceeds:

O-Jur2d: Executors and Administrators § 496; Guardian and Ward § 193

Lands subject to sale—fractional interests:

O-Jur2d: Executors and Administrators § 397;

Guardian and Ward § 159
Am-Jur2d: Executors and Administrators § 347

ALR

Amount of attorneys' compensation in matters involving real estate. 58 ALR3d 201.

Law Review

Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

CASE NOTES AND OAG

1. This section, providing for the sale of the entire interest in real property by an executor or administrator of a deceased co-owner, where decedent owned an undivided interest therein, is constitutional and not in violation of Art. II, § 28, or Art. I, § 19, of the Ohio constitution, or Art. XIV, amendments of the United States constitution: *Hatch v. Tipton*, 131 OS 364, 6 OO 68, 2 NE(2d) 875.

2. Where an action in partition has been instituted, following the death of a co-owner, and subsequent thereto the executor or administrator of such deceased co-owner institutes land sale proceedings under this section, the latter supersedes and prevails over the former: *Hatch v. Tipton*, 131 OS 364, 6 OO 68, 2 NE(2d) 875.

2.1 Under this section any fractional interest of a decedent will support a land sale proceeding; and, under RC § 2127.07, an equitable interest is subject to sale in such proceeding: *Weaver v. Crommes*, 109 App 470, 12 OO(2d) 15, 167 NE(2d) 661.

3. The fees of an executor, administrator, or their attorney shall be charged against the interest of the decedent where a sale of fractional interests in connection with the sale of other interests has taken place: *Fulton v. Griffith*, 11 OLA 673, 29 NP(NS) 435.

4. This section does not deprive a cotenant of any existing rights, does not impair the right of partition, but provides an additional remedy to an executor or personal representative, where the decedent was a cotenant, and his interest is required to be sold for the payment of his debts; hence, the statute is not in violation of any provision of the Ohio or United States constitutions: *Hatch v. Buckeye State Bldg. &c. Co.*, 32 NP(NS) 297.

§ 2127.09 Venue. (GC § 10510-11)

An action by an executor, administrator, or guardian to obtain authority to sell real estate shall be brought in the county in which he was appointed or in which the real estate subject to sale or any part thereof is situated. If the action is brought in a county other than that in which the real estate or a part thereof is situated, a certified transcript of the record of all proceedings had therein shall be filed with and recorded by the probate court of each county in which such real estate or any part thereof is situated.

HISTORY: GC § 10510-11; 114 v 320 (453). Eff 10-1-53. Analogous to former GC §§ 10775, 10945.

Research Aids

Venue:

O-Jur2d: Executors and Administrators § 434; Guardian and Ward § 167

ALR

Diverse adjudications by courts of different states

as to domicile of decedent as regards taxation, administration, or distribution of estate. 121 ALR 1200.

Ohio Rules

See Staff Note to Rule 73(B), Civil Rules volume to Page's Ohio Revised Code.

DECISIONS UNDER FORMER GC § 10775

Nature of action

1. Power of administrator to sell lands is strictly a legal one, and if sale is sought, the question is triable at law: *Lieby v. Park*, 4 O 469.

2. This is a civil action under the Code: *Doan v. Bitely*, 49 OS 588, 32 NE 600 [affirming *Bitely v. Doan*, 4 CC 7, 2 CD 388]; see also *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

3. Where one of the heirs assents to a decree of a foreign court purporting to transfer title to lands in Ohio, acts as one of the commissioners to execute it, and assents to the sale, he thereby passes his own title in equity: *Salmond v. Price*, 13 O 368.

4. In a proceeding by an administrator to sell real estate to pay debts, there is no general equity power in the probate court which will permit of a determination of the rights of judgment creditors of the estate in land claimed by the widow by virtue of a lost deed which she caused to be restored after her husband's death; but the proper forum for judgment creditors thus situated is in the common pleas court, where they may file an action in the nature of a creditors' bill asking to have the deed in question set aside and the land sold to satisfy their judgments: *Fleming v. McGuffey*, 12 NP(NS) 19, 21 OD 387.

5. This act must be strictly construed. And a judgment creditor of an heir or devisee is not a necessary party to a suit to pay debts of the deceased ancestor or devisor: *Kummer v. Lake*, 1 NP(NS) 209, 13 OD 491.

Jurisdiction

6. If the land is encumbered by mortgage or other liens, the court must settle priorities and order a sale free from such liens. Probate court not authorized to make an order to sell land subject to mortgage or other liens: *Stone v. Strong*, 42 OS 53.

7. The probate court has jurisdiction to try any question of fact arising in the action herein provided for, or it may afford the parties a trial by jury when appropriate, and all persons claiming an interest in the land should be brought before the court and all questions of title adjudicated: *Doan v. Bitely*, 49 OS 588, 32 NE 600 [affirming *Bitely v. Doan*, 4 CC 7, 2 CD 388]; see also *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

§ 2127.10 Action to sell real estate.

An action to obtain authority to sell real estate shall be commenced by the executor, administrator, or guardian by filing a complaint with the probate court.

The complaint shall contain a description of the real estate proposed to be sold and its value, as near as can be ascertained, a statement of the nature of the interest of the decedent or ward in the real estate, a recital of all mortgages and liens upon and adverse interests in the real estate, the facts showing the reason or necessity for the sale, and any additional facts necessary to constitute the

cause of action under the section of the Revised Code on which the action is predicated.

HISTORY: GC §§ 10510-12, 10510-13; 114 v 320 (453); 136 v S 145. Eff 1-1-76.

See former GC §§ 10779, 10946, 10994.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.10 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2127.29 which refers to this section.

Forms

1 A&H Probate FORM 2127.10a et seq.

1 A&H Probate FORM 2127.01.1a et seq: Application to sell real estate.

1 A&H Probate FORM 2127.02a et seq: Sale to pay debts.

1 A&H Probate FORM 2127.05a et seq: Sale by guardian.

1 A&H Probate FORM 2127.20a et seq: Sale subject to mortgage.

Outline of Procedure

Sale of lands by executors, etc. *Leyshon No. 102*; A&H No. 82

Research Aids

Applicability of Rules of Civil Procedure:

O-Jur2d: Executors and Administrators § 19.1; Wills § 222.1

Pleading:

O-Jur2d: Executors and Administrators §§ 440, 441; Guardian and Ward § 170

Am-Jur2d: Executors and Administrators § 359 et seq.; Guardian and Ward § 130

Ohio Rules

See Staff Note to Rule 73, Civil Rules volume to Page's Ohio Revised Code.

§ 2127.11 Summary proceeding if value of land less than three thousand dollars.

When the actual market value of decedent's or ward's real estate to be sold is less than three thousand dollars, and the court so finds, it may by summary order authorize the sale and conveyance of the land at private sale, on such terms as it deems proper, and in such a proceeding, all requirements of sections 2127.01 to 2127.43 of the Revised Code, as to service of summons, appraisal, and additional bond, shall be waived.

HISTORY: GC § 10510-14; 114 v 320 (454); 128 v 154 (Eff 11-9-59); 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.11 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

Although service of summons may be waived, it is not definitely stated that all notice may be dispensed with. As a general rule it is axiomatic that no one can be deprived of, or affected as to his interest in, or lien upon, real estate, unless he is in court with an opportunity to be heard; so that unless those hold-

ing the different interests in, or liens upon, the real estate were able and willing to enter their appearance in the proceedings, some sort of notice would have to be provided for, though not necessarily notice by service of summons.

The statute does not dispense with the filing of a formal petition as in other cases for the sale of land, and for all that appears, this first step in the institution of the proceeding is not changed by this statute. After the petition is filed, the matter of the value of the land to be sold may be brought to the attention of the court for such summary orders as the statute permits, and the court is willing to make in the premises. This statute can be invoked only when "the actual market value" of the real estate to be sold is less than five hundred dollars. The phrase "market value" as applied to real estate has been defined "as the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it": *Cincinnati, I., St. L. & C. R. Co. v. Pfitzer*, *Goebel* 248; *Ohio Words and Phrases*, p.339.

Forms

1 A&H Probate FORM 2127.11a et seq.

Research Aids

Summary proceedings where land is less than three-thousand dollars in value:

O-Jur2d: Executors and Administrators § 423;
Guardian and Ward § 162

Law Review

See explanatory article in 4 OBar 435.

CASE NOTES AND OAG

1. The phrase "actual market value" has been also defined as a sale on the market under circumstances calculated to elicit full and free bidding by intending purchasers: *Francis v. Million & Company*, 26 *KyL Rep* 42, 43.

§ 2127.12 Necessary parties in sale by executor or administrator. (GC § 10510-15)

In an action by an executor or administrator to obtain authority to sell real estate the following persons shall be made parties defendant:

- (A) The surviving spouse;
- (B) The heirs, devisees, or persons entitled to the next estate of inheritance from the decedent in such real estate and having an interest therein, but their spouses need not be made parties defendant;
- (C) All mortgagees and other lienholders whose claims affect such real estate or any part thereof;
- (D) If the interest subject to sale is equitable, all persons holding legal title thereto or any part thereof and those who are entitled to the purchase money therefor, other than creditors;
- (E) If a fraudulent conveyance is sought to be set aside, all persons holding or claiming thereunder;
- (F) All other persons having an interest in such real estate.

HISTORY: GC § 10510-15; 114 v 320 (454); 120 v 284, § 1. Eff 10-1-53. Analogous to former GC §§ 10780, 10810.

Forms

1 A&H Probate FORM 2127.12a et seq.

Research Aids

Parties:

O-Jur2d: Executors and Administrators § 436 et seq.
Am-Jur2d: Executors and Administrators § 359 et seq.

Law Review

Failure of executor, administrator or guardian to give additional bond; effect on sale of decedent's or ward's land. (Case Note.) 4 *OO* 193.

Recent changes in probate law. Article by James B. Danaher of the Cleveland bar. 17 *OBar* (No. 22) 271.

CASE NOTES AND OAG

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Validity of claims, action to determine, 6.1

1. The word "devisees" as used in former GC § 10780 (see now RC § 2127.12) is qualified by the words "having the next estate of inheritance from him": *Ruff v. Baker*, 146 *OS* 456, 32 *OO* 537, 66 *NE*(2d) 540.

2. Where a testator devised real property to G for life with remainder to his unborn issue or in default of such issue to the issue of W, and where an action was brought by decedent's executor to sell the devised real property to pay debts, G was a necessary party, but neither of the remaindermen was a necessary or proper party and there was no necessity for such contingent remaindermen to be represented in such action: *Ruff v. Baker*, 146 *OS* 456, 32 *OO* 537, 66 *NE* (2d) 540.

2.1 All lienholders are necessary parties in an action for partition whether acquired before or after the demise of the decedent: *Keenan v. Wilson*, 19 *App* 499, 3 *OLA* 702.

3. Legatees, if necessary parties to a proceeding to sell real estate to pay debts of a deceased person, are before the court for all purposes when summoned on a cross-petition of a mortgagee setting up his interest in the real estate to be sold: *J. H. Day Co. v. Morris*, 49 *App* 181, 2 *OO* 203, 195 *NE* 870.

4. The part of this section which provides that "all mortgagees and other lienholders whose claims affect such real estate or any part thereof" shall be made defendants in an action by an administrator to sell real estate to pay debts of the estate, is directory, and a failure to make a judgment lienholder a party defendant does not, in and of itself, deprive the court of jurisdiction to order a sale: *Schmidt v. Weather-Seal, Inc.*, 71 *App* 387, 26 *OO* 322, 50 *NE*(2d) 362.

5. In a proceeding to set aside a judicial sale of real estate on the grounds of insufficiency of purchase price, the purchasers are not parties in interest before the court's confirmation of the sale, but after such confirmation their interests in the real estate vest and they become necessary parties: *Ozias v. Renner*, 78 *App* 166, 33 *OO* 504, 64 *NE*(2d) 325.

5.1 A person not given notice of or made a party to a proceeding to sell land to pay debts, who upon the death

of the deceased is seized with an interest in real property, is entitled to assert his interest in a partition action: *Shackelford v. Alford*, 119 App 63, 26 OO(2d) 152, 169 NE(2d) 609.

6. An heir who is made a party defendant in a proceeding to sell real estate of a decedent to pay his debts may have his disallowed claim determined in such proceeding if the cross-petition is filed within two months after disallowance: *Cooper v. Cooper*, 3 OO 431 (PC).

6.1 Actions to determine validity or amount of particular claims against an estate seeking an order to sell are not actions as delineated in this section, but rather in the nature of an action to quiet title: *Gauthier v. Land Co.*, 11 OLA 311.

6.2 The spouse of an heir need not be made a party to an action to sell real estate to pay debts: *Carmack v. Carmack*, 22 OLA 702, 7 OO 313, 3 OSU 111.

7. Although under the language of this section it appears that it is necessary to make the county treasurer a party to an action to sell real estate to pay debts, the failure to do so is not a fatal defect because the personal representative is charged with knowledge of this lien: *In re Saviers*, 23 OLA 166.

7.1 Spouses of cotenants are nonessential parties in a partition action between cotenants: *Dunkle v. Dunkle*, 73 OLA 477, 2 OO(2d) 399, 137 NE(2d) 170.

DECISIONS UNDER FORMER GC § 10780

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Jurisdiction

1. In whichever court the action is brought, the rights of the several parties may be determined by such court: *Tidd v. Bloch*, 4 CC(NS) 216, 16 CD 113.

Parties

2. Persons in interest, though not named in the petition, if they enter an appearance, are properly parties on the record: *Ewing v. Hollister*, 7 O 138.

3. Where an executor, under order of court, sells real estate without making deceased's former wife, divorced because of his aggression, a party to the suit, and the wife later has dower assigned her, the purchaser of the lands cannot recover back from the executor sufficient of the purchase money to compensate him for such assignment of dower. *Caveat emptor* applies: *Arnold v. Donaldson*, 46 OS 73, 18 NE 540.

4. Prior to 1858 a mortgagee was not a necessary party to the action: *Defrees v. Greenham*, 11 OS 486.

5. All persons claiming an interest should be made parties: *Doan v. Bitely*, 49 OS 588, 32 NE 600 [affirming *Bitely v. Doan*, 4 CC 7, 2 CD 388]; see also *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

6. A mortgagor who has parted with his title to land mortgaged, and is not in possession thereof, is not a necessary party to a proceeding brought by the executor of the purchaser to obtain an order to sell the land for the payment of debts: *Denison University v. Manning*, 65 OS 138, 61 NE 706.

7. A party loaning money to an executor and taking the executor's note as evidence of such loan, is not a necessary or even a proper party: *Smith v. Hayward*, 5 NP 501, 5 OD 462.

8. In an action by an administrator to sell realty to pay debts (former GC § 10780 [see now RC § 2127.12]), all lienholders are necessary parties; and this includes a lien acquired upon the share of an heir at law after death of the ancestor and before filing of the petition: *Keenan v. Wilson*, 19 App 499.

9. Contra: *Kummer v. Lake*, 1 NP(NS) 209, 13 OD 491, 25 Bull 102.

10. In petition to sell lands fraudulently conveyed. Held: That the defrauded creditors could not be joined: *Webster v. Ballard*, 2 ClevLRep 137.

11. A judgment creditor of an heir who obtained a levy on real estate and a grantee of a devisee are necessary parties in a will contest case: *Bloor v. Platt*, 78 OS 46, 84 NE 604; *Sears v. Stinehelper*, 89 OS 163, 105 NE 1047.

12. It is not enough to make the guardian of a person under disability a party. The person under disability should be made a party, individually: *Burns v. Burns*, 20 NP(NS) 116, 27 OD 510.

13. It would be advisable to make the guardian a party also: *Stuard v. Porter*, 79 OS 1, 85 NE 1062.

14. A person who has a judgment lien at the time of the death of the owner of the property need not issue execution within five years in order to be a necessary party: *Webster v. Dennis*, 4 CC 313, 2 CD 567.

15. An action for the determination of the validity and amount of certain claims against the estate of a testator, and asking for an order to sell under the terms of a will, is not such an action as is referred to in former GC § 10780 (see now RC § 2127.12), but is more in the nature of an action to quiet title, and a judgment creditor of a devisee is not a necessary party to such an action: *Bewaster v. Franck*, 11 OLA 171.

Omission of necessary parties

16. An administrator's sale under order of court, since 1824, without showing that the heirs were parties to the proceeding, is void: *Adams v. Jeffries*, 12 O 253.

17. Where intestate left four children, only three of whom were named as defendants in the petition to sell land, but the guardian ad litem appeared and acknowledged an appearance as such guardian, the order of sale was not void: *Snevely v. Lowe*, 18 O 368.

18. The lien of a mortgagee who is not made a party to the petition remains unaffected by the order of sale and the proceedings thereunder: *Holloway v. Stuart*, 19 OS 472.

19. Under the amendment of 1858, the lien of a mortgagee who is not made a party thereto remains unaffected by the order of sale and the proceedings thereunder: *Holloway v. Stuart*, 19 OS 472.

20. To render the sale of lands by an administrator good, the heirs must have been made defendants: *Sprague v. Litherberry*, FedCas No.13251, 2 OFD 574.

§ 2127.13 Necessary parties in sale by guardian. (GC § 10510-16)

In an action by a guardian to obtain authority to sell the real estate of his ward the following persons shall be made parties defendant:

(A) The ward;

(B) The spouse of the ward;

(C) All persons entitled to the next estate of inheritance from the ward in such real estate who are known to reside in Ohio, but their spouses need not be made parties defendant;

(D) All lienholders whose claims affect such real estate or any part thereof;

(E) If the interest subject to such sale is equitable, all persons holding legal title thereto or any part thereof;

(F) All other persons having an interest in such real estate, other than creditors.

HISTORY: GC § 10510-16; 114 v 320 (454); 119 v 394 (418); 120 v 284, § 1. Eff 10-1-53.

Comment

Subsection (C) includes persons entitled to the next estate of inheritance who are known to reside in the state of Ohio. Subsection (C), previously subsection (3) of GC § 10510-16, prior to the 1941 amendment was limited to persons who resided in the county where the action was brought.

In preparing the petition, it is always advisable to check the application for letters of guardianship for the next of kin, if given, and for the spelling of the name of the ward and next of kin, if given. The name of the ward should appear in the petition exactly as he took title to the property in the deed. If he took title by inheritance, his name should appear exactly as it appears in the application for letters or in the will of the estate through which he acquired title. Any difference in the spelling of the name should be explained in the petition.

The 1943 amendment to GC § 10510-16 changed the section to the effect that the spouse of each of the parties defendant named in subdivision (C), formerly subdivision (3), thereof need not be made a party defendant.

Forms

1 A&H Probate FORM 2127.13a et seq.

Research Aids

Parties:

O-Jur2d: Guardian and Ward § 169

Am-Jur2d: Guardian and Ward § 131

CASE NOTES AND OAG

See also case notes under RC § 2127.12.

1. Persons in interest, though not named in the petition, if they enter an appearance, are properly parties on the record: *Ewing v. Hollister*, 7 O 138.

§ 2127.14 Service of summons. (GC § 10510-17)

Service of summons, actual or constructive, in an action to sell the real estate of a decedent or a ward shall be had as in other civil actions, but if any competent person in interest enters appearance or consents in writing to the sale, service on such person shall not be necessary. If all parties consent in writing to the sale, an order therefor may issue forthwith.

HISTORY: GC § 10510-17; 114 v 320 (454). Eff 10-1-53.

Comment

The principal change made by the 1931 amendment to GC § 10510-17 was the dropping of the provision of former GC § 10781 and also of former GC § 10947, that summons may be served by the plaintiff or other person by copy personally. Except as to persons under disability, all service of summons in probate court shall be in the same manner as in common pleas court. See RC § 2101.29.

Forms

1 A&H Probate FORM 2127.14a et seq.

Research Aids

Applicability of Civil Rules as to service:

O-Jur2d: Executors and Administrators § 19.3 et seq.; Wills § 222.3 et seq.

Process:

O-Jur2d: Executors and Administrators § 444; Guardian and Ward § 172

Am-Jur2d: Executors and Administrators § 362 et seq.; Guardian and Ward § 131

Ohio Rules

See Staff Note to Civil Rule 73(A), Civil Rules volume to Page's Ohio Revised Code.

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1. Under the act of 1824, guardians could appear for minors not named in the petition: *Ewing v. Higby*, 7 O (pt1) 198; *Ewing v. Hollister*, 7 O (pt2) 138.

2. Persons in interest, though not named in the petition, are properly parties on the record if they enter an appearance: *Ewing v. Hollister*, 7 O (pt2) 138.

3. Before a valid decree can be made, it must affirmatively appear that the minor defendants have been served: *Moore v. Starks*, 1 OS 369.

4. Constructive service in a mortgage foreclosure action may be made on a nonresident lunatic: *Sturges v. Longworth*, 1 OS 544.

5. Where the record recites that it was "shown to the court that due notice had been given defendants," held that this amounted to a finding by the court that the notice which the law required under the circumstances had been regularly given, and that evidence would not be received to contradict this finding of the court: *Richards v. Skiff*, 8 OS 586.

6. Probate court given power by this section to award parties a trial by jury: *Doan v. Bitely*, 49 OS 588, 32 NE 600 [approved, *Wiler v. Logan Natural Gas &c. Co.*, 6 CC(NS) 206, 17 CD 257]; see also *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

7. It is not necessary that cross-petitioners whose claims are strictly confined to the matter in issue in the petition, have summons issued on their cross-petitions, but the summons issued on the petition is sufficient to sustain a judgment on the cross-petition: *Citizens Sav. &c. Co. v. Burkhart*, 17 NP(NS) 401.

8. No summons need be issued on an answer setting up a judgment against an heir: *In re Seitz*, 11 CC(NS) 204, 21 CD 32.

9. An affidavit verifying the return of service of summons made outside the state of Ohio must be made before a person authorized by the Code to take depositions: *Fitch v. Campan*, 31 OS 646.

10. A competent person may by a separate paper enter his appearance and waive the issuance of summons, or he may do some act in the proceedings that the court will construe as an entry of appearance: *Fee v. Big Sand Iron Co.*, 13 OS 563; *Evans v. Iles*, 7 OS 233; *Abernathy v. Latimore*, 19 OS 286; *Mason v. Embree*, 5 O 277; *Maholm v. Marshall*, 29 OS 611; *Watson v. Paine*, 25 OS 34; *Schafer v. Waldo*, 7 OS 309.

11. A guardian cannot enter an appearance for his ward unless authorized by statute: *Roberts v. Rob-*

erts, 61 OS 96, 55 NE 411.

12. An affidavit for service by publication made before the attorney for the plaintiff is void: *Hunt v. Hunt*, 14 NP 522, 27 OD 153.

13. Where service is made to a minor in connection with an action to sell real estate, service is made by personal delivery of copies to the minor, guardian, father, mother, or custodian as is required in each case: 1930 OAG No. 2560.

§ 2127.15 Pleadings and procedure.

All pleadings and proceedings in an action to obtain authority to sell the real estate of a decedent or a ward in the probate court shall be the same as in other civil actions, except as otherwise provided in sections 2127.01 to 2127.43 of the Revised Code.

HISTORY: GC § 10510-18; 114 v 320 (455); 136 v S 145. **EFF** 1-1-76.

See former GC § 10781.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.15 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

All pleadings that may be filed in an action to sell real estate are governed entirely by the code of civil procedure. Matters of defense are set up by answer, or the petition is demurred to, or other defects taken advantage of by motion. If a mortgagee or judgment creditor or any lienholder wishes to be found to have a lien, he should file an answer which may be styled an answer and cross-petition. A person is not in default until the expiration of the third Saturday after the return day which is the second Monday after the summons is issued, or in the case of service by publication, until the expiration of the third Saturday after the date of the sixth publication.

Cross-References to Related Sections

Election to take five hundred dollars in lieu of a homestead may be made by answer, RC § 2127.26.

Research Aids

Applicability of Civil Rules:

O-Jur2d: Executors and Administrators § 19.1; Wills § 222.1

Pleadings and proceedings:

O-Jur2d: Executors and Administrators §§ 421, 440; Guardian and Ward §§ 161, 170, 171.

Am-Jur2d: Executors and Administrators § 358 et seq.

Ohio Rules

See Staff Note to Civil Rule 73(A), Civil Rules volume to Page's Ohio Revised Code.

CASE NOTES AND OAG

See also case notes under RC § 2127.14.

1. The probate court is given power by this section to award parties a trial by jury: *Doan v. Biteley*, 49 OS 588, 32 NE 600.

§ 2127.16 Sale to be free of dower. (GC § 10510-19)

In a sale of real estate by an executor, admin-

istrator, or guardian, such real estate shall be sold free of all right and expectancy of dower therein, but out of the proceeds of the sale, in lieu of dower, the court shall allow to the person having any dower interest in the property such sum in money as is the just and reasonable value of such dower, unless the answers of such person waives such allowance.

HISTORY: GC § 10510-19; 114 v 320 (455). **EFF** 10-1-53. See former GC § 10996.

Forms

1 A&H Probate FORM 2127.16a et seq.

Research Aids

Sale to be free of dower:

O-Jur2d: Dower §§ 57, 93, 111; Executors and Administrators § 453; Guardian and Ward §§ 171, 177

CASE NOTES AND OAG

1. A purchase money mortgage should be subtracted before figuring dower: *Nichols v. French*, 83 OS 162, 93 NE 897; contra: *Hickey v. Conine*, 71 OS 548, 74 NE 1137 [affirming, without opinion, 6 CC (NS) 321, 17 CD 369; distinguished, *Snyder v. Bickley*, 18 App 439].

2. A mortgage existing on the property at the time of the marriage should be subtracted: *King v. Alt*, 11 NP(NS) 443, 22 OD 183; *Pelton v. Smith*, 26 CC (NS) 271, 35 CD 137.

3. Where property was owned free and clear at some time during the marriage and later mortgaged, but not for the purpose of purchasing or paying off another mortgage, the value of the dower is to be computed on the entire sale price: *Kling v. Ballentine*, 40 OS 391; *Mandel v. McClave*, 46 OS 407, 22 NE 290.

4. Since a spouse need not sign a purchase money mortgage, a purchase money mortgage would be subtracted when figuring dower whether the spouse signed or not: *Welch v. Buckins*, 9 OS 331.

5. A widow must bear her share of the costs incurred in the probate court in settling her dower: *Kling v. Ballentine*, 40 OS 396.

§ 2127.17 Costs when there are objections to granting order for sale.

In an action to obtain authority to sell real estate, if a party in his answer objects to an order for the sale of real estate by an executor, administrator, or guardian, and on hearing it appears to the court that either the complaint or the objection is unreasonable, it may award costs to the party prevailing on that issue.

HISTORY: GC § 10510-20; 114 v 320 (455); 136 v S 145. **EFF** 1-1-76.

Analogous to former GC § 10792.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.17 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2127.17a et seq.

Research Aids

Costs where either complaint or objections unreasonable:

O-Jur2d: Executors and Administrators § 425;
Guardian and Ward §§ 164, 171

§ 2127.18 Equities and priorities.

Upon the hearing of an action to obtain authority to sell real estate by an executor, administrator, or guardian, if satisfied that all necessary parties defendant are properly before the court, and that the demand for relief ought to be granted, the court may determine the equities among the parties and the priorities of lien of the several lien holders on the real estate, and order a distribution of the money arising from the sale in accordance with its determination. The court may in the same cause order contributions among all parties in interest.

HISTORY: GC § 10510-21; 114 v 320 (455); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10783, 10784.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.18 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2127.18a et seq.

1 A&H Probate FORM 2127.10a et seq: Action to sell real estate.

1 A&H Probate FORM 2127.20a et seq: Sale subject to mortgage.

1 A&H Probate FORM 2127.22a et seq: Appraisalment order.

Research Aids

Determination of equities and priorities:

O-Jur2d: Executors and Administrators § 430;
Guardian and Ward § 166

ALR

Jurisdiction and power of equity to subject legacy, devise, or distributive share in estate to claim of creditor of legatee, devisee, or distributee. 123 ALR 1293.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145
AMENDMENT]

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Decree, 18

Jurisdiction, 1 et seq

Priorities, 10 et seq

Jurisdiction

1. Where the real estate is encumbered by mortgages and other liens, the court is to settle the priorities among lienholders, and order a sale free from such liens. It cannot sell same, subject to the mortgage or other liens: *Stone v. Strong*, 42 OS 53.

2. The probate court has power to decide all questions among lienholders and to decide whether the land belongs to the decedent: *Doan v. Bitely*, 49 OS 588, 32 NE 600; see also *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

3. In proceedings to sell the real estate of a decedent to pay debts, the jurisdiction of the probate court is limited by statute, former GC § 10783 (see now RC § 2127.18), and it is not authorized, on distribution of the proceeds in such proceeding, to render a personal judgment against a legatee of the estate, who has been made a party thereto: *State ex rel Voight v. Lueders*, 101 OS 211, 128 NE 70.

4. A deed executed by the deceased may be found by the probate court actually to be a mortgage; in such proceedings: *Helmbold v. Helmbold*, 25 App 32, 158 NE 499.

5. Probate courts have jurisdiction to ascertain and adjust the liens on real estate to be sold for payment of debts of deceased, to settle priorities among lienholders and to apply the proceeds of sale in satisfaction thereof, in the same manner and to the same extent as a court of equity: *Farmers' Nat. Bank v. Green*, 4 Fed 609, 4 OFD 674.

Priorities

10. A creditor having a lien on one fund only may call upon a creditor having a prior lien on the same fund, and also upon another, to exhaust that other first: *Bank of Muskingum v. Carpenter*, 7 O (pt1) 21.

11. A mortgage defectively executed is not entitled to priority over lien of general creditors: *Straman v. Rechtime*, 58 OS 443, 51 NE 44.

12. In a proceeding to sell property of a decedent to pay debts, the lien of a magistrate's judgment obtained against a party having an interest in the property as heir may be set up. Such proceeding is not one requiring the issuance of summons for the party against whom the lien was obtained, and an order claim cannot be collaterally attacked: *In re Seitz*, 11 CC(NS) 204, 24 CD 32.

13. Heirs giving new mortgages in substitution of the ancestor's mortgages, in order to prolong time of payment, may be subrogated to the priority of the original mortgages: *Jacobs v. Jacobs*, 7 OD 486.

Decree

18. Where the widow, as executrix, brings the action to sell lands, and the court placed her dower and allowance for a year's support after the payment of certain liens and decreed a sale, such order is final, and cannot be set aside and a different distribution ordered at a subsequent term, except by proceedings under GC §§ 11631 and 11643 (see now RC §§ 2325.01, 2325.13). Coming in of a new party after final order will not authorize vacation of the order on the motion of one of the original parties with whose consent such final order was entered: *Potter v. Jennman*, 4 NP 75, 5 OD 444.

§ 2127.19 Release of liens. (GC § 10510-22)

When an action to obtain authority to sell real estate is determined by the probate court, the probate judge shall make the necessary order for an entry of release and satisfaction of all mortgages and other liens upon the real estate except such mortgage as is assumed by the purchaser. The executor, administrator, or guardian shall thereupon enter such release and satisfaction, together with a memorandum of the title of the case, the character of the proceedings, and the volume and page of record where recorded, upon the record of such mortgage, judgment, or other lien in the office where it appears as matter of

record. If the executor, administrator, or guardian fails to enter such release and satisfaction, the court may, on the application of an interested party, enter such release and satisfaction and tax in his cost bill the fee provided by law for entering such release and satisfaction, and a fee of twenty-five cents to the court.

HISTORY: GC § 10510-22; 114 v 320 (455). **EFF** 10-1-53. Analogous to former GC § 10784.

Comment

The change made by the 1931 amendment to GC § 10510-22 was to provide for the fiduciary releasing and satisfying the liens on the record instead of the court. The court, however, still has authority to do so on application of an interested party in the event of the failure of the fiduciary to do it. Since it is no longer the duty of the court to enter the release and satisfaction upon the record, it seems likely that it will be neglected in many instances. The statute contemplates, however, that it should be done as a part of the duties of an administrator or executor in administering an estate.

Forms

- 1 A&H Probate FORM 2127.19a et seq.
- 1 A&H Probate FORM 2127.35a et seq: Confirmation of sale; deed.

Research Aids

Release of liens:

- O-Jur2d: Executors and Administrators § 452; Guardian and Ward § 176
- Am-Jur2d: Executors and Administrators § 350

CASE NOTES AND OAG

1. When a mortgage or lien is released or satisfied by court order under this section, and a marginal entry is made upon the records of the county recorder as required in said section, the fee to be charged for such marginal entry is that set forth in RC § 317.32 (C): 1960 OAG No.1770.

§ 2127.20 Sale subject to mortgage.

The probate court, with the consent of the mortgagee, may authorize the sale of lands subject to mortgage, but the giving of any such consent shall release the estate of the decedent or ward should a deficit later appear.

HISTORY: GC § 10510-23; 114 v 320 (456); 129 v 7 (11), § 1. **EFF** 10-5-61.

Forms

- 1 A&H Probate FORM 2127.20a et seq.
- 1 A&H Probate FORM 2127.10a et seq: Action to sell real estate.

Research Aids

Sale subject to mortgage:

- O-Jur2d: Executors and Administrators § 451; Guardian and Ward § 175

§ 2127.21 Complaint of guardian to have land laid out in town lots.

If a guardian's complaint in an action to obtain authority to sell real estate seeks to have land laid out in town lots, and the court finds it to the

advantage of the ward, it shall authorize the survey and platting of the land as provided by law. Upon subsequent return of the survey and plat, the court, if it approves it, shall authorize the guardian on behalf of his ward to sign, seal, and acknowledge the plat in that behalf for record.

HISTORY: GC § 10510-24; 114 v 320 (456); 136 v S 145. **EFF** 1-1-76.

Analogous in part to former GC §§ 10948, 10951.

Research Aids

Guardian authorized to acknowledge plat on behalf of ward:

- O-Jur2d: Acknowledgments § 10
- Petition to have land laid out in lots:
- O-Jur2d: Guardian and Ward § 174

CASE NOTES AND OAG

1. By the terms of former GC § 10991 (see now RC §§ 2109.04, 2111.13, 2111.14, 2111.26 and 2111.48), former GC § 10948 (see now RC §§ 2127.21, 2127.22) is made applicable to proceedings by a guardian of an imbecile to sell the realty of his ward: *McBride v. Bell*, 3 App 5, 22 CC(NS) 596, 25 CD 403 [affirmed, without opinion, *Case v. McBride*, 92 OS 516].

2. An action lies to set aside a sale of real estate made by a guardian if no order of appraisal is taken, and no appraisal in fact is made, and such an action may be brought by the surety on the guardian's bond without waiting indefinitely for the filing of a final account: *McBride v. Bell*, 3 App 5, 22 CC (NS) 596, 25 CD 403 [affirmed, without opinion, *Case v. McBride*, 92 OS 516].

3. An objection by an interested party to a sale, that it was made as an entirety instead of in parcels, comes too late after the sale has been made: *Hartshorne v. Reeder*, 3 DecRep 109, 3 Gaz 245.

4. The other conditions of jurisdiction being satisfied, a circuit court of the United States has jurisdiction in equity to set aside a sale of an infant's lands, fraudulently made by his guardian, under authority derived from a probate court, and may give such relief therein as is consistent with equity: *Arrowsmith v. Gleason*, 129 US 86, 32 LEd 630, 9 Sct 237, 6 OFD 310.

[APPRAISEMENT]

§ 2127.22 Appraisalment may be dispensed with; new appraisalment; appraisers.

If an appraisalment of the real estate is contained in the inventory required of an executor or administrator by section 2115.02 of the Revised Code, and of a guardian by section 2111.14 of the Revised Code, the probate court may order a sale in accordance with the appraisalment, or order a new appraisalment. If a new appraisalment is not ordered, the value set forth in the inventory shall be the appraised value of the real estate. If the court orders a new appraisalment, the value returned shall be the appraised value of the real estate.

If the interest of the deceased or ward in the real estate is fractional and undivided, and if a party requests and the court orders the entire interest in the real estate to be sold, a new ap-

praisement of the entire interest in the real estate shall be ordered.

If the relief requested is granted and new appraisal is ordered, the court shall appoint one, or on request of the executor, administrator, or guardian, not exceeding three judicious and disinterested persons of the vicinity, not next of kin of the complainant, to appraise the real estate in whole and in parcels at its true value in money. Where the real estate lies in two or more counties the court may appoint appraisers in any or all of the counties in which the real estate or a part of it is situated.

HISTORY: GC §§ 10510-25, 10510-26; 114 v 320 (456); 119 v 394 (418); 133 v S 185 (Eff 1-1-71); 136 v S 145. Eff 1-1-76.

Analogous in part to former GC §§ 10793, 10948.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.22 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Exemption of statute from execution sale, exception, RC § 2329.75.

See RC §§ 2111.30, 2127.23 to 2127.27 which refer to this section.

Forms

1 A&H Probate FORM 2127.22a et seq.

1 A&H Probate FORM 2127.20a et seq: Sale subject to mortgage.

1 A&H Probate FORM 2127.27a et seq: Additional bond before sale.

1 A&H Probate FORM 2127.23a et seq: Oath of appraisers.

Research Aids

Appointment of appraisers:

O-Jur2d: Executors and Administrators § 455; Guardian and Ward § 178

Appraisement:

O-Jur2d: Executors and Administrators § 454 et seq; Guardian and Ward § 178

Am-Jur2d: Executors and Administrators § 396

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. Where appraiser of lands to be sold by an administrator becomes a purchaser, the rule may be set aside, on application of the heir, as injected with fraud: *Armstrong v. Huston*, 8 O 552.

2. Under former GC § 10793 (see now RC § 2127.-22), where a mortgagee is made a party, and the widow asks for assignment of dower in the premises petitioned to be sold, and the mortgagee stands by and permits dower to be assigned to the widow, without resisting her claim, he is estopped from afterwards bringing an action to foreclose his mortgage upon the part of the premises in which the widow's dower was assigned: *Affleck v. Snodgrass*, 8 OS 235.

3. The heirs of a decedent cannot, after a lapse of over thirty years, have a judicial sale set aside upon the ground that the purchaser at such sale was the son of one of the appraisers, and that he purchased the land with money furnished by the father under circumstances which would raise a secret trust: *Brick-*

man v. Shale, 11 CC(NS) 41, 20 CD 372.

4. When one who was both administrator and heir has instructed the appraisers to return a low appraisal of the property of the estate in order to minimize taxes thereon, he cannot later, after the widow has elected to take a large portion of the property at its appraised value, ask for a reappraisal. The fact that the caption of the petition in error shows that one of the other heirs has since died and that the plaintiff is administrator of the estate of such heir is not sufficient to justify the setting aside of such appraisal in the absence of averments in the petition setting forth the death of such heir and the appointment of such administrator, especially if the record shows that no one filed exceptions to the appraisement within the period limited by law except such plaintiff: *Sprinkle v. Odell*, 22 CC(NS) 233, 33 CD 540 [for a former opinion in same case, see 22 CC(NS) 480, 33 CD 685, which was affirmed, without opinion, *Sprinkle v. Sprinkle*, 78 OS 404].

5. By the terms of former GC § 10991 (see now RC §§ 2109.04, 2111.13, 2111.14, 2111.26 and 2111.48), former GC § 10948 (see now RC §§ 2127.21, 2127.22) is made applicable to proceedings by a guardian of an imbecile to sell the realty of his ward: *McBride v. Bell*, 3 App 5, 22 CC(NS) 596, 25 CD 403 [affirmed, without opinion, *Case v. McBride*, 92 OS 516].

6. An action lies to set aside a sale of real estate made by a guardian if no order of appraisement is taken, and no appraisal in fact is made, and such an action may be brought by the surety on the guardian's bond without waiting indefinitely for the filing of a final account: *McBride v. Bell*, 3 App 5, 22 CC (NS) 596, 25 CD 403 [affirmed, without opinion, *Case v. McBride*, 92 OS 516].

7. An administrator has been held personally liable to the purchaser where it developed the deceased held no title: *Fisher v. Fisher*, 15 CC(NS) 273, 23 CD 525 [affirmed, without opinion, 86 OS 363, 99 NE 1126].

§ 2127.23 Oath of appraisers. (GC § 10510-27)

The appraisers appointed under section 2127.22 of the Revised Code shall take an oath truly and impartially to appraise the real estate at its fair cash value upon actual view and to perform the duties required of them by the order of the court. Such oath shall be administered by some officer authorized to administer oaths and a certificate thereof inserted in or annexed to their return. The executor, administrator, or guardian may administer the oath. The appraisement shall be signed by the appraisers, and the officer to whom issued shall make return thereof to the court for confirmation.

HISTORY: GC § 10510-27; 114 v 320 (456). Eff 10-1-53. Analogous to former GC §§ 10798, 10949.

Cross-References to Related Sections

See RC § 2111.30 which refers to this section.

Forms

1 A&H Probate FORM 2127.23a et seq.

Research Aids

Oath of appraisers:

O-Jur2d: Executors and Administrators § 456; Guardian and Ward § 178

Return of appraisement:

O-Jur2d: Executors and Administrators § 456;
Guardian and Ward § 178

CASE NOTES AND OAG

1. Appraisement must be made upon actual view: *In re Slane*, 42 Bull 89, 9 OD 830; *Mills v. Life Assn. of America*, 6 DecRep 827, 8 AmlRec 358, 7 DecRep 677, 4 Bull 935.

2. As a general rule, the market value of real estate is to be ascertained from sales either of property out of the same tract, or of property in the immediate vicinity having substantially the same surroundings and the same conditions: *Ohio Southern R. Co. v. Snyder*, 5 NP 461, 5 OD 480.

3. Where the real estate to be appraised is naked land, the appraisers should go within actual view of every part of the entire tract. If it is shown that an appraisement has been made without actual view, upon application made before the sale or confirmation of sale the court will set aside the appraisement and order a new one: *Creditors v. Search*, 2 DecRep 495, 3 WLM 319.

4. It might be advisable to have a tract appraised both as an entirety and separately in parcels or lots, and then offer it for sale in both ways, accepting that bid which will realize the most money for the estate: *Mathers v. Kinney*, 8 DecRep 516, 8 Bull 267.

5. It is proper to have land appraised as one parcel, but sold in two separate parcels, as long as the two sale prices, when added together, equal two-thirds of the appraised value of the entire tract: *Stall v. Macal-ester*, 9 O 19.

§ 2127.24 Vacancy in appraisers. (GC § 10510-28)

When a person appointed by the court under section 2127.22 of the Revised Code as an appraiser fails to discharge his duties, the probate judge on his own motion or on the motion of the executor, administrator, or guardian may appoint another appraiser.

HISTORY: GC § 10510-28; 114 v 320 (456). **EF** 10-1-53. Analogous to former GC § 10797.

Research Aids

Appointment of appraiser to fill vacancy:

O-Jur2d: Executors and Administrators § 455;
Guardian and Ward § 178

CASE NOTES AND OAG

1. It has been held in a partition action that if three appraisers acted, a report signed by two would be sufficient, the action of the majority being binding, so that no substitute appraiser would have to be appointed merely because one disagreed: *Nichols v. Balzer*, 1 CC 47, 1 CD 29. It would be better practice, however, to substitute a new appraiser or new appraisers in case a unanimous appraisal could not be reached.

§ 2127.25 Compensation of appraisers. (GC § 10510-29)

Appraisers appointed under section 2127.22 of the Revised Code shall each be paid such compensation as the court thinks proper for services performed by them.

HISTORY: GC § 10510-29; 114 v 320 (457). **EF** 10-1-53. Analogous to former GC § 10799.

Cross-References to Related Sections

The amount of appraisers' fees may be charged against the estate as part of the costs, RC § 2115.06.

Research Aids

Compensation of appraisers:

O-Jur2d: Executors and Administrators § 455;
Guardian and Ward § 178

§ 2127.26 Assignment of homestead. (GC § 10510-30)

If a deceased left a family homestead and a surviving spouse or minor children, or both, entitled to have a homestead set off, in an action brought by an executor or administrator to sell real estate, the court shall order the appraisers appointed under section 2127.22 of the Revised Code to set off and assign such homestead and to appraise the premises in whole or in parcels subject to such homestead. In lieu of such homestead, the surviving spouse or minor children may elect to waive such assignment of homestead and to receive five hundred dollars in money out of the proceeds of the sale.

HISTORY: GC § 10510-30; 114 v 320 (457); 125 v 903 (982). **EF** 10-1-53. Analogous to former GC § 10795.

Cross-References to Related Sections

This section is exception to statute exempting homestead from execution or sale under court order, RC § 2329.75.

Forms

1 A&H Probate FORM 2127.26a et seq.

1 A&H Probate FORM 2127.22a et seq: Appraisement order.

Research Aids

Assignment of homestead:

O-Jur2d: Homesteads §§ 11, 13, 56, 58, 59

ALR

Direction and will for payment of debts and expenses as subjecting exempt homesteads to their payment. 103 ALR 257.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 ALR2d 515.

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1. This section was passed by the legislature long after the passage of GC § 11732 (repealed, 114 v 320, reenacted as GC § 10509-111 which was omitted from RC, see comparative section table), and supersedes that section in so far as it is inconsistent therewith:

Barnheiser v. Barnheiser, 25 OO 388 (PC).

2. In the sale of lands by an administrator to pay debts of the estate, by virtue of this section, a widow is entitled to have set off to him a homestead or, in lieu thereof, to receive five hundred dollars from the proceeds of the sale: Barnheiser v. Barnheiser, 25 OO 388 (PC).

3. A widow cannot maintain a claim to a homestead in any property occupied by a tenant, or in which she has a fee simple title as joint owner: Stegeman v. Riede, 26 NP(NS) 221.

4. When husband and wife were joint owners, each seized in fee simple of an undivided one-half interest in realty improved by a double dwelling house, the wife, occupying one-half at the time of his death, the other half being rented, cannot claim homestead rights therein: Stegeman v. Riede, 26 NP(NS) 221.

DECISIONS UNDER FORMER GC § 10795

5. Where the dower interest of a widow, in property sought to be converted into assets, is manifest, it will be protected, although she may not have filed an answer: McDonald v. Aten, 1 OS 293.

6. The homestead right is considered as a personal privilege: Conley v. Chilcote, 25 OS 32; Schuler v. Miller, 45 OS 325, 13 NE 275.

7. If a homestead, not exceeding one thousand dollars in value, is to be set off by metes and bounds to the surviving spouse, minor child, or minor children, the premises are to be appraised subject to such homestead rights and may thus be sold: Taylor v. Thorn, 29 OS 569.

8. A former wife of decedent, divorced because of his aggressions, is dowerable of his lands: Arnold v. Donaldson, 46 OS 73, 18 NE 540.

9. A widow having separated from her husband is not entitled to an allowance in lieu of homestead: Nichols v. French, 83 OS 162, 93 NE 897.

10. Where an interest in real estate is sold to pay debts of decedent, the widow's dower is the present value of one-third of the proceeds, and is payable to her in money: Ralston Steel Car Co. v. Ralston, 112 OS 306, 147 NE 513, 39 ALR 334.

[SALE; DEED]

§ 2127.27 Additional bond before sale. (GC § 10510-31)

Upon the return and approval of the appraisal provided for by section 2127.22 of the Revised Code, the court shall require the executor, administrator, or guardian to execute a bond with two or more personal sureties, or one or more corporate sureties, whose qualifications shall be those provided by section 2109.17 of the Revised Code. Such bond shall be payable to the state in an amount which the court deems sufficient, having regard to the amount of real estate to be sold, its appraised value, the amount of the original bond given by the executor, administrator, or guardian, and the distribution to be made of the proceeds arising from the sale, and such bond shall be conditioned for the faithful discharge of his duties and the payment of, and accounting for, all moneys arising from such sale according to law. Such bond shall be additional to that given by the executor, administrator, or guardian at the time of his appointment. If the

court finds the amount of the original bond given by the executor, administrator, or guardian is sufficient, having regard for the amount of real estate to be sold, its appraised value, and the distribution to be made of the proceeds arising from the sale, the giving of additional bond may be dispensed with by order of the court. Such bond shall be given in the court from which the executor, administrator, or guardian received his appointment.

If the action to obtain authority to sell real estate is pending in another court, the latter shall proceed no further until there is filed therein a certificate from the court wherein the executor, administrator, or guardian received his appointment, under its seal, that such bond has been given or that the original bond is sufficient. This section does not prevent the court in an action to sell real estate from ordering the sale of such real estate without bond in cases where the testator had provided by his will that the executor need not give bond.

HISTORY: GC § 10510-31; 114 v 320 (457); 117 v 545, § 1; 123 v 460 (466), § 1. Eff 10-1-53. Analogous to former GC §§ 10790, 10950.

Comment

This section formerly provided that the "qualifications" should be payable to the state. The amendment made the bond payable to the state.

The section apparently was intended to give the probate court discretion as to the amount of additional bond depending on (1) the amount of the real estate to be sold; (2) its appraised value; (3) the amount of the original bond and (4) the distribution to be made of the proceeds arising from the sale; however, an additional bond cannot be dispensed with unless the original bond is found by the court to cover double the total real and personal assets of the estate. Consequently, in order to satisfy certain title companies and title lawyers, the practice has been to give an additional bond in such an amount which, when added to the original bond, would result in the total of the two bonds being double the total of the real and personal assets of the estate. For example: Should there be in an estate real estate having a value of \$50,000 and no personal property, and it is necessary to sell one parcel of real estate having a value of \$5,000, bonds totaling \$100,000 must be given. It is the committee's opinion that this created an unjust burden on the estate and served no useful purpose.

Cross-References to Related Sections

See RC §§ 2113.38, 2127.29 which refer to this section.

Comparative Legislation

Fiduciary bond for sale:

Cal.—Probate Code, § 542

Ind.—Burns' Stat, § 29-1-11-1

Mich.—MCLA, § 709.13

N.Y.—SCPA, § 1910

Pa.—Purdon's Stat, Tit. 20, § 3171

Forms

1 A&H Probate FORM 2127.27a et seq.

1 A&H Probate FORM 2127.20a et seq: Sale subject to mortgage.

Research Aids

Additional bond:

O-Jur2d: Executors and Administrators § 424;
Fiduciaries § 181; Guardian and Ward § 163

Am-Jur2d: Executors and Administrators § 376

Sureties:

O-Jur2d: Fiduciaries §§ 201, 203

ALR

Liability on bond in respect of sale of property of estate which is invalid. 106 ALR 429.

Law Review

Analysis of proposed amendments to the probate code. Address by Judge Rodney M. Love of Dayton. 22 OBar (No. 24) 366.

DECISIONS UNDER FORMER ANALOGOUS GC § 10950

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1. Prior to 90 v 293, the failure of the court to require an additional bond of the guardian before allowing the order of sale or to appoint appraisers who have proper qualifications, although it might be ground for error, did not render the proceeding void: *Mauarr v. Parrish*, 26 OS 636; *Arrowsmith v. Harmoning*, 42 OS 254; *Arrowsmith v. Gleason*, 129 US 86, 32 LED 630, 9 SCt 237, 6 OFD 310.

2. General payments by the guardian from the commingled fund are not to be presumed on account of the proceeds of the real estate to exonerate the sureties, nor are they to be prorated between this and the general bond: *McWhinney v. Swisher*, 58 OS 378, 50 NE 812.

3. Where a guardian has sold real estate and defaulted as to the proceeds and died, in an action against his bondsmen interest is to be calculated upon the amount realized on the sale with annual rests to his death, and thereafter with simple interest without such rests to the date of judgment: *Swisher v. McWhinney*, 64 OS 343, 60 NE 565.

4. Where wards own real estate in equal shares, the money realized in an action upon the special bond given on the sale of such real estate, should be equally divided among them, even though the amount due to the several wards by reason of other funds received and appropriated by the guardian may be unequal: *Swisher v. McWhinney*, 64 OS 343, 60 NE 565.

5. The sureties on the special bond are entitled to have any sum realized from an indemnity mortgage given by the guardian to the sureties of both bonds credited upon the liability in proportion to the liability upon the special bond for funds received on sale of real estate to the liability under the general bond for funds not so received: *Swisher v. McWhinney*, 64 OS 343, 60 NE 565.

6. The sureties in a general bond of a guardian under GC § 10922 (see now RC § 2109.04), and in a special bond for the sale of real estate under this section, where the funds have been commingled, are co-sureties only to the extent of the proceeds of the real estate: *Swisher v. McWhinney*, 64 OS 343, 60 NE 565.

7. Where a ward dies pending appeal of an action ordering sale of the real estate of that person, the guardianship terminates, thus mooted the action: *Becker v. Becker*, 69 OLA 414, 125 NE(2d) 563.

8. Where guardian gives an additional general bond in an action to sell realty under former GC § 10950 (see now RC § 2127.27), the amount recoverable is not limited to the sum realized from sale: *Huntington v. Globe Indem. Co.*, 27 NP(NS) 12.

9. Under an earlier form of this section an order of the probate court for the sale by a guardian of real estate of his ward, where the bond provided for in the statute is not given, although it may be erroneous, was not void: *Arrowsmith v. Gleason*, 129 US 86, 32 LED 630, 9 SCt 237, 6 OFD 310.

DECISIONS UNDER FORMER GC § 10790

10. If the sureties upon a bond given under this section and under GC § 10606 (see now RC § 2109.04) are both liable for the default of the executor, it is assumed that they are liable as co-sureties and in proportion to the respective amount of their bond: *State ex rel Hunt v. American Bonding Co.*, 16 NP (NS) 497, 23 OD 609, 58 Bull 249.

§ 2127.28 Expense of sale.

The probate court may, after notice to all parties in interest, allow a real estate commission in an action to sell real estate by an executor, administrator, or guardian, but an allowance shall be passed upon by the court prior to the sale.

The court may allow payment for certificate or abstract of title or policy of title insurance in connection with the sale of any land by an executor, administrator, or guardian.

HISTORY: GC §§ 10510-32, 10510-33; 114 v 320 (457); 136 v S 145. Eff 1-1-76.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.28 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2127.28a et seq.

Research Aids

Abstract of title and title insurance:

O-Jur2d: Executors and Administrators § 499;
Guardian and Ward § 192

Real estate commission:

O-Jur2d: Executors and Administrators § 498;
Guardian and Ward § 192

Law Review

See explanatory article in 4 OBar 435.

Practical considerations in probate practice. Address by Judge Chase M. Davies of Cincinnati. 22 OBar (No. 19) 277.

CASE NOTES AND OAG

1. An administrator, having real property of an estate to sell, may give an exclusive listing to an agent or place it for sale with a limited number of agents, subject, however, to the reservation that the

probate court must authorize the payment of the commission: *McKinley v. Beem*, 28 OLA 285.

§ 2127.29 Order of sale.

When the bond required by section 2127.27 of the Revised Code is filed and approved by the court, it shall order the sale of the real estate included in the complaint set forth in section 2127.10 of the Revised Code, or the part of the real estate it deems necessary for the interest of all parties concerned. If the complaint alleges that it is necessary to sell part of the real estate, and that by the partial sale the residue of the estate, or a specific part of it, would be greatly injured, the court, if it so finds, may order a sale of the whole estate.

HISTORY: GC § 10510-34; 114 v 320 (458); 125 v 903 (982) (Eff 10-1-53); 136 v S 145. Eff 1-1-76.

See former GC §§ 10786 to 10788, 10951.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.29 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC §§ 2127.30, 2127.32 which refer to this section.

Comparative Legislation

Hearing on petition for sale of realty:

Cal.—Probate Code, § 758

Ill.—Rev Stat, ch 3, § 20-9

Ind.—Burns' Stat, § 29-1-15-11

Mich.—MCLA, § 709.9

N.Y.—SCPA, § 1904

Pa.—Purdon's Stat, Tit. 20, § 3353

Fla.—FSA, § 733.613

Forms

1 A&H Probate FORM 2127.27a et seq: Additional bond before sale.

Research Aids

Order of sale:

O-Jur2d: Executors and Administrators § 446 et seq.; Guardian and Ward §§ 173, 174

Am-Jur2d: Executors and Administrators § 370 et seq.

Quantity of land to be sold:

O-Jur2d: Executors and Administrators § 404; Guardian and Ward § 160

Am-Jur2d: Executors and Administrators § 348

ALR

Right or duty of executor or administrator as to contest of order directing sale of real estate for payment of debt. 126 ALR 903.

DECISIONS UNDER FORMER GC § 10786

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Construction

1. To be strictly construed: *Kummer v. Lake*, 1 NP(NS) 209, 13 OD 491.

Order of sale

2. An order of court, made after its jurisdiction is exhausted, cannot be cured by entering the order nunc pro tunc as of a prior date: *Ludlow v. Johnston*, 3 O 553.

3. Where all the land sale proceedings were regular except that they showed no order of the court confirming the sale which the court had ordered and the administrator had made and reported, such error in not confirming the sale may be corrected by a nunc pro tunc entry: *Jacks v. Adamson*, 56 OS 397, 47 NE 48, 60 AmSt 749.

4. An order of court authorizing administrators to sell the real estate of their intestate, made subsequent to the sale, cannot be given in evidence to sustain such sale: *Ludlow v. Park*, 4 O 5; *Leiby v. Park*, 4 O 469.

5. Where decedent's lands are sold by executors or administrators, the record must show an order of sale by the court, or the sale is void: *Goforth v. Longworth*, 4 O 129.

7. The order for sale cannot be made on the joint petition of the executor and guardian to maintain the children and improve the property: *Newcomb v. Smith*, 5 O 447.

8. Power of administrator to sell lands of intestate is entirely statutory. Though an order be made for the carrying of the law into effect, yet if the statute be repealed before the order is executed, its effect is at an end and no valid sale can be effected: *Ludlow v. Wade*, 5 O 494.

9. Administrator can sell real estate only upon order of the court, after it has ascertained the necessity of such sale: *Avery v. Pugh*, 9 O 67.

10. The power to order the real estate to be sold by necessary implication includes the power to decide whether the land was the property of the deceased: *Doan v. Bitely*, 49 OS 588, 32 NE 600; see, also, *Levy v. Ginn*, 61 OS 644, 57 NE 1133.

11. The court may refuse to order a sale on application of the administrator to pay a mortgage debt, if the mortgagee and heirs object and the heirs have a substantial equity of redemption: *In re Marhoover*, 22 NP(NS) 46, 30 OD 6 [affirmed by court of appeals].

12. An order of sale is essential to a title under an administrator's deed; it should be made by the court, and evidenced by record on the journals. A petition to sell, with "allowed" written upon it by an associate judge, is no such order of sale. If the minutes show no order, the court cannot presume one to have been made and lost: *Newcomb v. Smith*, W 208.

13. Where administrators were ordered by the court to sell real estate under the statute, and before the sale was made the law was repealed, the power of the administrators to sell terminated: *Bank of Hamilton v. Dudley*, 27 US(2 Pet) 492, 7 LEd 496, 1 OFD 233.

Effect of order

14. However, a sale will not be set aside for a slight error in description of realty, when it can be corrected on purchaser's motion for confirmation:

Watson v. Watson, 24 App 45, 156 NE 241.

15. An order of sale made upon the application of a fiduciary is in the nature of a judgment and cannot be collaterally impeached for mere errors or irregularities, if the court making the orders had jurisdiction of the subject matter and of the parties: *In re Hess*, 14 CC(NS) 463, 23 CD 449.

16. Whether an order for sale of decedent's real estate was made in a proper case and upon sufficient proof, cannot be collaterally examined where the court making it had jurisdiction: *Ludlow v. Johnston*, 3 O 553.

17. A bill in chancery will not lie to set aside a sale made by an administrator, claiming that the same is void because made without any order of sale of the court of common pleas, the sale in such case being void, and there being adequate remedy at law: *Mawhorter v. Armstrong*, 16 O 188.

18. The order of sale will not be reversed for want of a journal entry showing that the facts stated in the petition were found to be true. In such a case, the reviewing court will presume that the judgment was founded on proper proof: *Sidener v. Hawes*, 37 OS 532.

19. Where an order has issued out of the probate court, directing an executor to sell lands to pay debts of the estate, the executor may maintain an action to recover damages for the wrongful destruction of the market value of such premises, where it appears that rights of creditors will be prejudiced thereby: *Clark v. McClain Fire Brick Co.*, 100 OS 110, 125 NE 877.

Error and appeal

20. Proceedings by administrators for the sale of real estate may be reviewed in the upper courts: *Ewing v. Hollister*, 7 O 138.

21. No appeal can be taken from an order for the sale of land to pay debts: *Steinbarger v. Steinbarger*, 19 O 106.

21.1 Where a ward dies pending appeal of an action ordering sale of the real estate of that person, the guardianship terminates, thus mooted the action: *Becker v. Becker*, 69 OLA 414, 125 NE(2d) 563.

DECISIONS UNDER FORMER GC § 10787

22. Purchase money paid to an administrator upon sale of intestate's lands cannot be recovered of the heir where the sale is operative and the heirs recover the land: *Nowler v. Coit*, 1 O 519.

23. A purchaser who loses a title which depends on an administrator's sale can set up no equity on the estate of the decedent by reason of appropriation of his purchase money to the debts of the decedent: *Salmond v. Price*, 13 O 368.

24. One who goes into possession of premises, purchased at an administrator's sale of lands to pay a decedent's debts, is liable for the value of the use of the premises, if the sale is afterwards set aside: *Christ v. Lay*, 16 CC(NS) 38, 27 CD 312 [affirmed, without opinion, *Lay v. Christ*, 82 OS 417].

DECISIONS UNDER FORMER GC § 10788

25. If the mortgagee has not presented his claim to the executor, and is not asking for sale or foreclosure of the mortgaged premises and same is amply sufficient in value to secure the mortgaged indebtedness and the heirs have a considerable interest in said real estate over and above the mortgage debt, the court may find that it is not necessary for the sale by the administrator of the real estate to pay said mortgage indebtedness: *In re Marhooover*, 22 NP(NS) 46, 30 OD 6 [affirmed by court of appeals].

DECISIONS UNDER FORMER GC § 10951

26. The other conditions of jurisdiction being satisfied, a circuit court of the United States has jurisdiction in equity to set aside a sale of an infant's lands, fraudulently made by his guardian, under authority derived from a probate court, and may give such relief therein as is consistent with equity: *Arrowsmith v. Gleason*, 129 US 86, 32 LEd 630, 9 S Ct 237, 6 OFD 310.

§ 2127.30 Order of sale when an equitable estate is included. (GC § 10510-35)

If the order of sale set forth in section 2127.29 of the Revised Code includes real estate in which the ward or the estate has an equitable interest only, the court may make an order for the appraisal and sale of such equitable estate free from dower, for the indemnity of the estate against any claim for purchase money, and for payment of the value of such dower in money, as the court deems equitable, having regard for the rights of all parties in interest.

HISTORY: GC § 10510-35; 114 v 320 (458). Eff 10-1-53. Analogous to former GC §§ 10810, 10811.

Research Aids

Assignment of dower:

O-Jur2d: Dower § 111

Order of sale—when equitable interest is included:

O-Jur2d: Executors and Administrators § 448; Guardian and Ward § 174

CASE NOTES AND OAG

See also case notes under RC § 2127.07.

1. When an administrator makes a beneficial arrangement to rescind an unexecuted contract of the intestate for the purchase of land a court of equity will not interfere to aid the heirs to revive and enforce the rescinded contract: *Howard v. Babcock*, O (pt 2) 73.

2. A perfect equity in lands held by an intestate passes to the heirs and may be sold by the personal representative for the payment of the debts of the estate: *Avery v. Dufrees*, 9 O 145.

3. As a general rule, the personal representative of the estate may, in his own discretion, perform or rescind any personal contract of his intestate imposing an obligation on him, as may be for the best interests of the estate, but subject to the approval of the court: *Gray v. Hawkins*, 8 OS 449.

4. A conveyance in trust, with a proviso for reconveyance, is an equitable estate, which may be sold by the personal representative of the decedent under this section: *Biggs v. Bickel*, 12 OS 49.

§ 2127.31 Persons interested may give bond to prevent sale.

An order to sell the real estate of a deceased person shall not be granted in an action by an executor or administrator, if after the action is commenced and before the order of sale is granted, any person interested in the estate gives bond to the executor or administrator in a sum with sureties approved by the probate court, conditioned to pay all debts and legacies found due from the estate, the charges of administration,

and the allowance in money to the surviving spouse, so far as the personal estate of the deceased is insufficient. If the bond is not given until after the order of sale is granted, and the executor or administrator in reliance on the bond abates the action, the bond shall be binding upon the obligors, and may be enforced as though given prior to the granting of the order of sale.

HISTORY: GC § 10510-36; 114 v 320 (458); 136 v S 145. **EFF** 1-1-76.

Analogous to former GC § 10785.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.31 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Ancillary administrator not to sell, when, RC § 2129.16.

Forms

1 A&H Probate FORM 2127.31a et seq.

Research Aids

Bond given to prevent sale:

O-Jur2d: Executors and Administrators § 420;
Partition § 56

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. The heirs at law can prevent a sale of real estate to pay debts, and have partition, only by giving bond for the payment of debts as provided in the above section: *Stout v. Stout*, 82 OS 358, 92 NE 465, 137 AmSt 785.

1.1 An item in a will stating "I give, devise and bequeath to," certain named persons "the monies realized from sale of 1159 Dennison Ave. and 1097 and 1099 16th Ave.," is a bequest of monies realized from the sale of the described real estate and not the real estate itself, and when executrix holds such real estate for several months and then, pursuant to the implied authority and direction of the will, sells the real estate and distributes the proceeds among the persons named, without interposition of any of such legatees to assert any other or different right than his proportionate share of the monies so realized, the rents received by executrix during the months she held the property does not pass to the named legatees, since such rents are no part of the monies realized from the sale of the described real estate: *In re Anderson*, 74 OLA 549 (App).

2. This section which provides for the giving of a bond conditioned to pay all debts and charges of administration, including compensation to counsel, applies only to land sale proceedings brought for the purpose of paying debts of the deceased under GC § 10510-2 (RC § 2127.02), or legacies under GC § 10510-3 (RC § 2127.03). It does not apply to an action brought under GC § 5336 (RC § 5731.17): *Kingrey v. Oldfather*, 10 OO 524 (PC).

3. If the heirs furnish the administrator with money sufficient to pay debts of deceased, in order to save the real estate from being sold, he must account for such money as assets: *Campbell v. McCormick*, 1 CC 504, 1 CD 281.

4. A widow is sufficiently interested in her deceased husband's estate, to entitle her, in connection with one or more of the heirs thereof, to give bond to obviate a sale of real estate to pay debts. In such case the widow is not a volunteer, but is subrogated to the rights of the administrator: *Corey v. Hayes*, 13 CC 185, 7 CD 272.

5. Partition of a deceased's real estate cannot be had within one year after his death unless it is averred and proved (1) that there is sufficient to pay deceased's debts, (2) that the debts are paid, or (3) that the debts are secured as provided in this section: *Smith v. Montag*, 32 Bull 153, 1 OD 224; *Swihart v. Swihart*, 7 CC 338, 4 CD 624.

§ 2127.32 Public or private sale.

The real estate included in the court's order of sale, as provided in section 2127.29 of the Revised Code, shall be sold either in whole or in parcels at public auction at the door of the courthouse in the county in which the order of sale was granted, or at another place, as the court directs, and the order shall fix the place, day, and hour of sale. If it appears to be more for the interest of the ward or the estate to sell the real estate at private sale, the court may authorize the complainant to sell it either in whole or in parcels. If an order for private sale is issued, it shall be returned by the complainant. Upon motion and showing of a person interested in the proceeds of the sale, filed after thirty days from the date of the order, the court may require the complainant to return the order, if the premises have not been sold. Thereupon, the court may order the real estate to be sold at public sale.

If upon showing of any person interested, the court finds that it will be to the interest of the ward or the estate, it may order a reappraisal and sale in parcels.

If the sale is to be public, the executor, administrator, or guardian must give notice of the time and place of the sale by advertisement at least three weeks successively in some newspaper printed in the county where the lands are situated.

HISTORY: GC §§ 10510-37, 10510-38; 114 v 320 (458); 136 v S 145. **EFF** 1-1-76.

Analogous to former GC §§ 10803, 10951, 10800.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.32 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

See RC § 2127.33 which refers to this section.

Comparative Legislation

Notice of sale of realty:

Cal.—Probate Code, § 780

Ill.—Rev Stat, ch 3, § 20-5

Ind.—Burns' Stat, § 29-1-15-15

Mich.—MCLA, § 709.20

N.Y.—SCPA, § 1907

Pa.—Purdon's Stat, Tit. 20, § 3353

Forms

1 A&H Probate FORM 2127.32a et seq.

1 A&H Probate FORM 2127.20a et seq: Sale subject to mortgage.

Research Aids**Manner of sale:**

O-Jur2d: Executors and Administrators § 460 et seq.; Guardian and Ward § 181 et seq.

Am-Jur2d: Executors and Administrators § 378 et seq.

Return where private sale ordered:

O-Jur2d: Executors and Administrators § 458; Guardian and Ward § 180

Time and place of sale:

O-Jur2d: Executors and Administrators § 448; Guardian and Ward § 174

Am-Jur2d: Executors and Administrators § 379

ALR

What constitutes public sale. 4 ALR2d 575.

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

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Change of law

1. Where an order of sale was granted under the act of 1795, and the sale made after the repeal of that act by the act of 1805, such sale conferred no title upon the purchaser: *Perry v. Clarkson*, 16 O 571.

Jurisdiction

6. The other conditions of jurisdiction being satisfied, a circuit court of the United States has jurisdiction in equity to set aside a sale of an infant's lands, fraudulently made by his guardian, under authority derived from a probate court, and may give such relief therein as is consistent with equity: *Arrowsmith v. Gleason*, 129 US 86, 32 LEd 630, 9 SCt 237, 6 OFD 310.

Sale of part of land

11. It will not affect the title of the purchaser if the whole tract was ordered sold and sale made of only a part: *Ewing v. Higby*, 7 O (pt 1) 198.

12. An executor or administrator may, at his discretion, sell in parcels a tract that is ordered sold entire, but he is responsible for the exercise of this discretion: *Stall v. Macalester*, 9 O 19.

Place of sale

17. The provision as to where the sale shall be made is directory only, and not mandatory; and where the order of sale is silent as to the place where the sale shall be made, and the executor sells the property at auction on the premises, the purchaser takes good title: *Smiley v. Cook*, 8 NP(NS) 191, 52 Bull 156, 4 OLR 737 [affirmed, without report, *Caito v. Smiley*, 79 OS 452].

18. In conducting a judicial sale of land at auction, an administrator may employ an auctioneer and pay the fee from the assets provided the auctioneer is approved by the court and such auctioneer is licensed. 1957 OAG No. 969.

Purchaser

22. Purchase by an administrator or executor at his own sale may be set aside whether the property is held by him or any purchaser from him with notice: *Sheldon v. Newton*, 3 OS 494.

23. An administrator who buys land at his own sale will be held to have purchased in trust for the heirs. If he has sold the land to a third person, the vendor will be held to account to the heirs for its value at the time of its original purchase, or otherwise, as the case may be: *Glass v. Greathouse*, 20 O 503.

24. Every person to whose integrity and judgment is committed the execution of any step necessary in making the sale will be excluded from purchasing thereat. So, the purchase of an appraiser, though without fraud and at full price, will be set aside by the court after confirmation at the instance of the heirs: *Armstrong v. Huston*, 8 O 552.

25. Appraisers cannot purchase at administrator's sale: *Bohart v. Atkinson*, 14 O 228.

26. Where an infant purchases land at an administrator's sale for the administrator, and immediately conveys to the latter, he cannot disaffirm such sale on coming of age, as though the land belonged to him: *Sheldon v. Newton*, 3 OS 494.

27. The administrator's fiduciary relation to the land does not terminate when the land is struck off and sold at public auction, but continues until the title of the purchaser becomes perfect by the payment of the purchase money and the delivery of the deed of conveyance, whereby the title passes from the heirs of the estate, unencumbered by any charges in favor of the administrator or the estate arising out of the sale: *Barrington v. Alexander*, 6 OS 189.

28. Where an administrator has enjoyed the use and occupancy of real estate under color of title acquired through a sale to himself, and for that reason void as to the heirs of the estate which he represents, an account of rents received or chargeable to him, and of improvements made by such administrator, will be ordered to be taken when such sale is set aside; and out of the proceeds realized from a subsequent sale, he will be paid any balance due him, and the remainder will go to the representatives of the estate: *Barrington v. Alexander*, 6 OS 189.

29. To guard against the uncertainty and hazard involved in the attempt to prove unfairness in the personal representative of the estate, the rule will, in such case, permit the cestuis que trustent to come into court at their option, and without showing actual fraud or injury, insist, as a matter of course, upon having the property resold: *Barrington v. Alexander*, 6 OS 189.

30. If an appraiser buys the land at the sale, such transaction is voidable only, not void: *Terrill v. Auchauer*, 14 OS 80.

31. Where the administrator procured a party to buy the land at two-thirds its appraised value, there being no other person present at the sale, and this party, with the administrator's consent, immediately conveyed the land in trust for the use of the administrator's wife and children, the transaction is fraudulent and void on its face, in the absence of clear and satisfactory explanation: *Riddle v. Roll*, 24 OS 572.

32. Administrator cannot directly or indirectly be interested as a purchaser at his own sale of lands

of the intestate, neither can he act as agent of others: *Piatt v. Longworth*, 27 OS 159.

33. Purchase of the land by the administrator from the purchaser at the sale upon consideration of the assumption of the latter's obligation to pay for the lands the sum bid, and release him from such payment, is void and the lands are still unadministered: *Caldwell v. Caldwell*, 45 OS 512, 15 NE 297.

34. A beneficiary of an estate may apply to the common pleas court for an order setting aside a sale to the administrator: *Caldwell v. Caldwell*, 45 OS 512, 15 NE 512.

35. Unless authorized by the will or by order of court, the executor cannot bind decedent's estate by a verbal promise to indemnify the purchaser against encumbrances or defects in title: *Arnold v. Donaldson*, 46 OS 73, 18 NE 540.

36. If the executor, in bad faith, sells the lands for a price that is manifestly less than their true value, he should be charged with the difference between that price and the true value: *Brown v. Reed*, 56 OS 264, 46 NE 982, 37 Bull 324.

37. Where lands are sold by an executor at private sale for less than the full value, he must nevertheless account for the full value: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354.

38. The statements and representations made by the administrator at the time of the sale bind the estate only as to such matters as are prescribed in the order, or concerning which he has discretionary power: *Dunlap v. Robinson*, 12 OS 530.

39. If the administrator misleads purchasers by false statements which he is not authorized to make, or in respect of matters lying beyond the scope of his discretion, he may make himself personally liable thereby, but not the estate: *Westfall v. Dungan*, 14 OS 276; *Arnold v. Donaldson*, 46 OS 73, 18 NE 540; *Fisher v. Fisher*, 15 CC(NS) 273, 23 CD 525 [affirmed, without opinion, 86 OS 365, 99 NE 1126].

40. General Code § 11696 (RC § 2329.39) forbids an appraiser or an officer making sale on execution from becoming a purchaser: *Hurst v. Fisher*, 46 Bull 19.

41. A long line of authorities establish the principle that a person acting as a trustee of any kind, cannot either directly or indirectly purchase the property he holds in trust, and that if he becomes interested in the purchase of such property the beneficiaries may have the purchase set aside. This principle has been applied, in the following cases, to purchasers by various trustees, in Ohio, such as executors, administrators, guardians, etc.: *Welsh v. Perkins*, 8 O 52, 56; *Armstrong v. Huston*, 8 O 552, 554; *Dunlap v. Mitchell*, 10 OO 117; *Glass v. Greathouse*, 20 O 503; *Sheldon v. Newton*, 3 OS 494; *Barrington v. Alexander*, 6 OS 189; *Riddle v. Roll*, 24 OS 572; *Piatt v. Longworth*, 27 OS 159; *Rammelsberg v. Mitchell*, 29 OS 22; *Beard v. Westerman*, 32 OS 29. Contra; does not apply to partition sales: *Bohart v. Atkinson*, 14 O 228.

42. If the sale is set aside when the executor purchases, he may credit himself for money paid out for taxes, repairs and improvements: *In re Wilds*, 50 Bull 384.

43. If an executor purchases it will be presumed fraudulent and the court will set sale aside on application of a party interested: *Barrington v. Alexander*, 6 OS 189. See *Sheldon v. Newton*, 3 OS 494; *Glass v. Greathouse*, 20 O 503; *Riddle v. Roll*, 24 OS 572; *Piatt v. Longworth*, 27 OS 159; *Caldwell v. Caldwell*, 45 OS 512, 15 NE 297.

44. By virtue of the provisions of GC § 11235 (RC § 2305.21), a cause of action for the fraudulent purchase by an executor of the property of the estate,

survived the death of such executor: *Carroll v. Kennison*, 14 App 133 [motion to certify record overruled, *Kennison v. Carroll*, 19 OLR 83].

45. In an action against an administrator for fraud in purchasing realty of the estate at his own sale, the measure of damages is said to be the value of the property together with the income which he has misappropriated: *Carroll v. Kennison*, 14 App 133 [motion to certify record overruled, *Kennison v. Carroll*, 19 OLR 83].

Legal notice

51. The title of a purchaser at an administrator's sale will be sustained, although the legal notice may not have been given, and the same protection must be given to those who have purchased at a guardian's sale: *Stall v. Macalester*, 9 O 19.

52. If the court is satisfied that the notice was published in a paper not of general circulation in the county, it may refuse to confirm the sale: *Craig v. Fox*, 16 O 563.

53. Where, in a proceeding by an administrator to sell land for the payment of debts, a public sale was ordered by the court, held and confirmed, and the purchaser received his deed, such sale will not be set aside on exceptions thereafter filed on the ground that GC § 10510-38 (RC § 2127.32) was not complied with, in that twenty-eight days had not elapsed from the first publication of notice to the date of sale: *Richcreek v. Clark*, 64 App 305, 18 OO 118, 28 NE (2d) 670.

54. The notice might be made in a Sunday paper: *Hastings v. Columbus*, 42 OS 585; *State v. Thomas*, 61 OS 444, 56 NE 276.

55. Where there is only one publication to be made in a newspaper, the statute means an English newspaper: *Cincinnati v. Bickett*, 26 OS 49; *In re Ringwald*, 5 NP 496, 5 OD 452.

56. Where the order of sale directed the sale to be held according to law, but the notice of sale showed that the sale was held on the premises, instead of at the courthouse, the sale was held to be valid: *Smiley v. Cook*, 8 NP(NS) 191, 4 OLR 737, 52 Bull 156.

§ 2127.33 Price at which real estate may be sold. (GC § 10510-39)

Where the sale authorized by a court as provided in section 2127.32 of the Revised Code, is private, the real estate shall not be sold for less than the appraised value. When the sale is at public auction the real estate if improved shall not be sold for less than two thirds of the appraised value, or if not improved, for less than one half of the appraised value. In private sales if no sale has been effected after one bona fide effort to sell under this section, or if in public sales the land remains unsold for want of bidders when offered pursuant to advertisement, the court may fix the price for which such real estate may be sold or may set aside the appraisement and order a new appraisement. If such new appraisement does not exceed five hundred dollars, and upon the first offer thereunder at public sale there are no bids, then upon the motion of any party interested the court may order the real estate to be readvertised and sold at public auction to the highest bidder.

HISTORY: GC § 10510-39; 114 v 320 (459); 126 v 903 (982). Eff 10-1-53. See former GC §§ 10802, 10803, 10951.

Forms

1 A&H Probate FORM 2127.33a et seq.
1 A&H Probate FORM 2127.27a et seq: Additional bond before sale.

Research Aids

Price at which realty may be sold:

O-Jur2d: Executors and Administrators § 467;
Guardian and Ward § 184

Am-Jur2d: Executors and Administrators §§ 380, 381.

CASE NOTES AND OAG

1. The confirmation or approval of the sale by the court is the judicial ascertainment of its validity and legality, and the decree so made cannot be questioned thereafter in any collateral proceeding: *Pierson v. Merritt*, 4 OO(2d) 425, 134 NE(2d) 591 (CP).

2. A sale of land for less than the appraisement is cured by the decree of confirmation: *Pierson v. Merritt*, 4 OO(2d) 425, 134 NE(2d) 591 (CP).

3. A sale by an administrator to his wife at two-thirds of value can be held voidable under the facts of the record: *Gahana Bank v. Miesse*, 41 App 316, 11 OLA 26, 181 NE 31.

DECISIONS UNDER FORMER GC § 10803

See also case note 22 et seq under RC § 2127.32.

1. Where an order of sale was granted under the act of 1795, and the sale made after the repeal of that act by the act of 1805, such sale conferred no title upon the purchaser: *Perry v. Clarkson*, 16 O 571.

2. It will not affect the title of the purchaser if the whole tract was ordered sold and sale made of only a part: *Ewing v. Higby*, 7 O (pt1) 198.

3. An executor or administrator may, at his discretion, sell in parcels a tract that is ordered sold entire, but he is responsible for the exercise of this discretion: *Stall v. Macalester*, 9 O 19.

4. The provision as to where the sale shall be made is directory only, and not mandatory; and where the order of sale is silent as to the place where the sale shall be made, and the executor sells the property at auction on the premises, the purchaser takes good title: *Smiley v. Cook*, 8 NP(NS) 191, 52 Bull 156, 4 OLR 737 [affirmed, without report, *Caio v. Smiley*, 79 OS 452].

§ 2127.34 Terms of sale.

The order for the sale of real estate, granted by the probate court in an action by an executor, administrator, or guardian, shall prescribe the terms of the sale, and payment of the purchase money, either in whole or in part, for cash, or on deferred payments. In the sales by executors or administrators, deferred payments shall not exceed two years with interest.

HISTORY: GC § 10510-40; 114 v 320 (459); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10786, 10803, 10951.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.34 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2127.27a et seq: Additional bond before sale.

Research Aids

Terms of sale:

O-Jur2d: Executors and Administrators § 466;
Guardian and Ward § 183

Am-Jur2d: Executors and Administrators §§ 370, 382

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

See in case notes to RC § 2127.29, decisions under former GC § 10786; in case notes to RC § 2127.33, decisions under former GC § 10803.

1. The probate court, under this section, is without power to order or confirm a sale of real estate by an executor, where the terms of such sale were part cash and the balance other real and personal property: *Binns v. Isabel*, 72 App 222, 27 OO 87, 51 NE(2d) 501 [affirming 39 OLA 225 (CP)].

2. The word "sale" as employed in GC §§ 10510-2 and 10510-34 (RC §§ 2127.02 and 2127.29), by virtue of this section and GC § 10510-42 (RC § 2127.36), means a sale for cash in hand, or on deferred payments not exceeding two years, with interest, and the above sections apply equally well to the general statute, GC § 10501-53, par. 8 [RC § 2101.24, par. (H)], which gives the probate court jurisdiction to authorize the sale of lands: *Binns v. Isabel*, 39 OLA 225, 12 OSupp 113 (CP) [affirmed, 72 App 222].

§ 2127.35 Confirmation of sale; deed.

An executor, administrator, or guardian shall make return of his proceedings under the order for the sale of real estate granted by the probate court. The court, after careful examination, if satisfied that the sale has in all respects been legally made, shall confirm the sale, and order the executor, administrator, or guardian to make a deed to the purchaser.

The deed shall be received in all courts as prima-facie evidence that the executor, administrator, or guardian in all respects observed the direction of the court, and complied with the requirements of the law, and shall convey the interest in the real estate directed to be sold by the court, and shall vest title to the interest in the purchaser as if conveyed by the deceased in his lifetime, or by the ward free from disability, and by the owners of the remaining interests in the real estate.

HISTORY: GC §§ 10510-41, 10510-44; 114 v 320 (459); 119 v 394 (419); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10804, 10952, 10807.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.35 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Cross-References to Related Sections

Mortgagees may consent to land being sold subject to their mortgages, RC § 2127.20.

Remedy of purchaser if sale invalid, RC § 2329.46.
What are emblements, RC § 2115.10.

Comparative Legislation

Confirmation of sale and conveyance of property by court order:

- Cal.—Probate Code, § 785
- Ill.—Rev Stat, ch 3, § 20-6
- Ind.—Burns' Stat, § 29-1-15-13
- Mich.—MCLA, § 709.24
- N.Y.—SCPA, § 1914
- Pa.—Purdon's Stat, Tit. 20, § 3353
- Fla.—FSA, § 733.613

Confirmation of sale and execution of conveyance:

- Cal.—Probate Code, § 786
- Ill.—Rev Stat, ch 3, § 20-9
- Ind.—Burns' Stat, § 29-1-15-16
- Mich.—MCLA, § 709.29
- N.Y.—SCPA, §§ 1907, 1911
- Pa.—Purdon's Stat, Tit. 20, § 3353

Forms

- 1 A&H Probate FORM 2127.35a et seq.
- 1 A&H Probate FORM 2127.08a et seq: Sale of entire (fractional) interest.
- 1 A&H Probate FORM 2127.20a et seq: Sale subject to mortgage.

Research Aids

Confirmation of sale:

- O-Jur2d: Executors and Administrators § 457 et seq.; Guardian and Ward § 179

- Am-Jur2d: Executors and Administrators § 392; Guardian and Ward § 136

Deed:

- O-Jur2d: Executors and Administrators § 474; Guardian and Ward § 186

- Am-Jur2d: Executors and Administrators § 431 et seq.; Guardian and Ward § 137

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1. Mere inadequacy of price unaccompanied by any other reason or cause is not sufficient ground for setting aside a judicial sale of real estate regularly made in accordance with law, unless such inadequacy raises a conviction that the property was unnecessarily sacrificed: *Ozias v. Renner*, 78 App 168, 33 OO 505, 64 NE(2d) 325.

2. Under GC § 10510-44 (RC § 2127.35), the deed made in pursuance of the court order is prima facie evidence that the petitioner in all respects observed the directions of the court and complied with the requirements of the law and vested title to the real estate in the purchaser in like manner as if conveyed by the deceased in his lifetime free from disability: *In re Saviers*, 23 OLA 166.

DECISIONS UNDER FORMER GC §§ 10804,
10952, 10807

Return of sale

6. Purchase money paid by an administrator upon sale of intestate's land cannot be recovered of the heirs where the sale is declared inoperative and the heirs recover the land: *Nowler v. Coit*, 1 O 519.

7. Conveyance made by executors under a defective order of court cannot be aided in equity: *Tiernan v. Beam*, 2 O 383.

8. Sale by an administrator to a trustee, to place the property beyond the reach of creditors, under an agreement or understanding with the trustee that he should hold it for the benefit of the heirs and such of the creditors as they saw fit to pay, is void: *Piatt v. St. Clair*, 6 O 227.

9. The deed may be made to the assignee of the purchaser: *Ewing v. Higby*, 7 O (pt1) 198.

10. Though an administrator's deed contains no words of perpetuity, yet if the sale was in fact made of the whole estate, chancery would so decree, and an administrator does not vitiate the conveyance by attaching trusts to it, fairly intended for the benefit of heirs and creditors: *Piatt v. St. Clair* 7 O (pt2) 165.

11. Where lands are sold by an executor at private sale for their full value such executor must account for the total amount of the purchase price received by him, if necessary for the payment of debts. If sold for less than the full value he must nevertheless account for the full value thereof: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, Ann Cas 1914A, 190.

12. To be strictly construed: *Kummer v. Lake*, 1 NP(NS) 209, 13 OD 491.

Confirmation of sale

13. If the purchaser consents, the plaintiff may substitute some one else as purchaser in his report: *Ewing v. Higby*, 7 O (pt1) 198; *Thompson v. McManama*, 13 DecRep 131, 2 D 213.

14. The matter of confirming the sale rests largely in the discretion of the judge, and the higher court will not review the same on the weight of the evidence: *Niles v. Parks*, 49 OS 370, 34 NE 735.

15. Where a sale had been made for a fair price upon competitive bidding, the court cannot set it aside merely because the sale was on the premises, when the statute provides that when not otherwise directed the sale shall be held at the courthouse: *Smiley v. Cook*, 4 OLR 737, 52 Bull 156.

16. As a general rule it may be said that the court will refuse to confirm the sale if the statute has not been literally complied with: *Craig v. Fox*, 16 O 563.

17. A defect in the description where not material and not objected to by the purchaser is no ground to resist confirmation: *Wilson v. Scott*, 29 OS 636.

18. A confirmation does not of itself constitute a sale: *Curtis v. Norton*, 1 O 278.

19. Under the act of February, 1824, in a sale by a guardian under order of court, the guardian's deed conveyed title, without a return of the sale to the court, or an order confirming the sale, and for a deed: *Stall v. Macalester*, 9 O 19.

20. Title passes with the deed but dates back to the date of sale: *In re Harper*, 26 NP(NS) 431.

21. The title of the purchaser may not be divested by a subsequent reversal of the order of sale: *Irwin v. Jeffers*, 3 OS 339.

22. Where jurisdiction has been acquired in such a proceeding, subsequent errors in the course of its exercise, as in the order of sale and its confirmation, however grave and glaring, will not subject the judgment to successful collateral attack: *Bohart v. Atkinson*, 14 O 228.

23. Where a devisee of a share dies before distribution is made, the proceeds from a sale of the property go to his heirs as personalty, and should be paid to his administrator: *Avery v. Howard*, 7 NP(NS) 97, 19 OD 71.

24. Even though real estate has been sold by an administrator in land sale proceedings, as ordered and confirmed by the probate court, at a price less than the appraised value thereof, such irregularity does not constitute or create any defect in the title acquired by the purchaser: *Pierson v. Merritt*, 4 OO (2d) 425, 134 NE(2d) 591 (CP).

Reversal of order of sale

28. If the statute is repealed after the order of court is made, but before it is executed, the effect of the order is at an end, and no valid sale can then take place: *Ludlow v. Wade*, 5 O 494.

29. Purchaser's title not divested by a subsequent reversal of the order of sale, even though he had notice, at the time of the sale, that an effort would be made to reverse it: *Irwin v. Jeffers*, 3 OS 389.

Deed

34. Though the administrator's deed contain no words of perpetuity, yet if the sale was in fact made of the whole estate, chancery would so decree it: *Piatt v. St. Clair*, 7 O (pt2) 165.

Effect of deed

40. An administrator's deed, even if made under order of court with but one witness, conveys no legal title: *Miami Exp. Co. v. Halley*, 7 O (pt1) 11.

41. It was formerly held to be the law in Ohio that a sale made by an administrator conveyed the property free from encumbrance to the purchaser: *Miller v. Greenham*, 11 OS 486; *Bank of Muskingum v. Carpenter*, 7 O (pt1) 21.

42. Since the law of 1858, requiring mortgagees and other lienholders to be made parties in the petition for the sale of such land, a mortgagee who was not made such party retains his rights unaffected by the administrator's sale, and the purchaser is liable therefor: *Holloway v. Stuart*, 19 OS 472.

43. However, if lienholders are made parties, the purchaser acquires the land free from liens: *Stone v. Strong*, 42 OS 53; *Bank of Muskingum v. Carpenter*, 7 O (pt1) 21.

44. The purchaser of land of decedent at a judicial sale holds it discharged of liens for debts. But heirs hold it subject to debts, and a purchaser from them takes the encumbrance with the title: *Stiver v. Stiver*, 8 O 217.

45. Where a wife joins her husband in a mortgage containing a renunciation of dower, a sale of the land by the administrator of the husband for the payment of his debts extinguishes the right of dower, and transfers an unencumbered title to the purchaser: *St. Clair v. Morris*, 9 O 16; contra: *Kling v. Baintline*, 40 OS 391.

46. Where real estate is sold by an administrator under an order of the probate court in a proceeding to sell lands to pay debts of a decedent, and it is stated both in the administrator's report of the sale

made to the court and in his deed to the purchaser, that the purchaser takes the land subject to a mortgage which she assumes and agrees to pay, the grantee of such purchaser will take the property subject to such mortgage, even though the mortgagee did not set up its mortgage upon these particular premises in the action to sell them and there was no finding of the probate court of the amount due him: *Ohio Sav. &c. Co. v. Weber*, 21 CC(NS) 130, 33 CD 279 [judgment modified; see journal entry, *Leisy v. Ohio Sav. &c. Co.*, 79 OS 472].

47. The proceedings of the court to sell the lands of a deceased to pay debts are presumed to have been regular: *Hamilton v. Stewart*, 5 NP(NS) 553, 18 OD 130 [affirmed by circuit court, without report, May, 1907].

48. Under the act of February, 1824, in a sale by a guardian under order of court, the guardian's deed conveyed title, without a return of the sale to the court, or an order confirming the sale, and for a deed: *Stall v. Macalester*, 9 O 19.

49. A sale of land by judicial sale does not become complete until the deed is executed and delivered. However, upon execution, there will be relation back to the date of the sale's execution: *In re Harper*, 26 NP(NS) 431.

Liability of administrator

53. An agreement to protect the title or indemnify the purchaser against encumbrances, orally made by the executor, does not bind the estate without authority from the will or court: *Arnold v. Donaldson*, 46 OS 73, 18 NE 540.

54. A sale does not carry a sound title, but only the deceased's or ward's title, a title clear and free, but only as free and clear a title as the deceased or ward had: *Vattier v. Lytle*, 6 O 477.

55. Where a purchase was made by one who was advised by his counsel that the land was clear and unencumbered, and that the wife had no dower estate therein, and thereupon he bought the lands at their full value and paid over the money to the executor and entered into possession, and afterwards the court of common pleas found that the wife was entitled to dower, it was held that the purchaser could not recover sufficient of the purchase money to compensate him for the loss he sustained: *Arnold v. Donaldson*, 46 OS 73, 18 NE 540.

56. When an administrator signs a deed in his official capacity, but in the warranty clause in the body of the deed his name appears, but not as administrator, and no allusion is therein found to an order of sale or other proceedings on which it is founded, the presumption is that the covenant of seizin is made in his individual capacity, and he is liable to the vendee for a breach of seizin and warranty: *Lockwood v. Gilson*, 12 OS 526.

57. Fraudulent representations by the administrator as to the title, without warranty, do not render the estate liable in damages: *Dunlap v. Robinson*, 12 OS 530.

58. False representations by the executors in respect to the land, made at the time of sale, are no defense to an action for the purchase money. The purchaser's sole remedy is against the executor personally: *Westfall v. Dungan*, 14 OS 276; see, also, *Parr v. Brown*, 59 OS 630, 54 NE 1106.

59. Where the executor was given power in the will to sell lands to pay debts, and sold the lands and distributed the proceeds without paying off a mortgage creditor as he had agreed to do, the executor was individually liable: *Western Reserve Bank v. McIntire*, 40 OS 528.

Transfer by county auditor

64. When a holder of a deed for real estate, which has been legally purchased through the probate court under procedure set forth in GC § 10510-2 (RC § 2127.02) et seq. makes application to the county auditor for transfer of such real estate by said deed properly describing such real estate, and presents therewith the deed and order of court for the execution of such deed, it is the mandatory duty of the auditor to indorse on such deed "transferred," pursuant to GC §§ 2573 and 2768 (RC §§ 319.20 and 317.22, 317.99): 1936 OAG No.6120.

Purchaser

69. The sale being a judicial sale, the doctrine of caveat emptor applies in all its rigor: *Mechanics Sav. &c. Assn. v. O'Connor*, 29 OS 651; *Riddle v. Bryan*, 5 O 48; *Vattier v. Lytle*, 6 O 477; *McLouth v. Rathbone*, 19 O 21; *Corwin v. Benham*, 2 OS 36; *Creps v. Baird*, 3 OS 277; *McKinzie v. Perrill*, 15 OS 162; *Dresbach v. Stein*, 41 OS 70; *Beal v. Price*, 13 O 368.

70. But see, contra: *Fisher v. Fisher*, 15 CC(NS) 273, 23 CD 525 [affirmed, 86 OS 365, 99 NE 1126]. The facts in this case are not reported but it seems that it is going to be a good way to hold the administrator liable if he does nothing more than make representations in his petition that deceased was the owner.

71. The purchaser, after his bid is accepted, cannot refuse to take the property because there are liens, etc., upon it. He is bound to examine the records before bidding, or failing so to do, must bear the consequences: *Mull v. Smith Premier Typewriter Co.*, 1 NP(NS) 509, 14 OD 455.

72. The rights of a purchaser at a judicial sale as to payment of taxes out of the proceeds are fixed by the date of sale: *Scheid v. Scheid*, 5 OD 559.

73. Consequently, the purchaser is entitled to all the rents that accrued after that date: *Boyd v. Longworth*, 11 O 235; *Oviatt v. Brown*, 14 O 285.

74. Emblements, however, do not pass to the purchaser: *Mason v. Lemmon*, 3 NP 116, 4 OD 322.

75. A purchaser who loses a title which depends on an administrator's sale, can set up no equity on the estate of the decedent by reason of appropriations of the purchase money to pay debts of decedent: *Beal v. Price*, 13 O 368.

76. The title of a purchaser to real estate sold by an administrator to pay debts, is not divested by a subsequent reversal of the order of sale, and notice to such purchaser, at the time of sale, that an effort would be made to reverse the order, does not affect the purchaser's title: *Irwin v. Jeffers*, 3 OS 389.

§ 2127.36 Security for deferred payments.

The order for the sale of real estate granted in an action by an executor, administrator, or guardian shall require that before the delivery of the deed the deferred installments of the purchase money be secured by mortgage on the real estate sold, and mortgage notes bearing interest at a rate approved by the probate court. If after the sale is made, and before delivery of deed, the purchaser offers to pay the full amount of the purchase money in cash, the court may order that it be accepted, if for the best interest of the estate or the ward, and direct its distribution.

The court in such an order may also direct the

sale, without recourse, of any or all of the notes taken for deferred payments, if for the best interest of the estate or the ward, at not less than their face value with accrued interest, and direct the distribution of the proceeds.

HISTORY: GC §§ 10510-42, 10510-43; 114 v 320 (459); 122 v 495; 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10805, 10951.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.35 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Forms

1 A&H Probate FORM 2127.36a et seq.

Research Aids

Sale of notes without recourse:

O-Jur2d: Executors and Administrators § 384

Security for deferred payments:

O-Jur2d: Executors and Administrators § 468;

Guardian and Ward § 185

Am-Jur2d: Executors and Administrators § 343

CASE NOTES AND OAG

1. Before 1891, the executor or administrator could sell such notes and mortgages, as at common law, without order of the court, and an innocent purchaser was not responsible if the executor or administrator converted the money so paid to his own use: *Jelke v. Goldsmith*, 52 OS 499, 40 NE 167, 49 AmSt 730.

§ 2127.37 Compensation of executor, administrator, or guardian. (GC § 10510-45)

When an action to sell estate is prosecuted by an executor or administrator he shall be allowed the compensation provided by law, by the probate court from which his letters issued. When such action is by a guardian, his duties and obligations therein shall be considered by the court appointing him in awarding such compensation as the court deems reasonable.

HISTORY: GC § 10510-45; 114 v 320 (460). Eff 10-1-53. Analogous to former GC §§ 10837, 10953.

Cross-References to Related Sections

Compensation of executor and administrator, RC §§ 2113.35, 2113.36.

Compensation of fiduciaries generally, RC § 2109.-23.

Research Aids

Compensation:

O-Jur2d: Executors and Administrators § 502; Guardian and Ward § 192

Am-Jur2d: Executors and Administrators § 486 et seq.

ALR

Appraised value of estate as shown by inventory or value at time of settlement as basis for determining commissions of executor or administrator. 173 ALR 1346.

CASE NOTES AND OAG

See also case notes under RC § 2109.23 as to com-

pensation generally for fiduciaries; under RC § 2113.35 as to compensation generally for executors and administrators; under RC § 2127.38 as to compensation of fiduciary and his attorney.

1. If the proceeds of real estate and personal property come into the hands of the administrator or executor, the calculation is first to be made on the personal property. That is, if the personal property amounted to one thousand dollars and the real estate to two thousand dollars, the commission would be six per cent on the one thousand dollars of personalty and four per cent on the two thousand dollars of realty: *Strong v. Strong*, 42 OS 53.

2. A reasonable amount will be allowed for the expense of an auctioneer employed by the administrator: *West v. Child*, 16 OO 31 (PC).

3. When real estate is sold by the fiduciary through a court other than that from which letters issued, and a mortgagee purchases the property for less than the mortgage debt, before receiving his instrument of conveyance from the fiduciary the mortgagee must pay the costs and expenses of the sale, including such compensation for the fiduciary as the court through which the sale is had shall fix: *West v. Child*, 16 OO 31 (PC).

4. Under this section and GC § 15010-46 (RC § 2127.38) the probate court has authority to fix and determine the compensation to the fiduciary for services rendered in connection with a land sale proceeding: *In re Ohmer*, 22 OO 147 (PC).

5. Joint administrators are entitled to no more compensation than if there were only one of them administering: *Phillips v. Richardson*, 4 JJMarsh (Ky) 212.

§ 2127.38 Distribution of money received.

The sale price of real estate sold following an action by an executor, administrator, or guardian shall be applied and distributed as follows:

(A) To discharge the costs and expenses of the sale, including reasonable fees to be fixed by the probate court for services performed by attorneys for the fiduciary in connection with the sale, and compensation, if any, to the fiduciary for his services in connection with the sale as the court may fix, which costs, expenses, fees, and compensation shall be paid prior to any liens upon the real estate sold, and notwithstanding the purchase of the real estate by a lien holder;

(B) To the payment of taxes, penalties, and assessments then due against the real estate, and to the payment of mortgages and judgments against the ward or deceased person, according to their respective priorities of lien, so far as they operated as a lien on the real estate of the deceased at the time of the sale, or on the estate of the ward at the time of the sale, which shall be apportioned and determined by the court, or on reference to a master, or otherwise;

(C) In the case of an executor or administrator, the remaining proceeds of sale shall be applied as follows:

(1) To the payment of legacies with which the real estate of the deceased was charged, if the action is to sell real estate to pay legacies;

(2) To discharge the claims and debts of the estate in the order provided by law.

Whether the executor or administrator was appointed in this state or elsewhere, the surplus of the proceeds of sale must be considered for all purposes as real estate, and be disposed of accordingly.

HISTORY: GC § 10510-46; 114 v 320 (460); 116 v 385 (402); 131 v 630 (Eff 8-10-65); 136 v S 145. Eff 1-1-76.

See former GC §§ 10809, 10816.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.38 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

General Code § 10510-46 follows to a large extent the general plan of former GC §§ 10809 and 10816, enlarged to include guardians.

General Code § 10510-46 was amended in 1935. The comment of the probate code committee of the Ohio state bar association with reference to the amendment to this section was as follows:

"The change of language here recommended arises out of the decision of the courts in the so-called 'Griffith case' (see case note 1 below). If an action has not already been commenced by a lienholder it is mandatory on an executor or administrator to commence an appropriate proceeding to sell real estate to pay debts as soon as the necessity is indicated. It is not fair that the lienholder should be permitted to force such action by the fiduciary, buy in the property for less than the amount of his lien, and then complain at the allowance of a reasonable attorney fee for services which have saved him the cost of employing independent counsel to bring an action in foreclosure."

Comparative Legislation

Distribution of proceeds:

Cal.—Probate Code, § 762

Ill.—Rev Stat, ch 3, § 20-12

Ind.—Burns' Stat, § 29-1-5--3

Mich.—MCLA, § 709.34

N.Y.—SCPA, §§ 1911, 1914

Pa.—Purdon's Stat, Tit. 20, § 3532

Fla.—FSA, § 733.608

Forms

1 A&H Probate FORM 2127.10a et seq: Sale of entire (fractional) interest.

Research Aids

Distribution of proceeds:

O-Jur2d: Executors and Administrators § 494 et seq.; Guardian and Ward § 192; Taxation § 412; Judgments § 409

Sale to pay debts as equitable conversion:

O-Jur2d: Conversion in Equity § 15

ALR

Effect of appreciation or depreciation of assets of decedent's estate before final settlement but after partial distribution or setting up of trust. 114 ALR 458.

Executor's or administrator's right to appeal from order of distribution. 117 ALR 99.

Expense of preserving assets before appointment of executor or administrator as entitled to priority.

108 ALR 393.

Priority in event of incompetent's death, of claims incurred during guardianship over other claims against estate. 113 ALR 402.

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Rank of foreign judgment, or judgment of sister state rendered in lifetime of debtor in settlement of debtor's estate after his death. 128 ALR 1400.

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1. The supreme court of Ohio held that this section, as effective January 1, 1932, did not authorize the payment of attorney fees for land sale proceedings where the mortgagee purchased the property at the land sale proceedings for the amount of his mortgage or less: *State ex rel Fulton v. Griffith*, 127 OS 161, 187 NE 121 [reversing 37 OLR 353, which reversed 29 NP(NS) 435; approved, *Stone v. Strong*, 42 OS 53].

2. The supreme court held that this section, as amended effective September 2, 1935, does not deprive a person of his property without due process of law, does not deny equal protection of the law, and does not affect the inviolability of contracts, in providing reasonable compensation and fees to be fixed by the court for services performed by the fiduciary and by his attorneys in connection with the sale of real estate to pay debts as a part of the costs in the proceeding and to be paid prior to any liens upon the real estate sold, even though a lienholder was the purchaser thereof, and at a price less than his lien thereon: *Flory v. Cripps*, 132 OS 487, 8 OO 484, 9 NE(2d) 500 [affirming 6 OO 142].

3. By virtue of this section the probate court has exclusive jurisdiction to fix compensation due a fiduciary for his services, and to fix fees for services performed by attorneys for the fiduciary, in connection with the sale of lands ordered by the court to be made by such fiduciary: *In re Murnan*, 151 OS 529, 39 OO 333, 87 NE(2d) 84 [reversing 52 OLA 569 and 53 OLA 305].

4. This section, relative to the sale of lands by executors and administrators, providing that a commission to the executor or administrator for his administration and reasonable attorney fees "shall be paid prior to any liens upon the real estate sold and notwithstanding the purchase of such real estate by a lienholder," is constitutional although the lienholder receives less than the sum due on the sale on a mortgage executed prior to its effective date: *Bruin v. Leveline*, 55 App 339, 9 OO 80, 9 NE(2d) 895.

5. A transfer of a lien certificate to the Division of Aid for the Aged gives that division priority over the claim of the surviving spouse, where such spouse made the original lien transfer: *Division of Aid for the Aged v. Huff*, 110 App 483, 11 OO(2d) 397, 168 NE(2d) 316.

6. Where real estate is sold by a fiduciary through a court other than the one which issued the letters, and the

purchase price is less than the mortgage debt, the mortgagee pays for the costs and expenses of the sale: *West v. Child*, 30 OLA 231, 16 OO 31, 5 OSU 85.

7. This section provides that the probate court shall include in the costs of a land sale reasonable attorney fees as part of the costs: *In re Whinery*, 11 OO 96 (CP).

8. For history of this section, see *Lash v. Miller*, 16 OO 204 (PC).

9. The provision in this section, which gives authority to the court to allow compensation to the fiduciary in the order of distribution for services in connection with the sale of lands, is not exclusive, and the failure to allow such compensation in the order of distribution does not deprive the court of exercising the authority conferred on it under GC § 10509-193 (RC § 2113.36): *In re Ohmer*, 22 OO 147 (PC).

10. Under GC § 10510-46 (RC § 2127.38), the surplus of the proceeds from the sale of real estate must be considered as real estate and distributed accordingly: *Burroughs v. Raymond*, 50 OO 169, 111 NE(2d) 82 (PC).

11. Where land subject to the lien of the division of aid for the aged is sold in the administration of the owner's estate, the words "and the proceeds applied as provided by law" in RC § 5105.24 can mean only that the provisions of this section must be observed so far as they are applicable: *Fultz v. Singer*, 5 OO(2d) 433 (PC).

12. Under RC § 2127.38 the proceeds of a land sale proceeding of a guardian must be held and finally distributed in the same manner as would have been done had there been no sale. Such proceeds are, however, subject to bear a proportionate part of the expenses of supporting the ward: *Guerra v. Guerra*, 54 OO(2d) 14, 25 OMisc 1, 265 NE(2d) 818 (CP).

13. Reasonable attorney's fees are included in costs and expenses in a proceeding for sale of land to pay debts and such fees are to be taxed as part of court costs: *Griffith v. Ohio*, 13 OLA 211, 37 OLR 353.

14. In an administrator's suit to sell realty to pay debts of decedent, in which the property is purchased by one other than the mortgagee and the purchase price is insufficient to pay the mortgage obligation, the administrator and his attorney are entitled to their fees out of the proceeds of the sale, prior to the claim of the mortgagee, under authority of this section: *Federal Land Bank v. McClain*, 20 OLA 550.

15. In *Lakes v. Lakes*, 39 OLR 25, decided by the court of appeals of Butler county May 8, 1933, the court held that the proceeds from the sale of mortgaged real estate sold by an administrator in the proceeding to settle an estate, cannot be charged with the commission for making the sale, and the lien of the mortgages reduced by that amount, where the sale was for less than the face of the mortgage with interest and necessary expenses, and there is personality from which the commission can be paid.

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Costs and expenses

1. Proceeds of a sale of realty by an administrator to pay debts of decedent may properly be charged with court costs and expenses of the sale, the per centum and charges of the administrator in connection with the sale, allowance to administrator for attorney fees in connection with the sale, payment of sale bond, compensation of auctioneer and for special advertising. The above payments have priority over a mortgage claim on the land so sold, when proceedings to sell are in good faith and mortgagee joins in the proceedings and the property is purchased by other than the mortgagee: *Klimper v. Klimper*, 12 App 332, 31 OCA 267.

2. "The costs and expenses of the sale" do not include fees of the administrator's attorney, nor the general costs of administration, nor premiums due the surety company upon the administrator's bond, and these claims are therefore subsequent to the claim of a first mortgagee: *Sherman v. Millard*, 6 CC(NS) 338, 17 CD 175.

Compensation of administrator

3. In graduating the per centum compensation, the higher rate prescribed by GC § 10837 (see now RC §§ 2113.35 and 2127.37) should be first applied to the personality: *Stone v. Strong*, 42 OS 53.

4. The executor or administrator is entitled to compensation and charges for making the sale, to be first paid before applying the proceeds to mortgages or other liens. His compensation is computed by the per centum authorized by GC § 10837 (see now RC §§ 2113.35 and 2127.37), on the money arising from such sale to be administered: *Stone v. Strong*, 42 OS 53.

5. Where a mortgagee, whose lien is fixed by the court, becomes a purchaser, the executor or administrator is not entitled to a per centum compensation on that part of the purchase money applicable to the satisfaction of his mortgage: *Stone v. Strong*, 42 OS 53 [approved, *Andrews v. Johns*, 59 OS 65].

Taxes

6. When land is sold at a judicial sale, all taxes that are on the tax duplicate October 1 must be paid out of the proceeds of the sale: *Hoglen v. Cohen*, 30 OS 436; *Ketcham v. Fitch*, 13 OS 201; *Creps v. Baird*, 3 OS 278; *In re Harper*, 26 NP(NS) 431.

Mortgages and judgments

7. The proceeds of the sale of the lands are subject to all mortgage, judgment and other liens in the priority in which they attached to the land: *Bank of Muskingum v. Carpenter*, 7 O (pt1) 21.

8. Liens on the land are transferred to the proceeds arising from the sale thereof only when the sale is regular, and when the lienholders have been made parties to the action: *Holloway v. Stuart*, 19 OS 472.

9. Where a judgment is a lien on the debtor's lands at the time of his death, its payment is provided for in this section. But where it is no such lien, plaintiff's only method of obtaining satisfaction of his judgment is through the administrator in the regular course of administration: *Miller v. Taylor*, 29 OS 257.

10. Since this section requires a judgment lien to be paid it need not be presented for allowance to entitle the creditor to share in the proceeds of a sale of real estate to pay debts: *Ambrose v. Byrne*, 61 OS 146, 55 NE 408.

11. In case of a judgment lien on a debtor's land at his death, it is not necessary thereafter to issue execution thereon in order to preserve the lien. It is entitled to share in the proceeds of land sold by the personal representative although more than five years

have elapsed since its rendition or since the last execution: *Ambrose v. Byrne*, 61 OS 146, 55 NE 408; *Webster v. Dennis*, 4 CC 313, 2 CD 567.

12. A mortgagee is paid ahead of funeral expenses: *Nolan v. Kroll*, 33 OLR 222.

13. Installments of street assessments, if they stand unsatisfied upon the tax duplicate, should be paid out of the proceeds of the sale, but if not due and payable, they remain a lien upon the real estate in the hands of the purchaser, who has no right to have them paid out of the proceeds of the sale: *Makley v. Whitmore*, 61 OS 587, 56 NE 461.

14. Where a first mortgagee sets up his lien, it must be preserved in the fund realized from the sale of the property; but where he fails to set up his claim, his lien is cut off and he becomes a general creditor: *Sherman v. Millard*, 6 CC(NS) 338, 17 CD 175.

15. Where there is a judgment lien on real estate, but subsequently the owner asserts a homestead claim on the property and occupies same as a homestead until death, during such occupancy giving a mortgage thereon, then in case of suit brought by the administrator to sell the land, the judgment lien has priority over the mortgage lien: *Smith v. Phillips*, 5 NP(NS) 502, 18 OD 429.

16. All who may have a lien upon all or any part of the real estate sought to be sold by an administrator to pay debts are necessary parties to the action, whether the liens existed upon the real estate at the time of the death of the decedent or are acquired upon the share of an heir at law therein, after the death of the ancestor from whom the estate came, and before the petition is filed by the administrator: *Keenan v. Wilson*, 19 App 499.

Claims and debts

17. Where the sole devisee of lands is appointed executor of the will of the testator and sells such lands in his individual capacity as devisee, the proceeds of such sale come into his hands as executor, and where the personal estate is insufficient to pay the debts of the testator he must apply the proceeds of the sale of such lands to the payment thereof: *Hocking Val. R. Co. v. White*, 87 OS 413, 101 NE 354, *AnnCas* 1914A, 190.

18. Where a widow executed a mortgage upon the real estate of her husband, after his death, and this land is then sold to pay debts, the distribution of the fund arising therefrom must be, as to the widow, in accordance with the provisions of GC § 10714 (see now RC § 2117.25), providing in what order administrators shall pay debts, and not under the provisions of GC § 10809 (see now RC § 2127.38): *Neely v. Neely*, 1 NP(NS) 97, 48 Bull 929 [reversed on other grounds, 49 Bull 85].

Surplus

19. The balance of the money left after paying debts and costs, is, under our statute, real property: *Kling v. Bordner*, 65 OS 86, 61 NE 148.

Reversal

20. Where an appellate court reverses the order of distribution made in the probate court, it should either make the order of distribution or specifically indicate to the probate court how the fund should be applied: *Sherman v. Millard*, 6 CC(NS) 338, 17 CD 175.

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21. Lands directed by will to be sold and converted into money are treated as personal estate: *Ferguson v. Stuart*, 14 O 140; *Collier v. Collier*, 3 OS 369.

22. Where the real estate of an intestate, who had

no issue at his decease, is sold to pay debts, and before final distribution of a balance remaining, after payment of same, and the satisfaction of the widow's dower, his posthumous child dies, the surplus money belonging to such child is subject to the law of distribution as personal property: *Pence v. Pence*, 11 OS 290.

23. The surplus of the proceeds of a sale of real estate by an administrator, remaining in his hands on final settlement of his account, is to be considered and disposed of as real estate, and intestate's widow is not entitled to any part thereof in her capacity as one of the distributees of the personal estate: *Griswold v. Frink*, 22 OS 79.

24. Although the surplus goes to the heirs in the line that real estate would go, such proceeds are personality and are held as personality by the heir and as such pass from such heir: *Tuttle v. Northrop*, 44 OS 178, 5 NE 659.

25. Surplus remaining after settlement of administrator's accounts to be treated as realty: *McCall v. Pixley*, 48 OS 379, 27 NE 887.

26. The balance of the proceeds of real estate sold to pay debts is real and not personal property, and goes by descent to the heirs: *Kling v. Bordner*, 65 OS 86, 61 NE 148.

27. Proceeds from sale of realty directed to be sold is not to be blended with personality unless the will so provides: *Gilson v. Gilson*, 11 CC(NS) 49, 20 CD 322.

28. Where a testator's personality is not sufficient to pay his debts and costs of administration and the legacies provided for in his will are not made a charge on his real estate, proceeds from sale of realty do not fall into the residuum but pass to the heirs, and the legacies fail for want of a fund out of which they may be paid: *Ferguson v. Wentz*, 20 NP(NS) 13, 27 OD 462.

§ 2127.39 When proceeds of sale marshaled in conformity with will.

When an action to sell real estate is brought by an executor or administrator with the will annexed, if in the last will of the deceased there is a disposition of his estate for the payment of debts, or a provision that may require or induce the probate court to marshal the assets differently from the way the law otherwise would prescribe, such devises, or parts of the will, shall be set forth in the complaint, and a copy of the will exhibited to the court, whereupon the court shall marshal the proceeds of the sale accordingly, so far as it can be done consistently with the rights of creditors.

HISTORY: GC § 10510-47; 114 v 320 (461); 136 v S 145. EF 1-1-76.

Analogous to former GC § 10791.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.39 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Sale under power in will:

Cal.—Probate Code, § 757

Ill.—Rev Stat, ch 3, § 20-15

Ind.—Burns' Stat, § 29-1-15-2

Ky.—KRS, § 395.220

Mich.—MCLA, § 709.4

N.Y.—SCPA, § 1907

Pa.—Purdon's Stat, Tit. 20, § 3354

Fla.—FSA, § 733.613

Research Aids

Marshalling proceeds in conformance with will:

O-Jur2d: Executors and Administrators §§ 441, 495

[REAL ESTATE FRAUDULENTLY CONVEYED]

§ 2127.40 Sale by executor or administrator of real estate fraudulently conveyed by decedent.

When an action is brought by an executor or administrator to sell real estate to pay debts, the real estate subject to sale shall include all rights and interests in lands, tenements, and hereditaments conveyed by the deceased in his lifetime with intent to defraud his creditors, except that lands fraudulently conveyed cannot be taken from any who purchased them for a valuable consideration, in good faith, and without knowledge of the fraud. No claim to such lands shall be made unless within four years next after the decease of the grantor.

If real estate fraudulently conveyed is to be included in such an action, the executor or administrator, either before or at the same time, may commence a civil action in the court of common pleas in the county in which the real estate is situated to recover possession of it, or in his action for its sale, he may allege the fraud and have the fraudulent conveyance avoided. But when the real estate is included in the complaint before the recovery of possession by the executor or administrator, the action shall be brought in the court of common pleas in the county in which the real estate is situated.

HISTORY: GC §§ 10510-49, 10510-50; 114 v 320 (461); 136 v S 145. EF 1-1-76.

Analogous to former GC §§ 10777, 10778.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.40 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comparative Legislation

Setting aside sale of land fraudulently conveyed during decedent's lifetime:

Cal.—Probate Code, § 580

Ind.—Burns' Stat, § 29-1-13-4

Mich.—MCLA, § 707.14

N.Y.—Real Prop, § 268

Fla.—FSA, § 733.309

Research Aids

Action to set aside fraudulent conveyance:

O-Jur2d: Executors and Administrators § 616 et seq.

Am-Jur2d: Fraudulent Conveyances § 148

Jurisdiction:**O-Jur2d:** Executors and Administrators § 617

Limitation of actions:

O-Jur2d: Executors and Administrators § 435

Sale of lands fraudulently conveyed by decedent:

O-Jur2d: Executors and Administrators §§ 130, 399**ALR**

When statute of limitations or laches commences to run against action to set aside fraudulent conveyance or transfer in fraud of creditors. 100 ALR2d 1094.

Bar of statute of limitations or nonclaim statute against action or proceeding to enforce debt against decedent's estate, as affecting right to maintain suit by creditor to set aside conveyance by decedent as fraud upon creditors. 138 ALR 246.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors. 148 ALR 230.

CASE NOTES AND OAG

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Creditors, 16 et seq

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Jurisdiction, 29 et seq

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Purpose, 1

Purpose

1. This section is intended to enable the administrator to obtain in one action authority to convert into money all realty which in equity ought to be applied to the payment of the debts of the decedent, and not to make it necessary that the creditor should bring the action: *Beebe v. Canda*, 18 CC(NS) 104, 28 CD 582.

Conveyance with intent to defraud

7. A release of the wife's inchoate right of dower is a valid consideration for a conveyance of property to her. Such conveyance is not void as to creditors of the husband, unless the amount of consideration is grossly disproportionate. Transaction is not fraudulent unless mala fides be shown: *Singree v. Welch*, 32 OS 320.

8. A fraudulent conveyance of land by a debtor cannot be impeached by his personal representative unless the property so conveyed is actually required for payment of debts, and when the personal property is sufficient to pay costs of administration and all debts except such as are secured by mortgage on lands of which the debtor died seized, the administrator cannot maintain an action to subject to sale, for the payment of the mortgage indebtedness, other lands which decedent had conveyed away with intent to hinder, delay and defraud his creditors: *McCall v. Pixley*, 48 OS 379, 27 NE 887.

9. Where lands have been conveyed by decedent in fraud of his creditors, the administrator may maintain an action against the fraudulent grantee to recover the value of the lands, if the latter has conveyed them to an innocent purchaser: *Doney v. Clark*, 55 OS 294, 45 NE 316 [reversing *Doney v. Dunnick*, 8 CC 163, 4 CD 380]; see also *Thompson v. Tallman*, 82 OS 391.

10. Realty which has been conveyed in fraud of the

creditors of one who paid for such realty but had the legal title conveyed to another may be subjected to the payment of grantor's debts in the hands of the original grantee, or his devisee, or one to whom he has conveyed the legal title as security for a debt, which debt has subsequently been paid: *Beebe v. Canda*, 18 CC(NS) 104, 28 CD 582.

11. An administrator of the deceased grantor of a deed absolute with contract for reconveyance, may maintain an action to have it construed as a mortgage, but the relief granted will be a conveyance of the property to the heir or devisee, upon payment of the mortgage debt, such conveyance to be subject to the debts of the decedent: *Johnson v. Kendeigh*, 18 CC(NS) 553, 33 CD 207.

Creditors

16. After sale of real estate has been set aside as fraudulent, it may be sold to pay the widow's yearly allowance: *Allen v. Allen*, 18 OS 234.

17. Mere indebtedness of grantor is not sufficient to set aside a deed as in fraud of creditors, and a debt barred by the statute of limitations will not support an action to set aside a deed as fraudulent against creditors: *Jones v. Lehman*, 15 OD 541.

18. Where a chattel mortgage is declared void by statute, "as against creditors of the mortgagor," and the mortgagor dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the administrator or executor: *Keller v. Shaeffer*, 29 OS 264.

Interest of heirs

23. The case herein provided for forms no exception to the general rule that interest in real estate goes to the heirs, and not to the administrator. The intestate having transferred his land to defraud his creditors, the title could not descend to his heirs: *Overturf v. Dugan*, 29 OS 230.

24. Administrator can impeach a fraudulent conveyance only when needed to pay debts and not for benefit of heirs: *McCall v. Pixley*, 48 OS 379, 27 NE 887; *Jones v. Lehman*, 15 OD 541.

Jurisdiction

29. An administrator cannot maintain an action of trover to recover goods transferred by his intestate to defraud his creditors. The remedy, if there be any, is in chancery: *Benjamin v. La Baron*, 15 O 517.

30. Lands conveyed to defraud creditors cannot be ordered sold until the conveyance has been set aside in a proceeding commenced for that purpose in the court of common pleas. An order of the probate court for the sale of such lands upon a judgment of its own, setting aside the conveyance as null and void, is of no validity whatever, and may be impeached in a collateral proceeding to recover the land: *Spoors v. Coen*, 44 OS 497, 9 NE 132.

31. The only inhibition against the probate court to order the sale of a decedent's real estate to pay his debts is that found in GC § 10510-50 (RC § 2127-40), wherein it is provided that if the petition includes real estate fraudulently conveyed before recovery, the action must be brought in the common pleas court: *Rice v. James*, 21 OO 60, 6 OSupp 244 (PC).

32. Once a conveyance by intestate is voided by common pleas court, the probate court can execute a sale in order to pay debts: *Lowman v. Sewall*, 16 CC 466, 9 CD 177.

33. An administrator may bring his action in the common pleas court for the sale of lands to pay his decedent's debts and include in such action lands to which the decedent never held title, but for which he paid and fraudulently caused to be conveyed to

another with intent to defraud his creditors: *Beebe v. Canda*, 18 CC(NS) 104, 28 CD 582.

34. The probate court has no equity power to set aside a deed: *Fleming v. McGuffey*, 12 NP(NS) 19, 21 OD 387 [for former opinion, see 8 NP(NS) 431, 19 OD 521].

Parties

38. Former GC § 10777 (see now RC § 2127.40) does not give exclusive power to administrators to bring an action to set aside a fraudulent conveyance of decedent, and a creditor may bring the action: *Hause v. Coblenz*, 22 App 17, 153 NE 255.

39. Where a debtor conveys land to his creditor in trust to sell and from the proceeds to satisfy the debt and pay the balance to the debtor; and the debtor dies without having paid the debt, and without having elected to take the land instead of its proceeds, his personal representative is the proper party to compel the execution of the trust by a sale of the lands: *Craig v. Jennings*, 31 OS 84.

40. If the sale is insolvent, the administrator is a trustee for creditors as to lands conveyed by decedent in fraud of creditors, and he may maintain a suit to subject them to the payment of demands of such creditors, unless the rights of a purchaser in good faith intervene. And the administrator may sue the fraudulent grantee for the value of the lands if the latter has conveyed them to an innocent purchaser: *Doney v. Clark*, 55 OS 294, 45 NE 316 [reversing *Doney v. Dunnick*, 8 CC 163, 4 CD 380]; see also *Thompson v. Tallman*, 82 OS 391, 92 NE 1125.

Limitation

45. The action must be brought within four years: *Doney v. Clark*, 55 OS 294, 45 NE 316.

[REACHING PROCEEDS OF PARTITION]

§ 2127.41 Proceeds arising from partition of real estate may be reached by the executor or administrator.

If after the institution of proceedings for the partition of the real estate of a deceased person, it is found that the assets in the hands of his executor or administrator are probably insufficient to pay the debts of the estate, together with the allowance for the support of the surviving spouse and children, the expenses of administration, and the legacies that are a charge upon the real estate, the executor or administrator shall make a written statement to the probate court of the assets, indebtedness, expenses, and legacies, and the court forthwith shall ascertain the amount necessary to pay the debts, expenses, and legacies and give a certificate of the amount to the executor or administrator.

The executor or administrator thereupon shall present the certificate to the court in which the proceedings for partition are or have been pending, and on his motion the court shall order the amount named in the certificate to be paid over to the executor or administrator out of the proceeds of the sale of the premises, if thereafter they are sold or have already been sold. This section does not prohibit an executor or administrator

from proceeding to sell real estate belonging to the estate for the payment of debts or legacies, although it has been sold on partition or otherwise, or the proceeds of the sale have been fully distributed.

HISTORY: GC §§ 10510-51, 10510-52; 114 v 320 (462); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10818, 10819.

The effective date of S 145 is set by section 3 of the act.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

For text of RC § 2127.41 applicable to estates of decedents dying prior to January 1, 1976, see Appendix A, herein.

Comment

General Code § 10510-51 replaced former GC § 10819, but enlarged the last sentence to include legacies in addition to debts.

Cross-References to Related Sections

Who to file petition in partition, RC § 5307.03.

Forms

1 A&H Probate FORM 2127.41a et seq.

Research Aids

Heirs, right of partition:

O-Jur2d: Executors and Administrators § 400

Am-Jur2d: Executors and Administrators § 349

Reaching proceeds of partition:

O-Jur2d: Executors and Administrators § 401

CASE NOTES AND OAG

[DECISIONS UNDER LAW PRIOR TO SB 145 AMENDMENT]

1. The administrator is entitled to an order of sale for so much of the real estate of which the intestate died seized as may be necessary to satisfy the indebtedness of the estate, although such real estate may have been partitioned among his heirs, and by them either wholly or in part conveyed to purchasers; for decedent's debts are a lien upon his lands, and purchasers from his heirs take them cum onere, and subject to the maxim caveat emptor: *Faran v. Robinson*, 17 OS 243.

2. Right of administrator to sell lands to pay debts is superior to right of heirs to have partition. When the administrator has applied for authority to sell lands, the heirs can prevent a sale and have partition only by giving bond for the payment of debts. Former GC §§ 10818 and 10819 (see now RC § 2127.41) do not mean that a suit by the heirs in partition deprives the administrator of his right to an order to sell: *Stout v. Stout*, 82 OS 358, 92 NE 465, 137 Am St 785.

3. General Code §§ 10510-51 and 10510-52 (RC § 2127.41), providing for the appropriation of proceeds from a partition sale to pay debts where a deficiency of assets exists, do not supplant GC § 10510-2 (RC § 2127.02) et seq, requiring an administrator to commence an action to sell real estate to pay debts when he determines that personal property is insufficient; a sale for that purpose is a superior right and supplants a partition suit in the common pleas court: *Retterer v. Retterer*, 4 OO 333 (App).

4. Where the personal property of a deceased person is insufficient to pay debts of the estate, and partition proceedings are instituted in the court of common pleas for the partition of decedent's real

property, the executor or administrator of the estate of such decedent may elect either to bring an action in the probate court, under GC § 10510-2 (RC § 2127.02) to sell the real property to pay debts, or to secure and file a certificate in the court in which the partition proceedings are pending, as provided for in GC §§ 10510-51 and 10510-52 (RC § 2127.41): *Burrier v. Kiefer*, 90 App 571, 48 OO 210, 107 NE(2d) 565.

5. When the sale of lands is necessary to pay debts, the filing of a suit in partition does not prevent the administrator from selling the lands. On filing his certificate from the probate court in the court where the partition suit is pending, he is entitled to an immediate order of sale; and, without filing such certificate, he may appear in the partition suit and, on cross-petition, obtain an order of sale without waiting a year after the ancestor's death: *Myers v. Myers*, 9 CC(NS) 449, 19 CD 396 [for opinion disallowing attorney fees, see 5 NP(NS) 85, 17 OD 551].

6. Probate court may not force the dismissal of a partition action once common pleas court acquires complete jurisdiction and issues a valid order of sale: *Child v. Snyder*, 88 OLA 401, 20 OO(2d) 432, 181 NE(2d) 315.

[FOREIGN OR NONRESIDENT WARDS]

§ 2127.42 Sale of the lands of foreign wards.

Wards living out of this state and owning lands within it are entitled to the benefit of sections 2127.01 to 2127.43 of the Revised Code. Complaints for the sale of real estate by guardians of such wards shall be filed in the county in which the land is situated, or if situated in two or more counties, then in one of the counties in which a part of it is situated. Additional security shall be required from such guardians, when deemed necessary by the probate court of the county in which the complaints are filed.

HISTORY: GC § 10510-48; 114 v 320 (461); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10955, 10956.

Comment

The first sentence of GC § 10510-48 was taken from former GC § 10955 and the balance from former GC § 10956.

The above section, taken with RC §§ 2111.43 and 2111.44, confer an absolute right on foreign guardians to sue the same as local guardians, except that they must give security for costs the same as other nonresidents. When a foreign guardian brings an action for

the sale of real estate, the petition must set forth, in addition to the matters required by a local guardian (RC § 2127.10), the fact of such foreign appointment. It would be good practice to file as an exhibit an authenticated copy of the records of the court making the foreign appointment, as required by RC § 2111.41, as proof that such foreign guardian is acting in the capacity he represents himself to be, and that the bond he has given is ample and sufficient to secure whatever might be received. This authenticated copy is required of a foreign guardian before he may receive money or other property. See RC § 2111.42.

Research Aids

Sale of foreign ward's lands:

O-Jur2d: Guardian and Ward §§ 132, 157, 163

Venue:

O-Jur2d: Guardian and Ward § 167

CASE NOTES AND OAG

1. An action may be maintained in this state by a minor, resident in Pennsylvania, through his guardian appointed in that state, to recover damages for personal injuries: *Pennsylvania R. Co. v. Raub*, 11 CC (NS) 157, 20 CD 542 [affirmed, without report, 79 OS 454].

2. A guardian appointed in another state cannot as such guardian sue in this state: *Smith v. Madden*, 78 Fed 833, 37 Bull 291, 9 OFD 320.

§ 2127.43 Sale of real estate by trustees of nonresidents.

Chapter 2127. of the Revised Code extends to an action brought by the trustee of a nonresident minor or mentally ill or deficient person to sell the real estate of the ward.

HISTORY: GC § 10510-53; 114 v 320 (462); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 11017.

Cross-References to Related Sections

Guardian of nonresident minor, lunatic, etc., RC § 2111.37 et seq.

Lease of real estate by guardian, RC §§ 2111.25 et seq, 2111.48.

Mortgage by fiduciary, RC § 2109.46 et seq.

Sale of real estate by assignee of insolvent debtor, RC § 1313.21 et seq.

Outline of Procedure

Sale of lands by trustees of nonresidents. Leyshon No. 105; A&H No. 85.

Research Aids

Sale of real estate by trustee of nonresident:

O-Jur2d: Guardian and Ward § 157

CHAPTER 2129: ANCILLARY ADMINISTRATION

Section

- 2129.01 Record of extracounty and extrastate proceedings.
 - 2129.02 Proceedings by nonresident executor or administrator to bar creditor's claims.
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 - 2129.28 Trustee's bond.
 - 2129.29 Trustee appointed by a foreign court.
 - 2129.30 Probate court may appoint a trustee under a foreign will.

§ 2129.01 Record of extracounty and extrastate proceedings. (GC § 10511-1)

The authenticated record of any extracounty or extrastate administration proceedings filed in the probate court shall be admitted to record, docketed, and indexed in the same manner as local administration proceedings.

HISTORY: GC § 10511-1; 114 v 320 (462). Eff 10-1-53.

Cross-References to Related Sections

See RC §§ 2129.08, 2129.10, 2129.24 which refer to § 2129.01 et seq.

See RC § 2131.02 which refers to this chapter.

Comparative Legislation

Probate of foreign wills:

- Cal.—Probate Code, § 360
- Ill.—Rev Stat, ch 3, § 7-1
- Ind.—Burns' Stat, § 29-2-1-1
- Ky.—KRS, § 394.150
- Mich.—MCLA, § 702.27
- N.Y.—SCPA, § 1602
- Pa.—Purdon's Stat, Tit. 20, § 4101
- Fla.—FSA, § 733.202

Forms

- 1 A&H Probate FORM 2129.01a et seq.

Research Aids

Ancillary administration; record:
O-Jur2d: Executors and Administrators § 550

ALR

Basis of distribution among decedent's unsecured creditors, of ancillary assets where entire estate or ancillary estate is insolvent. 164 ALR 765.
Duty of court in proceedings for ancillary letters upon estate of nonresident to determine conflicting claims of two or more states as to domicile or residence of decedent. 101 ALR 1510.
Accountability of domiciliary executor or administrator, to court of domicile, in respect of personal assets subject in another state to ancillary administration. 132 ALR 1369.

Law Review

See explanatory article in 4 OBar 458.

CASE NOTES AND OAG

1. Administration of ancillary estate is concerned solely with decedent's realty and personalty located within territorial limits of the state in which ancillary administration is granted. Unless otherwise expressly provided by statute, ancillary administration is subservient only to rights of creditors and legatees of nonresident decedent who are resident of state wherein granted, and residuum is transmissible to court of foreign state granting ancillary administration only when final account has been settled in proper tribunal where ancillary administration is granted upon equitable principles adopted by its own law in distribution of assets found therein. Such residuum, when transmitted to state of domiciliary administration, is to be there disposed of in accordance with laws of such state: *In re Kelley*, 68 App 51, 22 OO 158, 34 NE (2d) 34.

§ 2129.02 Proceedings by nonresident executor or administrator to bar creditor's claims. (GC § 10511-2)

When letters of administration or letters testamentary have been granted in any other state, territory, or possession of the United States, or in any foreign country, as to the estate of a deceased resident thereof, and when no ancillary administration proceedings have been had or are being had in Ohio, the person to whom such letters were granted may file in the probate court in any county of this state in which is located real estate of the decedent an authenticated copy of the letters of appointment, and such court shall cause notice thereof to be published for three consecutive weeks in some newspaper of general circulation in the county in which such copy was filed. The claim of any creditor of such decedent shall be presented to such court within six months after the date of such filing or be forever barred as a possible lien upon the Ohio real estate of such decedent. If, at the expiration of such period of six months, any such claims have been filed and remain unpaid after reason-

able notice thereof to the nonresident executor or administrator, ancillary administration proceedings as to such estate may be had forthwith.

HISTORY: GC § 10511-2; 114 v 320 (462). Eff 10-1-53.

Forms

1 A&H Probate FORM 2129.02a et seq.

1 A&H Probate FORM 2129.04a et seq: Application for ancillary administration.

Outline of Procedure

Claims of creditors, payment to nonresident executor or administrator. Leyshon No. 55; A&H No. 25.

Research Aids

Proceeding by foreign representative:

O-Jur2d: Executors and Administrators § 548

Am-Jur2d: Executors and Administrators § 680

Law Review

See explanatory article in 4 OBar 458.

CASE NOTES AND OAG

1. Where an authenticated copy of letters of appointment of the executor of the estate of a deceased nonresident is filed in a probate court of this state in accordance with this section, the filing in such court of a claim against such estate within six months from the filing of the copy of the letters, is within time and is not governed by GC § 10509-133 (RC § 2117.12), which provides that suit on a claim must be brought within two months after such claim is disallowed: *Foulks v. Talbott*, 74 App 281, 29 OO 434, 58 NE (2d) 790.

2. Where, following an automobile accident upon an Ohio highway, a nonresident defendant dies after an action has been commenced against him pursuant to the provisions of RC § 2703.20, if there has been no administration in Ohio, the time limitation of RC §§ 2311.31 and 2117.06, has not commenced to run, and under the provisions of RC §§ 2311.25 and 2703.20, the pending action may be revived, any time before judgment, against the nonresident decedent's executor or administrator appointed in another state: *Kibbey v. Mercer*, 11 OApp(2d) 51, 40 OO(2d) 223, 228 NE(2d) 337.

3. This new statute supersedes, apparently, the holding that creditors must present their claims to a foreign executor or administrator within the time specified by the law of such executor's or administrator's domicile: *Wilson v. Insurance Co.*, 164 Fed 117, 19 LRA(NS) 553.

§ 2129.03 Delivery of personal property and payment of debts to nonresident executor or administrator. (GC § 10511-3)

The money, debts, and other personal property located in Ohio, belonging to a nonresident decedent may be delivered to the nonresident executor or administrator without further liability to the estate provided the person delivering such money, debts, or other personal property has no knowledge of ancillary proceedings being had or having been had in Ohio.

HISTORY: GC § 10511-3; 114 v 320 (463); 125 v 903 (983). Eff 10-1-53.

Cross-References to Related Sections

Payments to ancillary administrator, RC § 2129.20.

Research Aids

Foreign representative—collection of debts by and delivery of personalty to:

O-Jur2d: Executors and Administrators § 549

Am-Jur2d: Executors and Administrators § 693

Law Review

See explanatory article in 4 OBar 458.

CASE NOTES AND OAG

1. Payment by an Ohio debtor to an administrator appointed by another state than Ohio, prior to the appointment of an administrator in Ohio, is a satisfaction of the debt: *Crawford v. Foreign Christian Missionary Soc.*, 22 OD(NP) 804.

§ 2129.04 Ancillary administration. (GC § 10511-4)

When a nonresident decedent leaves property in Ohio, ancillary administration proceedings may be had upon application of any interested person in any county in Ohio in which is located property of the decedent, or in which a debtor of such decedent resides. Such applicant may or may not be a creditor of the estate. The ancillary administration first granted shall extend to all the estate of the deceased within the state, and shall exclude the jurisdiction of any other court.

HISTORY: GC § 10511-4; 114 v 320 (463). Eff 10-1-53.

Analogous to former GC §§ 10625, 10604.

Comparative Legislation

Letters of administration—foreign executor:

Cal.—Probate Code, § 362

Ill.—Rev Stat, ch 3, § 22-5

Ind.—Burns' Stat, § 29-2-1-5

Ky.—KRS, § 395.170

Mich.—MCLA, § 702.28a

N.Y.—SCPA, § 1604

Pa.—Purdon's Stat, Tit. 20, § 4101

Fla.—FSA, § 734.101

Forms

1 A&H Probate FORM 2129.04a et seq.

Outline of Procedure

Appointment of ancillary administrator. Leyshon No. 45; A&H No. 16.

Research Aids

Extent of ancillary administration:

O-Jur2d: Executors and Administrators § 561

Jurisdiction:

O-Jur2d: Executors and Administrators § 568

When ancillary administration may be had:

O-Jur2d: Executors and Administrators §§ 566, 567; Wills § 306; Conflict of Laws § 99

Am-Jur2d: Executors and Administrators § 680 et seq.

ALR

Diverse adjudications by courts of different states as to domicile of decedent as regards taxation, administration, or distribution of estate. 121 ALR 1200.

What constitutes "estate" of nonresident decedent within statute providing for local ancillary administration where decedent died leaving an estate in jurisdiction. 34 ALR2d 1270.

CASE NOTES AND OAG INDEX

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See also case note 1 under RC § 2129.01.

1. Unless expressly otherwise provided by statute, ancillary administration is subservient only to the rights of creditors, legatees and distributees of a nonresident decedent, who are resident within the state where it is granted; and the residuum is transmissible to the court of the foreign state granting ancillary administration only when a final account has been settled in a proper tribunal where the ancillary administration is granted, upon the equitable principles adopted by its own law in the application and distribution of assets found therein. In the application of such equitable principles it is essential that the status of the whole estate, wherever situate, as to assets and liabilities be considered: In re Estate of Crawford, 68 OS 58, 67 NE 156; Williams' Adms. v. Welton's Adms., 28 OS 451; Swearingen, Admr. v. Morris, 14 OS 424; In re Estate of Kelley, 68 App 51, 22 OO 158, 34 NE(2d) 34.

2. The rights of creditors who are nonresidents of the state of ancillary administration are not the subject of adjudication in ancillary administration: In re Estate of Kelley, 68 App 51, 22 OO 158, 34 NE(2d) 34.

3. An automobile insurance policy is not property located in Ohio within the meaning of this section, providing for ancillary administration. In re Wilcox, 60 OO 232, 137 NE(2d) 301 (App).

4. No ancillary administration of a nonresident decedent's estate can be had in Ohio where the application is made by one who is not an interested person, as required by this section: In re Wilcox, 60 OO 232, 137 NE(2d) 301 (App).

5. Alleged tortfeasor is an interested party and can question the validity of the appointment of an ancillary administrator: In re Walker, 21 OO 220, 6 OSupp 324 (PC), affirmed 34 OLA 248, 36 NE(2d) 800 (App).

6. Ancillary administration may be had only in cases where the nonresident decedent leaves property in Ohio: In re Walker, 21 OO 220, 6 OSupp 324 (PC), affirmed, 34 OLA 248, 36 NE(2d) 800 (App).

7. The situs of a wrecked automobile, the personal effects, and clothing of the decedent, are the domicile of the owner: In re Walker, 21 OO 220, 6 OSupp 324 (PC), affirmed, 34 OLA 248, 36 NE(2d) 800 (App).

8. The right of action for the wrongful death of a decedent is not property of a decedent: In re Walker, 21 OO 220, 6 OSupp 324 (PC), affirmed, 34 OLA 248, 36 NE(2d) 800 (App).

9. The protection afforded to a decedent under a policy of insurance for indemnity or against liability dependent upon the establishment of a liability against him or his estate constitutes property to support ancillary administration proceedings under the provisions of this section even though the decedent leaves no other estate to be administered in Ohio: In re McQueen, 4 OMisc 65, 32 OO(2d) 210, 210 NE(2d) 157 (PC).

10. When an injured party has brought an action in Ohio against an insured non-resident tortfeasor for

damages arising out of an automobile collision and service has been made upon said tortfeasor who dies during the pendency of said action, the injured party is an interested party who can apply for ancillary administration of said non-resident's estate under the provisions of this section: In re McQueen, 4 OMisc 65, 32 OO(2d) 210, 210 NE(2d) 157 (PC).

DECISIONS UNDER FORMER GC § 10625

11. The duties of an ancillary administrator under the Ohio Code are, to collect the proceeds and property of the estate, make application of them to the payment of the debts proved against the estate, and this having been done to pay the surplus into the court granting administration for the benefit of the estate of the decedent in the state where he resided at the time of his death: In re Estate of Wood, 27 NP(NS) 323 (CP).

12. It may be regarded as settled that the succession in personal estates of every description, wherever situated, is regulated by the law of the domicile: In re Estate of Wood, 27 NP(NS) 323 (CP).

13. Former GC §§ 10604 and 10625 (see now RC §§ 2113.01, 2129.04) provide for administration in this state on the estate of a nonresident leaving an estate in Ohio: Williams v. Welton, 28 OS 451.

14. The probate court has constitutional jurisdiction to issue letters of administration upon the estates of all those having a legal domicile in the state, and statutory jurisdiction, under GC § 10604, to issue such letters on the estates of inhabitants not domiciled in Ohio, and additional statutory jurisdiction under GC § 10625, over those having no residence of any kind in Ohio, but possessed of property therein. The first mentioned jurisdiction is exercised in the county of which the decedent was a resident; the second in the county in which he inhabited at his death; and the last in any county in which the decedent had property: Hill v. Blumenberg, 19 App 404.

15. Bill in equity to subject real estate of a decedent in Ohio, where the heirs and representatives reside in another state, and where no letters of administration have been taken in Ohio, cannot be sustained. The creditor may himself take letters of administration, and thus have a complete remedy at law: Bustard v. Dabney, 4 O 68.

16. That the petitioner is unsuitable to administer is of no consequence; while the court may refuse to appoint the petitioner, it cannot refuse to appoint anyone else, unless conditions warranting an administrator do not exist: In re Worthington, 4 OD(NP) 381.

§ 2129.05 Foreign wills. (GC §§ 10511-5, 10511-6)

Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to property in this state, may be admitted to record in the probate court of a county where a part of such property is situated. Such authenticated copies, so recorded, shall be as valid as wills made in this state.

When such a will, or authenticated copy, is admitted to record, a copy thereof, with the copy of the order to record it annexed thereto, certified by the probate judge under the seal of his court, may be filed and recorded in the office of the probate judge of any other county where a part

of such property is situated, and it shall be as effectual as the authenticated copy of such will would be if approved and admitted to record by the court.

HISTORY: GC §§ 10511-5, 10511-6; 114 v 320 (463). EF 10-1-53. Analogous to former GC §§ 10535, 10536.

Cross-References to Related Sections

Contesting foreign will, RC § 2107.48.

Foreign guardians, RC § 2111.39 et seq.

Sale of land in Ohio, RC § 2127.42.

Probate of later will, RC § 2107.22.

Until probated, a will does not pass realty, RC § 2107.61.

See RC §§ 2107.59, 2107.61 which refers to § 2129.05 et seq.

Forms

1 A&H Probate FORM 2129.05a et seq.

Outline of Procedure

Probate of will made in another state. Leyshon No. 94; A&H No. 73.

Research Aids

Contest of foreign wills:

O-Jur2d: Conflict of Laws § 107

Am-Jur2d: Wills § 1062

Probate or record of foreign wills:

O-Jur2d: Wills § 303 et seq; Conflict of Laws §§ 98, 100

Am-Jur2d: Wills § 831

ALR

Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state. 169 ALR 554.

Conflict of laws respecting revocation of will. 9 ALR2d 1412.

Probate in state where assets are found of a will of nonresident which has not been admitted to probate in state of domicile. 119 ALR 491; 20 ALR 3d 1033.

Duty of court in proceedings for ancillary letters upon estate of nonresident to determine conflicting claims of two or more states as to domicile or residence of decedent. 101 ALR 1510.

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Widow's election, 14.1

1. The will of a person whose domicile, at the time of his death, is in this state, is a domestic will, and properly admitted to original probate at the place of such domicile, without regard to where the will was made or where such person died: *Converse v. Starr*, 23 OS 498.

2. A will made in a sister state must be recorded in Ohio before title to land vests in the devisee: *Wilson v. Tappan*, 6 O 172.

3. Will devising lands in Ohio, if executed in a sister state according to her laws, and probate there made, is a sufficient devise of lands in Ohio upon its being duly recorded with the authentication of its

probate in the county where the lands lie: *Bailey v. Bailey*, 8 O 239.

4. A will made in another state takes effect from the death of the testator, and not from the date of its registry in Ohio: *Hall v. Ashby*, 9 O 96.

5. Will made in another state, valid where made but not in the form required in Ohio, passes no property in Ohio, under the act of 1831. Aliter, it seems, under the acts of 1805 and 1840: *Meese v. Keefe*, 10 O 362.

6. This section applies only to wills proved in a court to which the jurisdiction to make original probate in the case properly belongs, under the established rules of law: *Manuel v. Manuel*, 13 OS 458; see also *McNeal v. Ross*, 58 OS 707, 51 NE 1099, 39 Bull 353.

7. By the act of 1840, foreign wills executed and proved according to the foreign law, could be admitted to record in this state: *Jones v. Robinson*, 17 OS 180.

8. The act of 1824 (2 Chase, 1305), and the act of 1831 (3 Chase, 1785), like the act of 1840, required the will to be attested by two subscribing witnesses, but as to foreign wills the act of 1831 required them to be executed according to the law of this state, or they could not be admitted to record here: *Jones v. Robinson*, 17 OS 171.

9. The validity of wills is governed by the *lex rei sitae*. And the validity of a foreign will, a copy of which is recorded here, under this section, is derived from the provisions of this section, and not from the foreign law to which its execution and probate conform: *Jennings v. Jennings*, 21 OS 56.

10. Where a question arose as to the distribution of property under a clause in a will made in Connecticut the court held that to a very considerable extent, the construction of the will must depend upon the law of Connecticut. But when it is considered that the devisees and legatees are all in Ohio, that the trustee is in Ohio, that the property itself, so far as it can be done, is to be and actually has been transmitted to Ohio; when a question arises as to the distribution of that property thus transmitted, and where it is not controlled by the will, that question must be settled according to the laws of Ohio: *Brewster v. Brewster*, 14 OS 368, 382.

11. In proceedings under this section, it is not necessary to continue the motion to the next term, or to publish notice in a newspaper, as in the case of wills made out of the United States: *Carpenter v. Denoon*, 29 OS 379.

12. The statute in force when the record was made, and not that in force when the will was executed, controls the effect to be given to the record of an authenticated copy of a foreign will: *Carpenter v. Denoon*, 29 OS 379.

13. The act of 1824 (2 Chase, 1305) required that wills disposing of property in this state, but executed and proved in a sister state, should be executed in conformity with the statute of this state: *Carpenter v. Denoon*, 29 OS 379.

14. A domestic will, when duly probated in any county, vested in the devisee the land therein devised, although situated in another county. And an authenticated copy of a foreign will duly admitted to record in any county of this state is as valid to vest title as a domestic will: *Carpenter v. Denoon*, 29 OS 379.

14.1 Where an authenticated copy of a will, executed and proved according to the laws of the state of the decedent's domicile, has been admitted to record pursuant to this section and where it is not established that the widow who was domiciled in that state had claimed anything under that will or otherwise elected to take thereunder and where the

testator owned real estate in Ohio at his death, such widow has the right, with respect to that Ohio real estate, to elect not to take under the testator's will but to take under the Ohio statute of descent and distribution even though no such election is permitted by the law of the state of the testator's domicile at death: *Pfau v. Moseley*, 9 OS(2d) 13, 38 OO(2d) 8, 222 NE(2d) 639.

15. The record of a foreign will is necessary to effectually pass title to property in this state. When this is done, the doctrine of relation applies, and validates acts previously done which after such record may be performed: *Union Sav. Bank & Co. v. Baltimore & C. R. Co.*, 7 NP(NS) 497.

16. A person claiming property in Ohio under a will proved in another state cannot sue for same unless the will be proved in Ohio, or it is permitted by some law of Ohio. Under the Ohio statute permitting this, it must appear that the requisitions of the statute have been pursued, in order to give the will the same validity and effect as if made within the state: *Kerr v. Moon*, 22 US (9 Wheat) 565.

§ 2129.06 Will made outside the United States. (GC § 10511-7)

A will executed, proved, and allowed in a country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state in the manner and for the purpose mentioned in sections 2129.07 to 2129.30, inclusive, of the Revised Code.

HISTORY: GC § 10511-7; 114 v 320 (464). Eff 10-1-53. Analogous to former GC § 10537.

Cross-References to Related Sections

Probate of later will, RC § 2107.22.

Research Aids

Wills admitted in another country:

O-Jur2d: Wills § 311; Conflict of Laws § 98

§ 2129.07 Proceedings to admit foreign will to record. (GC §§ 10511-8, 10511-9)

An authenticated copy of a will executed, proved, and allowed in a country other than the United States and territories thereof and the probate of such will must be produced by the executor, or by a person interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon such judge shall continue the motion to admit it to probate for two months. Notice of the filing of such application must be given to all persons interested, in some public newspaper printed or in general circulation in the county where the motion is made, at least three weeks consecutively. The first publication shall be at least forty days before the time set for the final hearing of the motion.

If, on such hearing, it appears to the probate court that the instrument ought to be allowed in this state, it shall order the copy to be filed and recorded. The will, and the probate and record thereof, then shall have the same effect as if the

will originally had been proved and allowed in that court. This section does not give effect to the will of an alien different from that which it would have had if originally proved and allowed in this state. When such copy has been filed and recorded, and when no ancillary administration proceedings have been had or are being had in Ohio, sections 2107.39 to 2107.45, inclusive, of the Revised Code, relating to election shall be the same as in the case of resident decedents, except that such election shall be made not later than six months after the record of such copy.

HISTORY: GC §§ 10511-8, 10511-9; 114 v 320 (464); 125 v 903 (983). Eff 10-1-53. Analogous to former GC §§ 10538, 10539.

Cross-References to Related Sections

See RC § 2129.06 which refers to § 2129.07 et seq.

Forms

1 A&H Probate FORM 2129.07a et seq.

Outline of Procedure

Probate of will made in foreign country. *Leyshon* No. 95; A&H No. 74.

Research Aids

Election under foreign will:

O-Jur2d: Wills § 831

Probate of will admitted in foreign country:

O-Jur2d: Wills § 311

ALR

Probate in state where assets are found of a will of nonresident which has not been admitted to probate in state of domicile. 119 ALR 491.

CASE NOTES AND OAG

1. This section does not apply to wills executed and proved in any of the states or territories of the United States: *Carpenter v. Denoon*, 29 OS 379.

§ 2129.08 Appointment.

After an authenticated copy of the last will and testament of a nonresident decedent has been allowed and admitted to record as provided by sections 2129.01 to 2129.30 of the Revised Code, and after there has been filed in the probate court a complete exemplification of the record of the grant of the domiciliary letters of appointment and of such other records of the court of domiciliary administration as the court requires, the court shall appoint as the ancillary administrator the person named in such will as general executor or as executor of the Ohio estate of the decedent, provided that such person is a resident of Ohio, makes application, and qualifies in all other respects as required by law, except that if the testator in the will naming such executor orders or requests that bond be not given by him, bond shall not be required unless for sufficient reason the court requires it. If such decedent died intestate or failed to designate in his will any person qualified to act as ancillary administrator, the court shall appoint

in such capacity some suitable person resident of the county, who may be a creditor of the estate. An ancillary administrator acting as to the Ohio estate of a testate decedent may sell and convey the real and personal estate by virtue of the will as executors or administrators with the will annexed may do. No person shall be appointed ancillary administrator as to the Ohio estate of a nonresident presumed decedent except after sections 2121.01 to 2121.09 of the Revised Code, relative to the appointment of an ancillary administrator have been complied with.

HISTORY: GC § 10511-10; 114 v 320 (464); 125 v 903 (983) (EF 10-1-53); 135 v S 349, EF 9-30-74.

Analogous to former GC § 10511-10.

Cross-References to Related Sections

See RC §§ 2129.09, 2129.12 which refer to this section.

Election by surviving spouse, RC § 2107.39 et seq.

Comparative Legislation

Letters of administration:

- Cal.—Probate Code, § 362
- Ill.—Rev Stat, ch 3, § 9-1
- Ind.—Burns' Stat, § 29-2-1-5
- Ky.—KRS, § 395.105
- Mich.—MCLA, § 702.28a
- N.Y.—SCPA, § 1607
- Pa.—Purdon's Stat, Tit. 20, § 4101
- Fla.—FSA, § 734.102

Forms

1 A&H Probate FORM 2113.06a et seq: Application for letters.

Outline of Procedure

Appointment of ancillary administrator. Leyshon No. 45; A&H No. 16.

Research Aids

Appointment in case of presumed decedent:

O-Jur2d: Executors and Administrators § 570

Dispensing with bond:

O-Jur2d: Fiduciaries § 186

Am-Jur2d: Executors and Administrators § 687

Sale of real or personal property:

O-Jur2d: Executors and Administrators § 579

Am-Jur2d: Executors and Administrators § 701

Who entitled to appointment:

O-Jur2d: Executors and Administrators § 567

Am-Jur2d: Executors and Administrators § 685

ALR

Duty of court in proceedings for ancillary letters upon estate of nonresident to determine conflicting claims of two or more states as to domicile or residence of decedent. 101 ALR 1510.

§ 2129.09 Notice of appointment. (GC § 10511-11)

When an ancillary administrator has been appointed under section 2129.08 of the Revised Code, the probate court shall publish notice of his appointment as in other administration proceedings under section 2113.08 of the Revised Code, and such ancillary administrator shall for-

ward a notice of his appointment by registered mail to the domiciliary administrator, if the name and address of such domiciliary administrator are known; otherwise to the next of kin of the decedent whose names and addresses are known, and to the court having jurisdiction in estate matters in the county in which decedent resided at the time of his death.

HISTORY: GC § 10511-11; 114 v 320 (465). EF 10-1-53.

Cross-References to Related Sections

Notice of appointment of executor or administrator, RC § 2113.08.

Research Aids

Notice of appointment:

O-Jur2d: Executors and Administrators § 569

§ 2129.10 Procedure. (GC § 10511-12)

Except as otherwise provided by sections 2129.01 to 2129.30, inclusive, of the Revised Code, the procedure in ancillary administration shall be the same as in the administration of the estates of resident decedents.

All rights, powers, and duties authorized by section 2117.23 of the Revised Code relating to a year's allowance shall be available to a widow and a child or children under the age of eighteen of a nonresident decedent except that the duty to notify such widow and child or children of their right to apply for a year's allowance out of the Ohio property shall be exercised by the person granted ancillary letters of administration or ancillary letters testamentary.

HISTORY: GC § 10511-12; 114 v 320 (465); 125 v 411 (415); 125 v 903 (984). EF 10-16-53.

Cross-References to Related Sections

Year's allowance, nonresident decedent, RC § 2117.23.

Research Aids

Administration procedure:

O-Jur2d: Executors and Administrators § 571

Am-Jur2d: Executors and Administrators § 691

Year's allowance—notification:

O-Jur2d: Executors and Administrators § 221

ALR

Duty of court in proceedings for ancillary letters upon estate of nonresident to determine conflicting claims of two or more states as to domicile or residence of decedent. 101 ALR 1510.

Law Reviews

Probate code amendments. Francis J. Eberly. 14 OSLJ 368.

CASE NOTES AND OAC

See also case note 1 under RC § 2129.12.

1. Where deceased spouse, a resident of the state of Texas which makes no allowance for widow, also owned property in Ohio, the widow would be entitled to have set off to her a year's allowance out of the Ohio property. In re Weatherhead, 73 OLA 524, 137 NE(2d) 315 (PC).

§ 2129.11 No domiciliary administration. (GC § 10511-13)

If no domiciliary administration has been commenced, the ancillary administrator shall proceed with the administration in Ohio as though the decedent had been a resident of Ohio at the time of his death.

HISTORY: GC § 10511-13; 114 ▾ 320 (465); 125 ▾ 903 (984). **EFF** 10-1-53.

Research Aids

Necessity for domiciliary administration:

O-Jur2d: Executors and Administration § 571;
Conflict of Laws § 99

Am-Jur2d: Executors and Administrators § 686

CASE NOTES AND OAG

1. Where no domiciliary administration has been commenced, the estate of the foreign decedent is to be administered the same as if said decedent had died domiciled in Ohio; and the law of Ohio governing the probate of estates, including the statutes of descent and distribution, will be applicable: *Darrow v. Fifth Third Union Trust Co.*, 1 OO(2d) 104, 139 NE(2d) 112 (CP).

2. Under the provisions of RC § 2107.39, the surviving spouse, not only of a testator who was domiciled in Ohio at the time of his death but also of a testator who was not domiciled in, but owned property in Ohio, and whose will has not previously been admitted to probate in any other county of Ohio or elsewhere, has the right to elect whether to take under the will or under the statute of descent and distribution: *In re Gould*, 1 OO(2d) 366, 140 NE(2d) 793 (PC).

§ 2129.12 Presentation of claims. (GC § 10511-14)

Creditors having claims against the estate of a nonresident decedent shall file them with the ancillary administrator, appointed under section 2129.08 of the Revised Code, within the time and in the manner provided by sections 2117.06 and 2117.07 of the Revised Code.

HISTORY: GC § 10511-14; 114 ▾ 320 (465). **EFF** 10-1-53.

Cross-References to Related Sections

Presentation of claims generally, RC § 2117.06 et seq.

Proceedings by nonresident executor, etc., to bar creditor's claims, RC § 2129.02.

See RC § 2129.23 which refers to this section.

Research Aids

Presentation of claims:

O-Jur2d: Executors and Administrators § 577

Am-Jur2d: Executors and Administrators §§ 697, 698

ALR

Right of nonresident of ancillary jurisdiction to file claim in ancillary administration. 106 ALR 893.

CASE NOTES AND OAG

See also case note 2 under RC § 2129.02.

1. In the payment of unsecured claims allowed in an Ohio ancillary administration of a wholly insolvent

estate, such administrator shall consider the total of the available assets in the hands of the domiciliary administrator and those in his own hands, and also the total of the unsecured claims allowed by the domiciliary administrator and those allowed in Ohio: *In re Hirsch*, 146 OS 393, 32 OO 445, 66 NE(2d) 636 [reversing 76 App 69, 31 OO 386, 63 NE(2d) 174].

2. The rights of creditors who are nonresidents of the state of ancillary administration are not the subject of adjudication in ancillary administration: *In re Estate of Kelley*, 68 App 51, 22 OO 158, 34.

§ 2129.13 Sale of real estate. (GC § 10511-15)

If an ancillary administrator finds that the personal property of the nonresident decedent in Ohio is not sufficient to pay the expenses of administration, public rates and taxes, and other valid claims which have been presented, he shall proceed to sell as much of the real estate of the decedent located in this state as is necessary to pay such debts. The procedure shall be the same as in sales of real estate in administration proceedings relating to the estates of resident decedents under sections 2127.01 to 2127.43, inclusive, of the Revised Code.

HISTORY: GC § 10511-15; 114 ▾ 320 (465); 125 ▾ 903 (984). **EFF** 10-1-53.

Cross-References to Related Sections

Bona fide purchaser protected, RC § 2129.21.

Sale of land by fiduciaries, RC § 2127.01 et seq.

See RC § 2129.14 which refers to this section.

Outline of Procedure

Sale of lands by ancillary administrator. *Leyshon* No. 104; *A&H* No. 84.

Research Aids

Sale of real estate:

O-Jur2d: Executors and Administrators § 579

Am-Jur2d: Executors and Administrators § 701

§ 2129.14 Sale requested by domiciliary executor or administrator. (GC § 10511-16)

A domiciliary executor or administrator of a nonresident decedent may file in the probate court by which the ancillary administrator was appointed information showing that it will be necessary to sell Ohio real estate of the decedent to pay debts and legacies, and the court may thereupon authorize the ancillary administrator to sell such part or all of such real estate as is necessary. The ancillary administrator shall proceed to sell such real estate in the manner provided by section 2129.13 of the Revised Code.

HISTORY: GC § 10511-16; 114 ▾ 320 (466). **EFF** 10-1-53.

Comparative Legislation

Sale of real estate by foreign administrator:

Cal.—Probate Code, § 780

Ill.—Rev Stat, ch 3, § 22-4

Ind.—Burns' Stat, § 29-2-1-6

Ky.—KRS, § 395.515

Mich.—MCLA, § 709.2
 N.Y.—SCPA, § 1610
 Pa.—Purdon's Stat, Tit. 20, § 3351

Research Aids

Sale upon request of domiciliary representative:
O-Jur2d: Executors and Administrators § 580
Am-Jur2d: Executors and Administrators § 701 et seq.

CASE NOTES AND OAG

1. Upon compliance by a domiciliary executor with the provisions of this section, any probate court in this state, by which an ancillary administrator has been appointed in conformity with law, has jurisdiction to order such administrator to sell Ohio real property of which the deceased died seized to pay debts and legacies: *Crabbe v. Lingo*, 146 OS 489, 32 OO 561, 67 NE(2d) 1 [affirming 76 App 530].

2. Lands in Ohio, which are part of an estate of a person who dies in another state, may be sold to pay debts and charges of such estate, where the personal property is insufficient, even though the debts and charges in such other state are much larger than those in Ohio: *Crabbe v. Lingo*, 76 App 530, 32 OO 268, 61 NE(2d) 742 [affirmed, 146 OS 489].

§ 2129.15 Certificate of assets and liabilities. (GC § 10511-17)

Within five months after his appointment the ancillary administrator of a nonresident decedent shall forward to the domiciliary administrator, if any, of such decedent, if the name and address of such domiciliary administrator are known, a certificate showing all assets of the estate in this state and all debts and liabilities including estimated expenses of administration. If the name and address of such domiciliary administrator are not known, such certificate shall be forwarded to the next of kin of the deceased whose names and addresses are known and to the court having jurisdiction in estate matters in the county in which the decedent resided at the time of his death.

HISTORY: GC § 10511-17; 114 v 320 (466); 125 v 903 (984). **EF** 10-1-53.

Comment

The requirement of this statute is for the purpose of informing the domiciliary administrator or executor or the next of kin of the financial status of the Ohio estate, so that they may take the action authorized by RC § 2129.16 to prevent the sale of decedent's property located in Ohio, to pay debts and expenses, or to prevent the sale of any specific property by paying or securing its appraised value to the ancillary administrator.

Cross-References to Related Sections

See RC § 2129.16 which refers to this section.

Forms

1 A&H Probate FORM 2129.15a et seq.

Research Aids

Certificate of assets and liabilities:
O-Jur2d: Executors and Administrators § 572

Law Review

See explanatory article in 4 OBar 458.

CASE NOTES AND OAG

1. This section and GC § 10511-18 (RC § 2129.16) do not apply to estates being administered originally in Ohio in consequence of probating the will under GC §§ 10504-15 and 10504-22 (RC §§ 2107.11, 2107.12 and 2107.18) and the administratrix having received her appointment with the will annexed under GC § 10509-1 (RC § 2113.01): *In re McCombs*, 52 OLA 353 (PC).

§ 2129.16 Property not to be sold. (GC § 10511-18)

An ancillary administrator shall not sell property of a nonresident decedent if the domiciliary administrator or executor, or any other person having an interest in the estate, within thirty days after the forwarding of the certificate of assets and liabilities required by section 2129.15 of the Revised Code pays to the ancillary administrator a sum sufficient to pay all expenses of administration, public rates and charges, and creditors' claims filed in the state, or secures the payment of such sum to the satisfaction of the probate court. The domiciliary administrator or executor, or any other person having an interest in the estate, may likewise prevent the sale of any part of such property by paying, or securing to the satisfaction of the court the payment of, the appraised value of the property withheld from sale.

HISTORY: GC § 10511-18; 114 v 320 (466); 125 v 903 (985). **EF** 10-1-53.

Cross-References to Related Sections

Appraisal of estate, RC § 2115.06 et seq.

Persons interested may give bond to prevent sale, RC § 2127.31.

Research Aids

When property not to be sold:

O-Jur2d: Executors and Administrators § 582

Law Review

See explanatory article in 4 OBar 458.

CASE NOTES AND OAG

See case note 1 under RC § 2129.15.

§ 2129.17 Transcript to be filed. (GC § 10511-19)

An ancillary administrator shall file in the probate court of every county in Ohio in which real estate of the nonresident decedent is located a certified copy of the records in the court of his appointment which affect the title to such real estate.

HISTORY: GS § 10511-19; 114 v 320 (466); 125 v 903 (985). **EF** 10-1-53.

Research Aids

Filing transcript of records:

O-Jur2d: Executors and Administrators § 574

Law Review

See explanatory article in 4 OBar 458.

§ 2129.18 Determination of heirship. (GC § 10511-20)

Whenever property of a nonresident decedent as to whose estate ancillary administration proceedings are being had in Ohio passes by the laws of intestate succession or under a will to a beneficiary not named therein, proceedings may be had to determine the persons entitled to such property in the same manner as in the estates of resident decedents under sections 2123.01 to 2123.07, inclusive, of the Revised Code. The ancillary administrator shall file a certified copy of such finding in the probate court in every county in Ohio in which real estate of the decedent is located. Such administrator shall procure and file in the court for the information of the court a certified copy of any determination of heirship relative to such decedent's estate made in the state of the domiciliary administration.

HISTORY: GC § 10511-20; 114 v 320 (466); 116 v 385 (403), § 1; 125 v 903 (985). **Eff** 10-1-53.

Research Aids

Copies of court's finding to be filed elsewhere:

O-Jur2d: Descent and Distribution § 221

Determination of heirship:

O-Jur2d: Descent and Distribution §§ 212, 214

Am-Jur2d: Descent and Distribution § 104 et seq.

Ohio Rules

See Civil Rule 73(D) and Staff Note applying the provisions of Rule 5 to probate proceedings requiring service of summons. Civil Rules volume to Page's Ohio Revised Code.

CASE NOTES AND OAG

1. This section places upon the ancillary administrator of a nonresident decedent's estate the mandatory duty to procure and file in the court where the ancillary administration is being had "for the information of the court a certified copy of any determination of heirship relative to such decedent's estate made in the state of the domiciliary administration": *Howells v. Limbeck*, 114 App 129, 18 OO(2d) 449, 180 NE(2d) 624.

§ 2129.19 Application for certificate of transfer. (GC § 10511-21)

Prior to filing his final account, an ancillary administrator shall file in the probate court an application for a certificate of transfer as to the real estate of the nonresident decedent situated in Ohio, in the same manner as in the administration of the estates of resident decedents under section 2113.61 of the Revised Code.

HISTORY: GC § 10511-21; 114 v 320 (467); 116 v 385 (403), § 1; 125 v 903 (985). **Eff** 10-1-53.

Cross-References to Related Sections

Certificate of transfer, RC § 2113.61.

Research Aids

Application for certificate of transfer:

O-Jur2d: Executors and Administrators § 573

§ 2129.20 Payments to ancillary administrator. (GC § 10511-22)

Any person indebted to the estate of a nonresident decedent or holding property belonging thereto may pay such indebtedness or deliver such property to the ancillary administrator when appointed, and shall thereupon be discharged from further liability to said estate.

HISTORY: GC § 10511-22; 114 v 320 (467). **Eff** 10-1-53.

Research Aids

Payment to ancillary administrator:

O-Jur2d: Executors and Administrators § 576;

Conflict of Laws § 99

Law Review

See explanatory article in 4 OBar 458.

§ 2129.21 Bona fide purchaser protected. (GC § 10511-23)

The bona fide purchaser of real or personal property sold as provided by law by an ancillary administrator shall take the title free from all obligations of the estate.

HISTORY: GC § 10511-23; 114 v 320 (467); 125 v 903 (985). **Eff** 10-1-53.

Cross-References to Related Sections

Sale of personal property, RC § 2113.40.

Sale of real estate, RC § 2129.13.

When sale requested by domiciliary executor or administrator, RC § 2129.14.

Research Aids

Bona fide purchaser protected:

O-Jur2d: Executors and Administrators § 581

Law Review

See explanatory article in 4 OBar 458.

§ 2129.22 Estate discharged by payment. (GC § 10511-24)

When an ancillary administrator has paid a claim against the estate of a nonresident decedent, such estate shall be fully discharged of all liability therefor.

HISTORY: GC § 10511-24; 114 v 320 (467); 125 v 903 (986). **Eff** 10-1-53.

Research Aids

Estate discharged by payment:

O-Jur2d: Executors and Administrators § 578

Am-Jur2d: Executors and Administrators § 697

ALR

Payment of negotiable paper to personal representative of owner appointed in one state as affected by appointment of another representative in another state. 114 ALR 1461.

§ 2129.23 Distribution. (GC § 10511-25)

When the expense of the ancillary administration of a nonresident decedent's estate, including such attorney's fee as is allowed by the probate court, all public charges and taxes, and all claims of creditors presented as provided in section 2129.12 of the Revised Code, have been paid, any residue of the personal estate and the proceeds of any real estate sold for the payment of debts shall be distributed by the ancillary administrator as follows:

(A) With the approval of the court such residue may be delivered to the domiciliary administrator or executor.

(B) If the court orders, such residue shall be delivered to the persons entitled thereto.

HISTORY: GC § 10511-25; 114 v 320 (467). **Eff** 10-1-53.

Cross-References to Related Sections

Distribution after settlement, RC § 2113.57.

Research Aids

Distribution of assets:

O-Jur2d: Executors and Administrators § 583

Am-Jur2d: Executors and Administrators § 706 et seq.

ALR

Basis of distribution among decedent's unsecured creditors, of ancillary assets where entire estate or ancillary estate is insolvent. 164 ALR 765.

Law Review

See explanatory article in 4 OBar 458.

CASE NOTES AND OAG

See also case note 1 under RC § 2129.12.

1. This section confers discretion upon the probate court in the ancillary administration to order the residuum remaining after the payment of expenses of administration, all public charges and taxes, and all claims of creditors presented as provided by statute, to be paid from and delivered to the persons entitled thereto: *In re Kelley*, 68 App 51, 22 OO 158, 34 NE(2d) 34.

2. In the administration of an insolvent estate the assets are exhausted by the creditors and nothing remains for distribution to legatees, devisees and others entitled thereto. Hence this section would have no application: *In re Hirsch*, 146 OS 393, 32 OO 445, 66 NE(2d) 636, reversing 76 App 69, 31 OO 386, 63 NE(2d) 174.

3. In order to receive payment from funds in the hands of an ancillary administrator in Ohio of a nonresident decedent's insolvent estate, all creditors, both resident and nonresident of Ohio, are required to file and prove their claims in accordance with the Ohio statutes: *In re Estate of Hirsch*, 76 App 69, 31 OO 386, 63 NE(2d) 174, reversed, 146 OS 393, 32 OO 445, 66 NE(2d) 115.

4. General Code § 10511-25 (RC § 2129.23), requires the funds of the ancillary administrator of a nonresident decedent's insolvent estate, after payment of expenses of ancillary administration including attorney fees, public charges and taxes, to be applied to the payment of all creditors' claims, duly presented and proven to the ancillary administrator, in accordance with the Ohio priority statute, before remission of any part thereof to the domiciliary administrator or

the persons entitled thereto: *In re Estate of Hirsch*, 76 App 69, 31 OO 386, 63 NE(2d) 174, reversed, 146 OS 393, 32 OO 445, 66 NE(2d) 115.

5. Revised Code § 2129.23(B) places no restriction or limitation on persons entitled to the residue in ancillary administration. After payments of expenses, taxes and debts, the probate court may, in its discretion, order the residue of the personal estate and the proceeds of any real estate sold for the payment of debts, distributed to heirs or legatees, whether resident in Ohio or not, and without limitation to bequests of specific property: *In re Radu*, 35 OApp(2d) 187, 64 OO(2d) 293, 301 NE(2d) 263 (1973).

6. Revised Code § 2129.23 provides that when the expenses of ancillary administration of a nonresident decedent's estate, including attorney's fees as is allowed by the probate court, all public charges and taxes, and all claims of creditors presented as provided in RC § 2129.12 have been paid, any residue of the personal estate and the proceeds of any real estate sold for the payment of debts shall be distributed by the ancillary administrator, with the approval of the court, to the domiciliary administrator or executor, or if the court orders, to the persons entitled thereto: *In re Radu*, 35 OApp(2d) 187, 64 OO(2d) 293, 301 NE(2d) 263 (1973).

7. General Code § 10511-25 (RC § 2129.23), makes it within the discretion of the Probate Court as to whether the ancillary administrator makes distribution direct, or returns funds in its hands to the domiciliary administrator: *Knight, Admx. v. Burdsal*, 8 OO 363 (CP).

8. Where it appears that no domiciliary executor or administrator has been appointed, the probate court which appointed the ancillary administrator should order distribution under this section to be made to the persons entitled thereto: *Mastics v. Kiraly*, 26 OO(2d) 266, 196 NE(2d) 172 (PC).

§ 2129.24 Fees. (GC § 10511-26)

Probate judges, county recorders, and county auditors shall for services required by sections 2129.01 to 2129.30, inclusive, of the Revised Code, charge and collect the same fees as for similar services in the administration of the estates of resident decedents.

HISTORY: GC § 10511-26; 114 v 320 (467). **Eff** 10-1-53.

Research Aids

Fees:

O-Jur2d: Executors and Administrators § 563

[SALE OF REAL ESTATE BY FOREIGN EXECUTOR OR ADMINISTRATOR]

§ 2129.25 Foreign executor or administrator may be authorized to sell real estate. (GC § 10511-27)

When an executor or administrator is appointed in any other state, territory, or foreign country for the estate of a person dying out of this state, and no executor or administrator thereon is appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there is real estate of the deceased, together with an authenticated copy of the will. After filing such copies, he may be

authorized, under an order of the court, to sell real estate for the payment of debts or legacies and charges of administration, in the manner prescribed in sections 2127.01 to 2127.43, inclusive, of the Revised Code.

HISTORY: GC § 10511-27; 114 v 320 (468). **EF** 10-1-53. For an analogous section, see former GC § 10813.

Cross-References to Related Sections

Sale of land by fiduciaries, RC § 2127.01 et seq.
See RC § 2129.26 which refers to this section.

Comparative Legislation

Foreign executor and administrator sale of real estate:

- Cal.—Probate Code, § 780
- Ill.—Rev Stat, ch 3, § 22-4
- Ind.—Burns' Stat, § 29-2-1-6
- Ky.—KRS, § 395.515
- Mich.—MCLA, § 709.2
- N.Y.—SCPA, § 1610
- Pa.—Purdon's Stat, Tit. 20, § 3351

Outline of Procedure

Sale of lands by foreign executor or administrator.
Leyshon No. 103; A&H No. 83.

Research Aids

Sale of land by foreign executor or administrator:
O-Jur2d: Executors and Administrators § 552
Am-Jur2d: Executors and Administrators § 702

CASE NOTES AND OAG

1. A decree of a court of another state ordering a sale by an administrator of lands in this state is wholly void: *Nowler v. Coit*, 1 O 519; *Beall v. Price*, 13 O 368; *Blake v. Davis*, 20 O 231; *Price v. Johnston*, 1 OS 390.
2. One who buys lands at a sale ordered by a court of another state cannot compel the heirs to reimburse him, although such sale is void, but taxes paid by such purchaser shall be refunded: *Nowler v. Coit*, 1 O 519.
3. Bill in equity to subject the real estate of a decedent in Ohio to payment of debts, where the heirs and representatives reside in another state, and where no letters of administration have been taken in Ohio, cannot be sustained. The creditor himself may take letters of administration, and thus have complete remedy at law: *Bustard v. Dabney*, 4 O 68.
4. Where a void decree is made by a Virginia court, for the sale of Ohio lands, one of the heirs who assents to the decree, and aids in executing it, passes his own title in equity: *Beall v. Price*, 13 O 368.

§ 2129.26 Bond. (GC §§ 10511-28, 10511-29)

When it appears to the probate court granting the order of sale set forth in section 2129.25 of the Revised Code that the foreign executor or administrator is bound with sufficient surety in the state or country in which he was appointed to account for the proceeds of such sale, for the payment of debts or legacies, and for charges of administration, and an authenticated copy of such bond is filed in court, no further bond for that purpose shall be required of him. When the court finds that such bond is insufficient, before making such sale, such foreign executor or ad-

ministrator must give bond to this state with two or more sufficient sureties, conditioned to account for and dispose of such proceeds for the payment of the debts or legacies of the deceased and the charges of administration according to the laws of the state or country in which he was appointed.

When such foreign executor or administrator is authorized by order of the court to sell more than is necessary for the payment of debts, legacies, and charges of administration, before making the sale, he shall give bond with two or more sufficient sureties to this state, conditioned to account before the court for all the proceeds of the sale that remain and to dispose of such proceeds after payment of such debts, legacies, and charges.

HISTORY: GC §§ 10511-28, 10511-29; 114 v 320 (468). **EF** 10-1-53. Analogous to former GC §§ 10814, 10815.

Research Aids

Bond—sale of land by foreign representative:
O-Jur2d: Fiduciaries § 181

CASE NOTES AND OAG

1. Where sale is ordered and the bond is insufficient, additional bond may be required: *Wade v. Graham*, 4 O 126.
2. Whether bond covers surplus of money left in hand from the sale of real estate was discussed but not decided: *Griswold v. Frink*, 22 OS 79.

[TRUSTS CREATED BY FOREIGN WILL]

§ 2129.27 Trusts created by foreign will. (GC § 10511-30)

Trusts created by a will made out of this state and relating to lands situated herein may be executed as provided in sections 2129.28 to 2129.30, inclusive, of the Revised Code, after the will is admitted to record in this state.

HISTORY: GC § 10511-30; 114 v 320 (468). **EF** 10-1-53. Analogous to former GC § 10597.

Cross-References to Related Sections

Probate of foreign wills, RC § 2129.05 et seq.

Comparative Legislation

Trusts created by foreign will:
Mich.—MCLA, § 706.4
N.Y.—SCPA, § 1501
Pa.—Purdon's Stat, Tit. 20, § 4101

Research Aids

Nonresident trustees:
O-Jur2d: Trusts § 54
Am-Jur2d: Trusts § 113
Testamentary trust of land:
O-Jur2d: Conflict of Laws § 103

ALR

Conflict of laws as to trust inter vivos. 139 ALR 1129.
Conflict of laws respecting wills as affected by statute of forum providing for will executed in accordance with law of another state. 169 ALR 554.

CASE NOTES AND OAG

1. Foreign trust company, under will of a foreign testator, may sue in Ohio, where the will includes real property situated in this state, to recover compensation and damages for land, held by railroad company without agreement with owner, when a copy of the will and probate has been duly admitted to record in the county where the real estate is located: *Union Sav. Bank &c. Co. v. Baltimore & O. R. Co.*, 6 NP(NS) 454.

2. Foreign trust company may execute trust as to land in this state, and no administration in this state is required as a preliminary thereto: *Union Sav. Bank &c. Co. v. Baltimore &c. R. Co.*, 7 NP(NS) 497.

§ 2129.28 Trustee's bond. (GC § 10511-31)

If a trustee is named in a foreign will which creates a trust relating to lands situated in this state, such trustee may execute the trust upon giving bond to the state in such sum and with such sureties as the probate court of the county in which such lands or a part thereof are situated approves, conditioned to discharge with fidelity the trust reposed in him. If the testator in the will naming the trustee orders or requests that bond be not given by him, bond shall not be required, unless for sufficient cause the court requires it.

HISTORY: GC § 10511-31; 114 v 320 (468). **Eff** 10-1-53. Analogous to former GC § 10598.

Cross-References to Related Sections

Bond of fiduciary, RC § 2109.04.

See RC § 2129.29 which refers to this section.

See RC § 2129.27 which refers to § 2129.28 et seq.

Research Aids

Dispensing with bond:

O-Jur2d: Fiduciaries § 186

Nonresident trustees—bond:

O-Jur2d: Trusts § 54; Fiduciaries §§ 178, 179, 199

Am-Jur2d: Trusts § 550

ALR

Right of surety to terminate liability as regards future defaults of principal. 118 ALR 1261.

CASE NOTES AND OAG

1. Since this and the following section appear to contemplate the appointment of a nonresident as a testamentary trustee, if the testator is a nonresident, it will not be presumed, in the absence of specific statutory provision, that the legislature intended to deny to resident testators the right to appoint non-residents as testamentary trustees: *Seasongood v. Seasongood*, 23 CC(NS) 369, 27 CD 200.

§ 2129.29 Trustee appointed by a foreign court. (GC § 10511-32)

If a trustee has been appointed under a foreign will which creates a trust relating to lands situated in this state by a foreign court according to the laws of the foreign jurisdiction, he may execute the trust upon giving bond as provided in section 2129.28 of the Revised Code, and after satisfying the probate court of the county in which such lands or a part of them are situated, by an authenticated record of his appointment, that he has been appointed trustee to execute the trust.

HISTORY: GC § 10511-32; 114 v 320 (469). **Eff** 10-1-53. For an analogous section, see former GC § 10599.

Research Aids

Nonresident trustees—bond:

O-Jur2d: Trusts § 54; Fiduciaries §§ 178, 179, 199

CASE NOTES AND OAG

1. If a trust is created in realty which is situated in another state, the validity of such trust is determined by the laws of such state, but such foreign law is not otherwise to be regarded as affecting the construction of the will: *Babcock v. Monypeny*, 18 CC (NS) 53, 24 CD 434 [affirmed, without opinion, 86 OS 365].

§ 2129.30 Probate court may appoint a trustee under a foreign will. (GC § 10511-33)

When necessary, the probate court of the county where the property affected by the trust is situated, on application by petition of the parties interested, may appoint a trustee to carry into effect a trust created by a foreign will. Such trustee, before entering upon his trust, must give bond with such security and in such amount as the court directs.

HISTORY: GC § 10511-33; 114 v 320 (469). **Eff** 10-1-53. For an analogous section, see former GC § 10600.

Cross-References to Related Sections

Bond of fiduciary, RC § 2109.04.

Forms

1 A&H Probate FORM 2129.30a et seq.

Research Aids

Probate court may appoint trustee under foreign will:

O-Jur2d: Trusts §§ 50, 54

Am-Jur2d: Trusts §§ 120, 121

CHAPTER 2131: MISCELLANEOUS

Section

- 2131.01 American experience table to be used.
- 2131.02 Legal disability defined.
- 2131.03 Action to set aside antenuptial or separation agreement.
[CONTINGENT INTERESTS]
- 2131.04 Expectant estates descendible, devisable, and alienable.
- 2131.05 Validity of remainders.
- 2131.06 When expectant estates defeated.
- 2131.07 Estate in fee simple may be made defeasible.
[STATUTE OF PERPETUITIES]
- 2131.08 Statute against perpetuities.
- 2131.09 Exemption of certain trusts.
- 2131.10 Deposit payable on death.
- 2131.11 Release and discharge upon payment.
[SECURITIES HELD BY FIDUCIARY]
- 2131.21 [Deposit of securities held in fiduciary capacity.]

§ 2131.01 American experience table to be used. (GC § 10512-1)

The American experience table of mortality is the basis of determining present values in probate matters.

HISTORY: GC § 10512-1; 114 v 320 (469). Eff 10-1-53.

Comment

Prior to the enactment of GC § 10512-1 (RC § 2131.01), both the American and Carlisle tables had been used. See Davies' Revision of Addams and Hosford's Ohio Probate Practice, for tables and methods of calculation.

Cross-References to Related Sections

See RC § 2131.02 which refers to this chapter.

Comparative Legislation

American experience table adopted:

- Ill.—Rev Stat, ch 30, § 173
- N.Y.—Real Prop. A&C § 403
- Pa.—Purdon's Stat, Tit 20, § 8112
- Fla.—FSA § 738.14

Research Aids

- Computation of dower:
 - O-Jur2d: Dower § 112
 - Am-Jur2d: Dower and Curtesy § 20
- Mortality tables—admissibility in evidence:
 - O-Jur2d: Evidence § 568
 - Am-Jur2d: Evidence § 894 et seq.

ALR

- Mortality tables to determine expectancy of a small child. 162 ALR 1003.
- Lack of normal health as affecting admissibility of mortality tables as evidence. 116 ALR 416.
- Admissibility of mortality tables in personal injury action as dependent upon showing of permanency of injury. 50 ALR2d 419.

Law Reviews

- Dower in Ohio in case of forced sale. (Case note.) 8 OSLJ 220.
- See explanatory article in 4 OBar 492.

CASE NOTES AND OAG

1. It has long been a settled practice in this state, in ascertaining the present value of consummate or

inchoate dower in real estate or of an annuity, payable either at a stated annual period or at some future date, to use tables based upon the expectation of life: Black v. Kuhlman, 30 OS 199.

2. These tables have also been used for fixing a measure of damages in an action brought for the wrongful death of an individual: Wasner v. Rawlins, 64 OS 585, 61 NE 1150, 46 Bull 147.

3. The supreme court of Ohio has, before the passage of the above section, on two different occasions, approved calculations made upon the basis of the Carlisle table: Black v. Kuhlman, 30 OS 199; Wasner v. Rawlins, 64 OS 585, 61 NE 1150, 46 Bull 147.

4. The contingent right of a wife during her husband's life to be endowed of his real estate at his death is property having a substantial value that may be ascertained with reasonable certainty from established tables of mortality, aided by evidence respecting the state of health and constitutional vigor of the husband and wife respectively: Mandel v. McCave, 46 OS 407, 22 NE 290; Unger v. Liter, 32 OS 210; Moerlein Brewing Co. v. Westmeier, 4 CC 296, 2 CD 668. (For question of whether to figure dower on entire sale price, or equity after mortgage, see GC § 10510-19 [RC § 2127.16].)

5. The Bowditch table has been referred to with approval by our supreme court: Black v. Kuhlman, 30 OS 199.

6. In actions for damages for wrongful death, etc., courts to do not permit life annuity tables to be given in evidence to determine the probable present value of decedent's earnings, but tables of expectancy of life may be introduced in evidence and considered in estimating the amount of damages recoverable in such suits: Wasner v. Rawlin, 64 OS 585, 61 NE 1150, 46 Bull 147.

7. The American experience tables of mortality, this section, were used in calculating the amount to be awarded to the surviving spouse out of the proceeds of a partition sale, in lieu of dower: Huffman v. Huffman, 57 App 33, 10 OO 24, 11 NE(2d) 271.

8. Where lands are sold pursuant to RC § 5303.21, and both life tenants are shown to enjoy excellent health, the value of their shares should be determined by application of the statutory six percent formula and the factor determined by reference to the mortality table prescribed by RC § 2131.01 for the age of the younger life tenant, with the resulting percentage of the net sales proceeds to be distributed equally between such life tenants. The balance should be placed in trust to be accumulated until the death of the surviving life tenant and then distributed among the remaindermen as provided by the court under the will and applicable statutes: Henderson v. Henderson, 44 OO(2d) 463, 15 OMisc 276, 237 NE(2d) 336 (CP).

9. Where, for inheritance tax purposes, the probate court fixes the value of a life estate and remainder based on the actuarial value on the date of death, it may not subsequently adjust the values based on the actual duration of the life estate and order a refund of inheritance taxes thereby overpaid to the executors of the deceased's estate: In re Hough's Estate, 78 OLA 238, 152 NE(2d) 561.

§ 2131.02 Legal disability defined.

"Legal disability" as used in Chapters 2101., 2103., 2105., 2107., 2109., 2111., 2113., 2115.,

2117., 2119., 2121., 2123., 2125., 2127., 2129., and 2131. of the Revised Code includes the following:

- (A) Persons under the age of eighteen years;
- (B) Persons of unsound mind;
- (C) Persons in captivity;
- (D) Persons under guardianship of the person and estate, or either.

HISTORY: GC § 10512-2; 114 v 320 (469); 135 v S 1. Eff 1-1-74.

Research Aids

Late presentation of claims against estate:

O-Jur2d: Executors and Administrators § 309

Am-Jur2d: Executors and Administrators § 293

Will contest:

O-Jur2d: Wills § 336

Am-Jur2d: Wills § 882

CASE NOTES AND OAG

1. A person confined in the county jail under indictment for murder in the first degree is "a person in captivity" as defined in GC § 10512-2 (RC § 2131.02), and consequently under a "legal disability" within the meaning of GC §§ 10509-134 and 10512-2 (RC §§ 2117.07 and 2131.02): In re Gogan, 63 OLA 69, 108 NE(2d) 170 (App).

2. A probate court is guilty of an abuse of discretion in refusing a claimant the right to file a claim with an executor after the expiration of the four-month time limit fixed by RC § 2117.06, when such refusal to allow the claim to be filed prevents the revivor of an action pending against the executor's decedent in the court of common pleas, where the uncontradicted evidence establishes that the claimant was under a legal disability as defined by RC § 2131.02: In re Estate of Fuller, 112 App 25, 15 OO(2d) 378, 174 NE(2d) 613.

3. The term "legal disability," as used in RC § 2117.07, is defined in GC § 10512-2 (RC § 2131.02) and applies to "persons of unsound mind." The words, "of unsound mind," under the provisions of GC § 10213 (RC § 1.02, 1.10), include every species of mental deficiency or derangement: In re Price, 87 App 23, 42 OO 272, 93 NE(2d) 769.

4. Physical aches and pains, headaches, dizziness and inability to walk around or drive an automobile are not legal excuses for failure to comply with the statutory provisions for the presentation of claims against an estate. Where such claimant, for the four-month period following the appointment of the administrator, was able to and did go about and look into his business and affairs, he was not under legal disability so as to come within the provisions of RC § 2117.07: In re Estate of Christman, 100 App 133, 60 OO 129, 136 NE(2d) 80.

5. A person committed to a mental hospital for mental incompetency is of unsound mind within the definition of legal disability contained in subdivision (C) of RC § 2117.07 and subdivision (B) of RC § 2131.02, and for which belated claim may be filed: In re Estate of Wyckoff, 105 App 212, 6 OO(2d) 42, 152 NE(2d) 141.

6. A creditor, in order to be entitled to reinstate a barred claim, must plead one of the following allegations: (1) that the claimant was under "legal disability" as provided by GC § 10512-2 (RC § 2131.02); (2) that the creditor was absent from the state for the greater portion of the four months' period immediately following the appointment of the executor or administrator, and had no notice of the death of the debtor or the appointment of a fiduciary; (3) that the claimant's rights had been prejudiced by fraud or misrepresentation occasioned by the conduct of the executor or administrator: In re Dudley, 8 OO 404 (PC).

7. The failure of the guardian to present the claim during the four-month period does not deprive the minor of the benefits of RC § 2117.07: In re Gress, 28 OO 268, 13 OSupp 70 (PC).

§ 2131.03 Action to set aside antenuptial or separation agreement. (GC § 10512-3)

Any antenuptial or separation agreement to which a decedent was a party is valid unless action to set it aside is begun within six months after the appointment of the executor or administrator of the estate of such decedent, or unless within such period the validity of such agreement is otherwise attacked.

HISTORY: GC § 10512-3; 114 v 320 (469). Eff 10-1-53.

Text Discussion

1 Anderson Fam.L. § 18.11.

Forms

1 A&H Probate FORM 2131.03a et seq.

1 Anderson Fam.L. Nos. 83, 91.

Research Aids

Infancy not a disability:

O-Jur2d: Limitation of Actions § 103

Limitation of actions:

O-Jur2d: Divorce and Separation § 18; Husband and Wife § 80

Am-Jur2d: Husband and Wife § 311

Validity and nature of antenuptial agreements:

O-Jur2d: Descent and Distribution § 260

Am-Jur2d: Husband and Wife § 277 et seq.

ALR

What amounts to attack by widow upon antenuptial settlement. 117 ALR 1001.

Husband's death as affecting periodic payment provisions of separation agreement. 75 ALR2d 1085.

Law Reviews

Some practical aspects of antenuptial agreements under the laws of Ohio. Article by H. S. Subrin of the Akron bar. 18 CinLRev 53.

Marriage is a damnably serious business. Ellis V. Rippner. 40 OBar (No. 10) 291.

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1. Unless the antenuptial contract relinquishing all share in the husband's estate has been fairly performed in favor of the wife, it will not bar her: Phillips v. Phillips, 14 OS 308.

2. By the terms of GC § 8000 (RC § 3103.06), a husband and wife may agree to an immediate separation and make provisions for the support of either of

them and their children during the separation. Also it has been held that a reasonable antenuptial contract in bar of dower, if between parties of mature age, without imposition and in good faith, given full effect during life by the husband, will be enforced: *Mintier v. Mintier*, 28 OS 307.

3. Under this section an antenuptial agreement is deemed valid unless an action to set it aside is brought within six months after the appointment of the executor or administrator or unless the validity of the agreement is otherwise attacked within that period, and neither the filing of a written election to take under the law, in which is incorporated a statement that the widow repudiates "the prenuptial agreement, which was procured by fraud," nor the filing of exceptions to the inventory and appraisal on the ground that the appraisers failed to allow the statutory set-off and a year's support to the widow, constitutes an attack within the purview of the statute: *Juhasz v. Juhasz*, 134 OS 257, 12 OO 57, 16 NE(2d) 328.

3.1 By the provisions of this section, a separation agreement to which a decedent was a party shall be deemed valid unless action to set it aside is begun within six months after the appointment of the executor or administrator of the estate of the decedent or unless within such period the validity of such agreement is otherwise attacked: *Burlovic v. Farmer*, 162 OS 46, 54 OO 5, 120 NE(2d) 705.

3.2 The six-month limitation of this section, within which the validity of a separation agreement must be attacked by a surviving spouse after the appointment of the executor or administrator of the estate of his deceased spouse, applies to a surviving spouse notwithstanding he was an infant at the time of his marriage, at the time the separation agreement was executed, and during the entire period of limitation: *Burlovic v. Farmer*, 162 OS 46, 54 OO 5, 120 NE(2d) 705.

4. An antenuptial contract cannot be avoided by the surviving husband, by proof of concealment of a fact that did not affect the interest of such survivor: *Keever v. Brown*, 36 App 1, 172 NE 626.

5. The probate court has jurisdiction to render a declaratory judgment determining the validity of an antenuptial contract entered into between a decedent and his widow, where the estate is in process of being settled and the widow is contending that the antenuptial contract is of no effect, while the heirs of decedent claim that it is a binding contract, and the executor cannot safely distribute assets of the estate until the question is determined: *Pearson v. Pearson*, 58 App 503, 12 OO 300, 16 NE(2d) 837.

6. The filing of exceptions to an inventory and appraisal, on the ground that the appraisers failed to allow the statutory set-off and a year's support to the widow, did not constitute an attack upon an antenuptial agreement, under the provisions of this section: *In re Thrush*, 76 App 411, 32 OO 147, 64 NE(2d) 839.

7. Where exceptions to an inventory of a decedent husband's estate states that, by a separation agreement between such decedent and his wife, the latter is barred from certain allowances set-off to her in the inventory, and the wife by reply to the exceptions pleads that she is entitled to such allowances because such agreement is null and void, such reply is an attack on the agreement, within the purview of this section, which provides that such an agreement is deemed valid unless its validity is attacked within the time stated in such section. In such a case, upon the filing of such reply to the exceptions it becomes incumbent upon the exceptor to prove that the agreement was fair, reasonable and just to the wife under

the circumstances at the time of its execution: *In re Shafer*, 77 App 105, 32 OO 380, 65 NE(2d) 902.

7.1. Where an antenuptial agreement places restraints upon a testator and where such testator neglects to comply properly with such provisions in his will, and the widow, within nine months following the appointment of the executor, brings an action in a declaratory judgment proceeding to determine the validity of such antenuptial agreement and seeks the advice of the court, such declaratory judgment action is a "proceedings for advice" as is contemplated in RC § 2107.39: *Barlup v. Holloway*, 25 OApp(2d) 44, 54 OO(2d) 77, 266 NE(2d) 241.

8. Where a postnuptial contract is more than a mere separation and maintenance agreement, but includes a division of property or a property settlement between the husband and wife, it is ordinarily an executed agreement, and the mere fact of reconciliation, recohabitation and resumption of marital relation between the parties thereto, does not, of itself, revoke the postnuptial agreement: *In re Price*, 1 OO 459 (PC).

9. This section, which provides that any antenuptial agreement to which the decedent was a party shall be deemed valid unless action to set aside is commenced within six months after appointment of an executor or administrator, does not apply to an agreement that is void: *Petrich v. Petrich*, 44 OO 457 (App).

10. Where a man had twenty thousand dollars of real estate and thirty-five thousand dollars of personal property, an antenuptial agreement of two thousand five hundred dollars was set aside, where it was shown that the wife had no knowledge of the husband's wealth: *Duttenhoffer v. Duttenhoffer*, 12 OD (NP) 736.

11. There must be the utmost good faith in the making of such agreements. Where the husband has misrepresented the value of his estate, the wife has the right to set the agreement aside after his death when the fraud is discovered. Such contracts are to be tested by the rules which determine the validity of contracts between persons standing in a confidential relation to each other: *Duttenhoffer v. Duttenhoffer*, 12 OD(NP) 736.

12. There is no indication in the wording of this section that the legislature intended to change the law of contracts by making enforceable an antenuptial agreement which has not been performed by the parties thereto: *Cantor v. Cantor*, 15 OO(2d) 148, 174 NE(2d) 304 (PC).

13. Where no attack is made on an antenuptial agreement within six months from the appointment of the decedent's administrator, no evidence is admissible in support of the defenses that the agreement was void for failure of the decedent to disclose all pertinent facts in fraud of his wife's rights and was disproportionate to his property: *Cantor v. Cantor*, 15 OO(2d) 148, 174 NE(2d) 304 (PC).

14. This section does not permit the parties to an antenuptial contract to change the effect of the statutes of descent and distribution: *Cantor v. Cantor*, 15 OO(2d) 148, 174 NE(2d) 304 (PC).

15. The legislature intended this section to limit the time in which questions of validity arising out of the right of the surviving spouse to avoid an antenuptial agreement may be litigated: *Cantor v. Cantor*, 15 OO(2d) 148, 174 NE(2d) 304 (PC).

16. A collateral attack upon judgment of domestic relations division of court of common pleas under this section may not be entertained by the probate division of court of common pleas whether or not facts before rendering court warranted such attack. The latter court is bound by the divorce decree in-

corporating the terms of a separation agreement, which compelled conclusion that provisions for divorced wife in decedent's will had been revoked by implication: *Davis v. Davis*, 51 OO(2d) 388, 258 NE(2d) 277 (CP).

17. An antenuptial contract must be voluntarily entered into and the provisions for the wife must be fair and reasonable under all the surrounding facts and circumstances and an adult man and woman, each owning a substantial amount of property and each having grown children by prior marriages, may lawfully enter into a prenuptial agreement whereby each relinquishes every and all rights in the property of the other: *Osborn v. Osborn*, 10 Misc 171, 39 OO(2d) 275, 226 NE(2d) 814.

18. In an action to declare an antenuptial agreement invalid, unless there is evidence to establish that the provision for the prospective wife is, in the light of surrounding circumstances, wholly disproportionate to the means of her future husband and to what she would receive under the law, the burden rests on her to show that she did not at the time of execution of the agreement possess full knowledge of the nature, extent and value of his property or that she did not voluntarily enter into the agreement: *Rocker v. Rocker*, 13 Misc 199, 42 OO(2d) 184, 232 NE(2d) 445.

19. In an action by a wife seeking to share in her deceased husband's estate, contrary to the provisions of an antenuptial agreement, relief will be denied where there is a lack of proof of actual intent to impose or of a gross disproportion of her share under the agreement as compared to her share under the law, and where the parties were both of advanced age, the wife was an experienced businesswoman and knew of her prospective husband's desire that their marriage interfere as little as possible with the inheritance which his children would otherwise have received: *Rocker v. Rocker*, 13 Misc 199, 42 OO(2d) 184, 232 NE(2d) 445.

[CONTINGENT INTERESTS]

The following sections will make contingent interests freely alienable and wholly indestructible. For a comprehensive discussion of the subject see the article entitled "Some Ohio Problems as to Future Interests in Land," by Charles C. White, 1 CinLRev 36. These sections are patterned after the New York law.

§ 2131.04 Expectant estates descendible, devisable, and alienable. (GC § 10512-4)

Remainders, whether vested or contingent, executory interests, and other expectant estates are descendible, devisable and alienable in the same manner as estates in possession.

HISTORY: GC § 10512-4; 114 v 320 (470). Eff 10-1-53.

Comment

Vested remainders and reversions were by the common law descendible, devisable and alienable. The foregoing section gives a contingent remainder and an executory devise the same characteristics in said particulars. The reason for the inalienability of contingent remainders is historical, rather than logical. These interests were first allowed at a time when the feoffment with livery of seisin was the normal method of transferring land, and primarily livery of seisin was the delivery of the present possession. Also the common law was very insistent in its purpose to prevent anything savoring of champerty and maintenance. And to permit the transfer of interests which were not estates, but were only possibilities of acquiring estates in the future, was not in accordance with common law ideas. See 1 CinLRev 36.

The Ohio cases follow the common law as to the nonalienability of a contingent right of re-entry after condition broken, and a possibility of reverter after a determinable fee. If in Ohio, A conveys land to charity X in fee, upon condition that the land be used for certain charitable purposes, or so long as it be used for such purposes, A in each case has a contingent future interest which will descend to his heirs, and is neither alienable nor devisable. Article by Charles C. White, 1 CinLRev 36.

Comparative Legislation

Expectant estates descendible, devisable and alienable:

Cal.—Civil Code, § 711
Ill.—Rev Stat, ch 30, § 1
Ky.—KRS § 381.110
Mich.—MCLA, § 702.1
N.Y.—EPTL, § 6-5.1

Research Aids

Alienability:

Executory interests:

O-Jur2d: Estates §§ 125, 181, 182
Am-Jur2d: Estates § 371

Possibility of reverter:

O-Jur2d: Estates § 120
Am-Jur2d: Estates § 184 et seq.

Remainders:

O-Jur2d: Estates § 159 et seq.
Am-Jur2d: Estates § 315 et seq.

Assignment:

O-Jur2d: Assignments §§ 14, 15
Am-Jur2d: Assignments § 8

Descent:

O-Jur2d: Descent and Distribution § 74 et seq.
Am-Jur2d: Descent and Distribution § 30 et seq.

Devisability:

O-Jur2d: Wills § 61
Am-Jur2d: Wills § 1363 et seq.

Release of expectancy:

O-Jur2d: Release § 4
Am-Jur2d: Descent and Distribution §§ 165-170

ALR

Assignability of option to purchase at price offered by optionor to third person. 136 ALR 146.

Validity and effect of transfer of expectancy by prospective heir. 121 ALR 450.

Validity of conveyance of interest remaining in grantor of fee which is subject to conditional limitation, or which is terminable upon breach of condition subsequent. 53 ALR2d 224.

Devisability of possibility of reverter, or of right of re-entry for breach of condition subsequent. 16 ALR2d 1246.

Effect of conveyance of reversionary interest of grantor of deed subject to condition or limitation or terminable upon breach of condition subsequent. 53 ALR2d 224.

Law Reviews

See explanatory article in 4 OBar 492.

Reversionary restrictions. Article by Charles C. White of the Cleveland bar. 14 CinLRev 524.

Future interests; alienability of possibilities of reverter: application of this section. (Case note.) 21 OO 270.

Conditional, qualified or determinable estates and reverter rights. Article by Roy B. Meade of the Akron bar. 38 OO 414.

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifield

of the Steubenville bar. 8 CinLRev 174.

Reverters and determinable fees—trend of Ohio decisions. Roy B. Meade of the Akron bar. 55 OO 355.

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1. Where trust agreement vested defeasible interest in beneficiary who predeceased trustor, and power of revocation was not exercised by the trustor, the defeasible interest of the beneficiary passed, under the terms of her will, to named devisee in whom such interest became indefeasible upon the death of the trustor. First National Bank v. Tenney, 165 OS 513, 60 OO 481, 138 NE(2d) 15.

2. A future interest, whether contingent or executory, is alienable: Moore v. Foresman, 172 OS 559, 18 OO(2d) 123, 179 NE(2d) 349.

3. Future interests are expressly made transmissible by GC § 10512-4 (RC § 2131.04): Joseph Schonthal Co. v. Sylvania, 60 App 407, 14 OO 471, 21 NE(2d) 1008.

4. Where a life estate is devised to testator's wife "so long as she remains my widow," and the remainder is left equally to testator's two children, the children take vested remainders in fee, subject to the interest of the widow, which remainders may be alienated or mortgaged: Eastman v. Sohl, 66 App 383, 20 OO 305, 34 NE(2d) 291.

5. In such a case where there is a distribution of stock in kind to one of the two remaindermen, prior to the termination of the widow's life estate, consented to by the probate court and all interested parties, and, subsequently, at the end of the life estate there is not sufficient personalty remaining to give a like amount to the other remainderman under the will, such other remainderman, in an action to partition the real estate, is entitled to a lien on the proceeds of the sale in partition up to the amount advanced to the first remainderman, before the fund so obtained shall be divided equally between them; but, where the transfer of the real estate to the persons named in the will has been ordered by the court to be made on the tax duplicate and where the certificate of transfer has been issued and recorded, the lien of such other remainderman is inferior to the liens of creditors against the interest of such first remainderman: Eastman v. Sohl, 66 App 383, 20 OO 305, 34 NE(2d) 291.

6. This section permits a contract to convey, or the actual conveyance, of a possibility of reverter before a right of re-entry is exercised or before an estate is automatically terminated through breach of condition which delimits the duration of the estate. The words of the statute, "other expectant estates," include estates on condition subsequent and determinable fees: P C K Properties, Inc. v. Cuyahoga Falls, 112 App 492, 16 OO(2d) 378, 176 NE(2d) 441.

7. The provisions of this section declaring all expectant estates descendible, devisable and alienable, is a codification of the common law of Ohio existing in 1932, when a statute in this form was first enacted: Schneider v. Dorr, 32 OO(2d) 391, 3 OMisc 103, 210 NE(2d) 311 (PC).

8. This section includes under the term "expectant estates" a possibility of reverter: Willis v. Hannah, 38 OO(2d) 396, 9 OMisc 221, 224 NE(2d) 769 (CP).

9. The general rule, unless it has been changed by this section, which was enacted subsequent to the execution of this deed, is that the right of re-entry cannot be alienated to a stranger to the title: Murray v. Trustees of Lane Seminary, 1 OO(2d) 236, 140 NE(2d) 557 (CP).

10. In an action to quiet title brought by a life tenant in which were joined as proper and necessary parties the children of such life tenant who had an interest in the property by deed and will, and the pleadings and evidence put in issue the right, title and interest of said children, the judgment of the court holding that the children held the remainder estate in fee simple determined the rights of such children; is res judicata and cannot be collaterally attacked and their expectant estate became descendible, devisable and alienable: Scott v. Wilson, 73 OLA 85, 136 NE(2d) 282 (App).

§ 2131.05 Validity of remainders. (GC § 10512-5)

A remainder valid in its creation shall not be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder was limited to take effect. Should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

HISTORY: GC § 10512-5; 114 v 320 (470). **EF** 10-1-53.

Comparative Legislation

Contingent remainders not defeated:

Cal.—Civil Code, § 778

Ill.—Rev Stat, ch 30, § 40

Ind.—Burns' Stat, § 32-1-2-35

Ky.—KRS § 381.100

Mich.—MCLA, § 706.3

N.Y.—EPTL, § 6-5.10

Research Aids

Destructibility of contingent remainders:

O-Jur2d: Estates §§ 128, 158

Am-Jur2d: Estates § 321 et seq.

ALR

Time to which condition of remainderman's death refers, under gift or grant to one for life or term of years and then to remainderman, but if remainderman dies without issue, then over to another. 26 ALR3d 407.

Prior estate as affected by remainder void for remoteness. 168 ALR 321.

Law Review

Factors in the interpretation of unambiguous testamentary dispositions. Article by Samuel Freifield of the Steubenville bar. 8 CinLRev 174.

CASE NOTES AND OAG

1. Where remainder interests are accelerated by the renunciation of a life interest the rights of all subsequent beneficiaries are determined as though the life tenant had died at the time of renunciation, and such interests are not subject to defeasance at the time of the death of the life tenant: National Bank v. Eells, 5 Misc 187, 33 OO(2d) 418, 215 NE(2d) 77.

§ 2131.06 When expectant estates defeated. (GC § 10512-6)

An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger, or otherwise; but an expectant estate may be defeated in any manner which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation.

HISTORY: GC § 10512-6; 114 v 320 (470). **EFF** 10-1-53.

Comparative Legislation

Expectant estate not barred by tenant:

- Cal.—Civil Code, § 741
- Ind.—Burns' Stat, § 32-1-2-34
- Ky.—KRS § 381.110
- Mich.—MCLA, § 702.1
- N.Y.—EPTL, § 6-5.11

Research Aids

Destructibility of contingent remainders:

- O-Jur2d: Estates §§ 128, 158
- Am-Jur2d: Estates § 321 et seq.

CASE NOTES AND OAG

1. The first tenant in tail cannot by a sale and conveyance bar the in tail or deprive his issue of the right of succession to the inheritance: *Guida v. Thompson*, 80 OLA 148, 160 NE(2d) 153.

§ 2131.07 Estate in fee simple may be made defeasible. (GC § 10512-7)

An estate in fee simple may be made defeasible upon the death of the holder thereof without having conveyed or devised the same, and the limitation over upon such event shall be a valid future interest. For the purpose of involuntary alienation, such a defeasible fee is a fee simple absolute.

HISTORY: GC § 10512-7; 114 v 320 (470). **EFF** 10-1-53.

Comparative Legislation

Fee simple—defeasible:

- Cal.—Civil Code, § 762
- Ill.—Rev Stat, ch 30, § 1
- Ind.—Burns' Stat, § 29-1-6-1
- Ky.—KRS § 381.060
- Mich.—MCLA, § 554.2
- N.Y.—EPTL, § 6-1.1

Research Aids

Limited or conditional fees:

- O-Jur2d: Estates § 21 et seq.
- Am-Jur2d: Estates § 22 et seq.

ALR

Nature of estate conveyed by deed for park or playground purposes. 15 ALR2d 975.

Law Reviews

Life estate or fee? Article by Charles C. White of the Cleveland bar. 6 CinLRev 429.

Wills—effect of an absolute devise and a limita-

tion over a remainder. (Case note.) 19 CinLRev 300.

CASE NOTES AND OAG

1. Where testamentary language gives the property "absolutely and in fee simple," complete ownership is bestowed, and subsequent language designating a trustee and attempting a gift over is of no effect: *In re Estate of Koval*, 8 OMisc 206, 37 OO(2d) 265, 221 NE(2d) 490.

2. By GC § 10504-72 (RC § 2107.51), a limitation over is void whether rights of the devisees are determined by the law in effect at testator's death prior to this section, or by the law at the time of the life tenant's death subsequent thereto: *Rapking v. Rapking*, 3 OO 328 (CP).

3. A fee simple estate cannot be made defeasible, even under this section, unless the words of the instrument devising such estate indicate the specific real property upon which the limitation is intended: *Sweigert v. Sweigert*, 55 OLA 442 (App), discussed in 19 CinLRev 300.

4. Where the provisions of a will vest in the husband of the testatrix an estate in fee simple in all her real and personal property, and later provide that after his decease "... all his real and personal property that is in his possession at the time of his death" shall vest in fee simple in her son, the limitation imposed on the property of the husband is inconsistent with and repugnant to the provision of the will which vests an estate in fee simple in the husband and is an attempt to dispose of the husband's property in the testatrix' will; and this section and sections of the Code prior thereto have no application: *Sweigert v. Sweigert*, 55 OLA 442 (App), discussed in 19 CinLRev 300.

5. This section, providing that a fee simple estate may be made defeasible upon the death of the holder without conveying or devising the same, is restricted by implication to realty: *In re Knickel*, 89 OLA 135, 185 NE(2d) 93 (PC).

6. Where the clause in question reads as follows: "My land in Texas I give to Spray and Glee McWilliams. The balance of my estate, including the farm, I give to Blanche Willits. After she is through with the farm it is to go to the Masonic Home at Springfield," Blanche Willits takes a life estate with the vested remainder in fee to the Ohio Masonic Home: *In re Knickel*, 89 OLA 135, 185 NE(2d) 93 (PC).

[STATUTE OF PERPETUITIES]

§ 2131.08 Statute against perpetuities.

(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities, except as set forth in paragraphs (B) and (C) of this section.

(B) For the purposes of this section, the time of the creation of an interest in real or personal property subject to a power reserved by the grantor to revoke or terminate such interest shall

be the time at which such reserved power expires, either by reason of the death of the grantor or by release of the power or otherwise.

(C) Any interest in real or personal property which would violate the rule against perpetuities, under paragraph (A) hereof, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest the period of perpetuities shall be measured by actual rather than possible events.

(D) Paragraphs (B) and (C) of this section shall be effective with respect to interests in real or personal property created by wills of decedents dying after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed on or before December 31, 1967 which by reason of paragraph (B) of this section will be treated as interests created after December 31, 1967. An interest in real or personal property which comes into effect through the exercise of a power of appointment shall be regarded as having been created by the instrument exercising the power rather than the instrument which created the power.

HISTORY: GC § 10512-8; 114 v 320 (470); 132 v S 13, § 1. Eff 10-24-67.

See former GC § 8622.

Comparative Legislation

Rule against perpetuities:

Cal.—Civil Code, § 716

Ill.—Rev Stat, ch 30, § 153

Ind.—Burns' Stat, § 32-1-41

Ky.—KRS § 381.215

Mich.—MCLA, § 554.51

N.Y.—EPTL, § 9-1.1

Pa.—Purdon's Stat, Tit 20, § 6104

Estates tail:

Cal.—Civil Code, § 763

Ill.—Rev Stat, ch 30, § 5

Ind.—Burns' Stat, § 32-1-2-33

Ky.—KRS § 381.070

Mich.—MCLA, § 554.3

N.Y.—EPTL, § 6-1.2

Pa.—Purdon's Stat, Tit 20, § 6116

Fla.—FSA, § 689.14

Research Aids

Charitable gifts:

O-Jur2d: Charities § 8; Perpetuities § 48

Am-Jur2d: Charities § 17 et seq.

Estates in tail:

O-Jur2d: Estates § 51 et seq.

Am-Jur2d: Estates § 44 et seq.

Rule against perpetuities:

O-Jur2d: Perpetuities and Restraints on Alienation § 4 et seq.

Am-Jur2d: Perpetuities and Restraints on Alienation § 6 et seq.

ALR

Applicability of doctrine of equitable approxima-

tion to cut down to a permissible time period the time of a testamentary gift that violates rule against perpetuities. 95 ALR2d 807.

Application of rule against perpetuities to limitation over on discontinuance of or departure from for which premises are granted. 45 ALR2d 1154.

Distribution of income released by declaration of invalidity of express direction for accumulation. 17 ALR3d 231.

Comment note—Doctrine that gift which might be void under rule against perpetuities will be given effect where contingency actually occurs within period of rule. 20 ALR3d 1094.

Independent option to purchase real estate as violating rule against perpetuities or restraints on alienation. 66 ALR3d 1294.

Lease for years, or contract therefor, as violating rule against perpetuities. 66 ALR2d 733.

Perpetual nonparticipating royalty interest in oil and gas as violating rule against perpetuities 46 ALR2d 1268.

Pre-emptive rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 ALR3d 920.

Separability, for purposes of rule against perpetuities, of gift to several persons by one description. 56 ALR2d 450.

Validity and effect of provision or condition against alienation in gift for charitable trust or to charitable corporation. 100 ALR2d 1208.

Validity of restraint, ending not later than expiration of a life or lives in being, on alienation of an estate in fee. 42 ALR2d 1243.

Validity, under rule against perpetuities, of gift in remainder to creator's great-grandchildren, following successive life estates to children and grandchildren. 18 ALR2d 671.

Law Reviews

See explanatory article in 4 OBar 492.

Rule against perpetuities as applied against living trusts and living life insurance trusts. Article by Earl F. Morris of the Columbus bar. 11 CinLRev 327.

Ohio rule against perpetuities. (Editorial note.) 3 CinLRev 79.

History and development of the modern real estate deed. Article by Julius R. Samuels of the Cincinnati bar. 16 CinLRev 219, 23 OO 381.

Some aspects of the uniform property act in Ohio. Article by T. Latta McCray of the New York bar. 8 OSLJ 147.

Construction of the words "die without issue" under Ohio law. 18 CinLRev 311.

Future interests; survey of Ohio law, 1953. 5 WestRLRev 274.

The fee tail in Ohio. (Editorial note.) 17 OSLJ 335.

Rule against perpetuities not violated when testator's primary purpose was to benefit his sons. (Case note.) 30 CinLRev 377.

The rule against perpetuities—statutory reform. Note. 20 CaseWestResLRev 295.

The Ohio perpetuities reform statute. Robert J. Lynn. 29 OSLJ 1.

Application of the revised Ohio perpetuities statute. Case note. 34 OSLJ 433 (1973).

O.S.B. Service Letter

New perpetuities legislation. James S. Wachs. Probate Law Edition, Dec. 1967.

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1. A land purchase option which is appurtenant to a mineral estate and is limited to the necessary and reasonable use of the overlying surface estate for the exercise of mining rights, is a vested part of the mineral estate and is not void as a restraint upon alienation, although unlimited in time: *Quarto Mining Co. v. Litman*, 42 OS(2d) 73, 71 OO(2d) 58, 326 NE(2d) 676 (1975).

1.1. Where a testator bequeaths money in trust for a charitable corporation to be organized after his death for the purpose of accomplishing certain charitable purposes, the gift is valid although it is possible that the corporation might not be organized within the period of the rule against perpetuities. In such a case there is an immediate gift for charitable purposes, and the court will direct that the property be conveyed to the corporation if it is organized within a reasonable time, and if not so organized, will frame a scheme for the application of the property to the designated charitable purposes and direct that it be administered under the doctrine of cy pres: *Rice v. Stanley*, 42 OS(2d) 209, 71 OO(2d) 205, 327 NE(2d) 774 (1975).

1.2. There remains in the grantor of a fee tail estate a reversion in fee simple expectant upon the failure of a stated condition, which reversion is a descendible, devisable and alienable estate, which, if otherwise undisposed of, passes upon the death of the grantor by descent to his heirs then living: *Long v. Long*, 45 OS(2d) 165, 74 OO(2d) 287, 343 NE(2d) 100 (1976).

1.3. Common law fee tail estate exists in Ohio; RC § 2131.08 converting fee tail estate into fee simple absolute in issue of first donee in tail does not change nature of estate in donee in tail from inheritable estate to life estate but merely restricts entailment to immediate issue of such donee: *Long v. Long*, 45 OS(2d) 165, 74 OO(2d) 287, 343 NE(2d) 100 (1976).

2. Where conveyances were made in 1900 and 1901, the validity of the limitations over to a municipal corporation is governed by GC § 8622 (see now RC § 2131.08), in effect at that time, and not by the law in effect when the purpose is abandoned, or by the common law rule against perpetuities: *Joseph Schonthal Co. v. Sylvania*, 60 App 407, 14 OO 471, 21 NE(2d) 1008.

2.1 The common law rule against perpetuities was abrogated in Ohio in 1812 (10 v 7; RS § 4200; GC

§ 8622; repealed 114 v 745), and was not effective from that time until the enactment of this section in 1932, which readopted the rule. General Code § 8622 (see now RC § 2131.08) applied to municipal corporations as well as to persons: *Joseph Schonthal Co. v. Sylvania*, 60 App 407, 14 OO 471, 21 NE(2d) 1008.

3. Where a will creates a trust for the benefit of one person for life, then for the use of others until their marriage or death, and then "the trust to be continued and one-half of the annual income of said trust fund" to be paid to a charity, the gift to the charity does not violate the rule against perpetuities as the equitable estate vests in the charity immediately upon the transfer of the legal title to the trustee: *Schreiner v. Cincinnati Altenheim*, 61 App 344, 15 OO 228, 22 NE(2d) 587.

4. This section has supplanted the common law rule that a bequest for the permanent care of the settlor's cemetery grave or family lot violated the rule against perpetuities, and under the statute such trusts are valid: *Heinlein v. Elyria Sav. &c. Co.*, 75 App 353, 31 OO 123, 62 NE(2d) 284.

5. A bequest of money for the care of a dog does not, by the terms of the creating instrument, violate the rule against perpetuities: In re *Searight*, 87 App 417, 43 OO 169, 95 NE(2d) 779, discussed in 20 CinLRev 434.

6. A vested interest is not subject to the rule against perpetuities: *Cleveland Trust Co. v. McQuade*, 106 App 237, 6 OO(2d) 493, 142 NE(2d) 249.

6.1. "A vested interest is one in which there is a present fixed right, either of present enjoyment or of future enjoyment. Where, under the terms of the gift of a remainder, there is an ascertained person in existence who could take the remainder in possession immediately upon the determination of the particular estate whenever and however it might determine, the remainder is vested.

*** Where the right is to present enjoyment, the interest is always vested." 3 Page on Wills (Lifetime Ed.), Sec. 1257, quoted in: *Cleveland Trust Co. v. McQuade*, 106 App 237, 6 OO(2d) 493, 142 NE(2d) 249.

6.2. "A contingent interest is one in which there is no present fixed right of either present or future employment; but in which a fixed right will arise in the future under certain specified contingencies. Where, under the terms of the gift of remainder, there is no ascertained person in being who could take if the particular estate were at once to determine, or where the remainderman is ascertained by the terms of the gift but he cannot take upon the determination of the particular estate, unless some other or further event occurs before such determination, the remainder is contingent." 3 Page on Wills (Lifetime Ed.) Sec. 1257, quoted in: *Cleveland Trust Co. v. McQuade*, 106 App 237, 6 OO(2d) 493, 142 NE(2d) 249.

6.3. "A future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities. Probability of vesting, however great, is not sufficient. Moreover, the certainty of vesting must have existed at the time when the instrument took effect ***. It is immaterial that the contingencies actually do occur within the permissible period or actually have occurred when the validity of the instrument is first litigated." Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, at 642, quoted in: *Cleveland Trust Co. v. McQuade*, 106 App 237, 6 OO(2d) 493, 142 NE(2d) 249.

6.4. In applying the rule against perpetuities to litigation involving the validity of appointments made under a general power to appoint by will lodged in a donee of the power by virtue of an inter vivos indenture of trust, the period of time permitted for the vesting of interests given by the donee of the power in his will must be computed from the time of the

creation of the power and not from the exercise thereof: *Cleveland Trust Co. v. McQuade*, 106 App 237, 6 OO(2d) 493, 142 NE(2d) 249.

7. The legislature of Ohio specifically adopted the common law rule against perpetuities in the year 1932 (now codified at RC § 2131.08), although the rule had existed as a part of the common law of the state of Ohio for generations prior thereto: *Cleveland Trust Co. v. McQuade*, 106 App 237, 6 OO(2d) 493, 142 NE(2d) 249.

8. A will by which a testatrix left her estate to a designated person in trust with almost unlimited power to manage, control and dispose of both income and principal, and to pay or expend from time to time such sums as she deems necessary for the benefit of certain named beneficiaries, "until my grandson, M., shall, or would if he lived so long, attain the age of thirty years"; and upon disposition of the principal the trust to that extent to terminate; and in case the trust shall not be wholly disposed of under the foregoing provisions, such part not disposed of shall vest in equal shares in such of certain named beneficiaries "as shall be living when my grandson, M., shall, or would if he lived so long, attain the age of thirty years and the trust shall cease and determine," does not violate the rule against perpetuities as codified in this section: *Finkbeiner v. Finkbeiner*, 111 App 64, 13 OO(2d) 424, 165 NE(2d) 825.

9. When part of an attempted disposition fails as a direct consequence of the rule against perpetuities the effect, if any, of this partial invalidity upon the balance of the attempted disposition is determined by judicially ascertaining whether the conveyor, if he had known of this partial invalidity, would have preferred that (a) all the balance of the attempted disposition take effect, in accordance with its terms; or that (b) certain parts of the balance of the attempted disposition fail, but the rest thereof take effect in accordance with its terms; or that (c) all the balance of the attempted disposition fail: *Gwinner v. Schoeny*, 111 App 177, 13 OO(2d) 389, 171 NE(2d) 728.

10. The intent clearly expressed by the language of this section is that it is the vesting of the title that is the concern of the legislature: *Gwinner v. Schoeny*, 111 App 177, 13 OO(2d) 389, 171 NE(2d) 728.

11. Where the testator created a testamentary trust and directed his trustee to pay each month the sum of two hundred dollars to each of his five sons during each son's lifetime and after the son's death to continue to pay such sum to the deceased son's issue per stirpes, until the trust fund had been exhausted, each son had a vested life estate which became vested immediately upon the testator's death: *Gwinner v. Schoeny*, 111 App 177, 13 OO(2d) 389, 171 NE(2d) 728.

12. In such case, each of the testator's living and after-born grandchildren had a life estate in the undivided interest of his father, which must vest upon the instant of his father's death, and therefore vests within a life in being and twenty-one years thereafter as required by the rule: *Gwinner v. Schoeny*, 111 App 177, 13 OO(2d) 389, 171 NE(2d) 728.

13. In such case, each great-grandchild in actual or potential existence at the time of testator's death also had a vested life estate which will come into enjoyment after both his parent and grandparent of the testator's blood have died: *Gwinner v. Schoeny*, 111 App 177, 13 OO(2d) 389, 171 NE(2d) 728.

14. Where identical bequests to each of the testator's sons are payable out of the same testamentary trust fund the legal title to which is in the same trustee, but the gifts to the sons are not a gift to a class, the gifts must be considered separate and distinct from one another in applying the rule against perpetuities: *Gwinner v. Schoeny*, 111 App 177, 13 OO(2d) 389, 171 NE(2d) 728.

15. The state of Ohio, by virtue of this section, limits all estates given in tail by deed or will in lands or tenements lying within the state to be an absolute state in fee simple to the issue of the first donee in tail: *In re Jones*, 44 OLA 339, 64 NE(2d) 609 (App).

16. Where property is deeded by a mother to her son for life, and then to the heirs of his body, and if he dies without heirs of his body, the remainder to revert to the grantor, if living, and if not living, then the remainder to the grantor's heirs at law, it is incumbent upon the widow of the grantee-son, in an action to have quieted her title to such premises, to prove by a preponderance of the evidence that upon the death of the grantee-son without having had issue he had an absolute estate in fee simple in such premises which could pass to her as his heir or which could pass to her under the provisions of his will, i.e., that the grantor-mother had not successfully conveyed or devised away the reversion: *Kohler v. Ichler*, 116 App 16, 21 OO(2d) 221, 186 NE(2d) 202.

17. Where a charitable gift vests, a direction for accumulation, being for the management of the fund and not of the essence of the gift, will not, even if invalid, affect the validity of the gift: *Third National Bank v. Eaton*, 33 OApp(2d) 264, 62 OO(2d) 379, 294 NE(2d) 247 (1972).

18. In applying the rule against perpetuities, the test of vesting is not whether the beneficial enjoyment of the proceeds of the estate will arise within the period of the lives in being plus twenty-one years, but, whether, within such period it becomes certain that the interest is unconditional and will reach fruition in the future: *Third National Bank v. Eaton*, 33 OApp(2d) 264, 62 OO(2d) 379, 294 NE(2d) 247 (1972).

19. This statute abrogated the common law rule under the statute de bonis, although generally speaking many of the common law attributes were retained through interpretation: *Guida v. Thompson*, 80 OLA 148, 160 NE(2d) 153.

20. While the possibility of reversion on failure of issue remaining in the donor is not an estate, there is authority to the effect that the donor can release it to the person holding the intermediate estate, the first donee in tail. But this does not have the effect of converting the estate tail into an estate in fee simple in the hands of the first donee in tail so as to enable him to alien it in fee simple to a third person and thereby defeat the heirs of his body from acquiring it by descent upon his death. The only probable effect of an original donor's release of his reversion expectancy to the donee in tail would be to defeat donor's possibility of reversion in event the donee should die without issue and thereby vest the estate in the donee's general heirs in fee simple: *Guida v. Thompson*, 80 OLA 148, 160 NE(2d) 153.

21. Forty-five-year-old restrictions in a deed to a church congregation forbidding the use of musical instruments and any practice unauthorized in the New Testament on the premises and providing that in the event of a breach the property is to revert to those in the congregation who object to the breach will not be enforced to prevent the sale of the premises by the corporate successor of the congregation: *Church of Christ v. Ezzell*, 31 OO(2d) 224, 202 NE(2d) 212.

22. A testamentary disposition is not affected by the provision that possession by the grandchildren is postponed until they reach the age of thirty years, and then only on condition that they qualify as distributees to a designated standard of character and habits of life. The

interest of grandchildren, then in being and who might be thereafter born, vested at the death of the testator, subject to divestment in the case of any who might fail to qualify as distributees: *Sager v. Byrer*, 24 NP(NS) 129.

23. The requirement that a future interest must vest within the period of the rule against perpetuities does not mean that the interest must certainly vest; the requirement is that it must vest, if at all, within lives in being and twenty-one years: *Green v. Green*, 9 OMisc 15, 37 OO(2d) 394, 221 NE(2d) 388.

24. A future interest must vest, if at all, within the period of the rule against perpetuities; where the testamentary trust shall terminate the day the youngest living child of the son of the testator, in being on the date of the testator's death, attains twenty-five years of age, the rule is not violated: *Green v. Green*, 9 OMisc 15, 37 OO(2d) 394, 221 NE(2d) 388.

25. There is no constitutional prohibition against applying the 1967 statute against perpetuities, RC § 2131.08, to a power of appointment granted before that date. This statute is not regarded as operating retroactively merely because it relates to antecedent events, since it does not take away or impair vested rights: *Dollar Sav. & Trust Co. v. First Nat. Bank*, 61 OO(2d) 134, 32 OMisc 81, 285 NE(2d) 768 (CP 1972).

26. The last sentence of paragraph (D) of RC § 2131.08 applies only to the effective date of the 1967 amendment and its purpose was not to establish a general starting time for all powers of appointment; it does not change the Ohio common law rule that the perpetuities period of an interest derived from the exercise of a general testamentary power of appointment is measured from the time of the creation of the power and not from its exercise: *Dollar Sav. & Trust Co. v. First Nat. Bank*, 61 OO(2d) 134, 32 OMisc 81, 285 NE(2d) 768 (CP 1972).

27. Will providing for distribution after deaths of life tenants to their bodily heirs in fee simple held not to create an estate tail in that words in fee simple are inconsistent with usual form of limitation in estate tail to bodily heirs: *Pollock v. Brayton*, 28 App 172, 6 OLA 616, 162 NE 463.

30. A will provided that after all debts, funeral and administration expenses, and the year's allowance for the support of the widow were paid, the executor should select one-half of the inventory value of the property without deducting any taxes, and that only such assets should be selected as qualified to marital deduction under the federal estate tax law, and on making such selection the assets so selected should be delivered to a named trustee in trust for the testator's widow for life, with power in the trustee to pay to her the income and such of the principal as his widow might deem necessary for her comfortable support and welfare, and upon her death to dispose of the remaining assets as she might direct by will, and in the absence of such direction to the testator's daughters. The residue of the estate was placed in trust to pay the income to the widow and upon her death the principal and any accumulated income was payable to the daughters. Held: The estate vested within the period required by the rule against perpetuities: *Braun v. Central Trust Co.*, 92 App 110, 49 OO 249, 109 NE(2d) 476.

31. The rule against perpetuities as set forth in this section, is not a rule of construction, but of law, and it is to be applied even if the accomplishment of the expressed intention of the testator is made impossible: *Rudolph v. Schmalstig*, 9 OO 452 (CP).

32. A bequest in the nature of a public charitable trust does not violate this section, the statute against perpetuities: *Emrick v. Trustees*, 9 OO 468 (CP).

33. The operation of former GC § 8622 (repealed

114 v 320) (see now RC § 2131.08), is effective only upon the death of the first donee in tail, at which time it prohibits the future entailment of the lands by statute and places the absolute fee simple in the issue of the first donee in tail: *Mays v. Mays*, 24 OO 201, 8 OSupp 115 (CP).

34. The common law rule against perpetuities applies only to indestructible contingent interests, which the rule renders invalid at the time of their creation if at that time it is possible that they may remain contingent longer than lives then in being and twenty-one years thereafter: *Braun v. Central Trust Co.*, 46 OO 198, 104 NE(2d) 480 (CP).

35. Where a testator in his will gives, devises and bequeaths to a trustee property to be selected by the executor in order to qualify for the marital deduction of the federal estate tax, the title of the trustee to the property vests immediately upon the death of the testator and the rule against perpetuities does not apply: *Braun v. Central Trust Co.*, 46 OO 198, 104 NE(2d) 480 (CP).

36. A provision in a trust instrument which gives a corporation an option to purchase shares of stock and specifically requires each beneficiary to sign an agreement to give the corporation such option before delivery of the stock certificates by the trustee to the beneficiary, does not violate the rule against perpetuities: *Warner & Co. v. Rusterholz*, 41 FSupp 498, 22 OO 114.

37. The purpose of the rule against perpetuities is to prevent the tying up of land and its removal from commerce for long periods of time by the creation of future estates which would prevent the alienation of lands; the application of the rule has been extended by the common law and statute to personal property: *Warner & Co. v. Rusterholz*, 41 FSupp 498, 22 OO 114.

38. The period provided for by the rule against perpetuities begins to run from the time of the exercise of a general testamentary power of appointment and not from the time of its creation: *Cleveland Trust Co. v. McQuade*, 72 OLA 120, 133 NE(2d) 664 (PC).

39. One of the objects of the rule against perpetuities is to preclude the suspension of the marketability or transferability of property or interest: *Cleveland Trust Co. v. McQuade*, 72 OLA 120, 133 NE(2d) 664 (PC).

40. Under a provision in a trust instrument providing that after the death of the donee his share of the estate should "vest in and be distributed to his nominees and appointees by his last will and testament" the donee had power to appoint a trust company to hold such property in trust for certain designated beneficiaries, where such trust terminated within lives in being at the effective date of the appointment: *Cleveland Trust Co. v. McQuade*, 72 OLA 120, 133 NE(2d) 664 (PC).

41. From the standpoint of the rule against perpetuities there is no difference between a general power to appoint by deed or will and a general power to appoint by will only and in the latter case, as in the former, the period of the rule is to be computed from the date the power is exercised: *Cleveland Trust Co. v. McQuade*, 72 OLA 120, 133 NE(2d) 664 (PC).

42. The provisions of a will in which the testator directs his testamentary trustee to pay the net income derived from the trust estate to each of his four children if alive and so long as each shall live, and to the issue of a deceased child so long as alive, such payment to such issue to be made as a class, and to terminate the trust upon the death of all of testator's children and all of the issue of his children,

fail because of the application of the statute against perpetuities: *Large v. National City Bank*, 14 OO (2d) 100, 170 NE(2d) 309 (PC).

43. The question of remoteness is to be determined from the time of testator's death, and not of his will: *Large v. National City Bank*, 14 OO(2d) 100, 170 NE(2d) 309 (PC).

44. The remoteness of interests appointed under a special power of appointment is measured from the time of the creation of the power, not from the time of its exercise: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

45. If a power of appointment can be exercised at a time beyond the limits of the rule against perpetuities, the estate or interest to be appointed is too remote: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

46. If there is any possibility that the interests will not vest within lives in being plus twenty-one years, then the interests are void ab initio: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

47. Under this section, the twenty-one year period must follow, not precede, the lives in being by which the period of the rule is measured, and the measuring lives must be lives in being at the creation of the interest, i. e. in the case of a testamentary trust, at the death of the testator: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

48. An interest is not vested if, in order for it to come into possession, the fulfillment of some condition precedent other than the determination of the preceding estate is necessary: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

49. The rule against perpetuities applies only to the vesting of interests, and it applies to equitable as well as legal interests: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

50. The immediate purpose of the rule against perpetuities is to prevent the creation of interests which may vest too remotely: *Thomas v. Harrison*, 24 OO(2d) 148, 191 NE(2d) 862 (PC).

51. If there is any possibility that the gift to a class will not vest in every possible member of the class within the rule, the gift must fail: *Abram v. Wilson*, 37 OO(2d) 288, 8 OMisc 420, 220 NE(2d) 739 (PC).

52. A provision in a will that the testamentary trust should terminate on the day the youngest living child of testator's son, in being on the date of the testator's death, attains the age of twenty-five, does not violate the rule against perpetuities: *Green v. Green*, 37 OO(2d) 394, 9 OMisc 15, 221 NE(2d) 389 (PC).

53. The rule against perpetuities applies to property interests, not to contractual obligations: *Doyle v. Massachusetts Mut. Life Ins. Co.*, 41 OO(2d) 348, 377 F(2d) 19.

DECISIONS UNDER FORMER GC § 8622

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Perpetuities—scope and purpose

1. This section forbids gifts to any persons except

those who are in being or the immediate issue or descendants thereof at the time of testator's death: *Phillips v. Herron*, 55 OS 478, 45 NE 720.

2. This section is said to be a notable limitation on the power of devising property by will: *German Mutual Ins. Co. v. Lushey*, 66 OS 233, 64 NE 120.

2.1 The rule against perpetuities applies to trust estates as well as to legal estates: *Hoopert v. Gugel*, 25 NP(NS) 516.

3. The provisions of former GC § 8622 (see now RC § 2131.08) do not apply to a bequest of the income from lands and tenements devised in trust, nor the payment of such income to the child of a grandson born after testator's death: *Dahlgren v. Pierce*, 270 Fed 507.

4. Within the meaning of this section, the expression "time of making will" means the time at which the will took effect by reason of the death of the testator: *Phillips v. Herron*, 55 OS 478, 45 NE 720; *McArthur v. Scott*, 113 US 340, 28 LEd 1015, 5 SCt 652, 5 OFD 357.

—Immediate issue or descendants

5. The term "immediate issue" refers to the children, that is to the first generation, of persons in being: *Turley v. Turley*, 11 OS 173.

6. The term "immediate descendants" includes issue or lineal descendants no matter how remote, if in being at the death of the designated person who was in being when the deed was delivered or the will took effect: *Turley v. Turley*, 11 OS 173.

7. The word "immediate" in former GC § 8622 (see now RC § 2131.08), relating to perpetuities, designates the nearest living lineals, no matter how many generations removed; and time for determining immediacy of issue is at the date of vesting: *Von Overbeck v. Dahlgren*, 28 F(2d) 936.

8. Under devise to issue of daughter (a life tenant) and their heirs, grandchildren and two children jointly of deceased grandchild of daughter take per capita as daughter's immediate descendants, within former GC § 8622 (see now RC § 2131.08): *Von Overbeck v. Dahlgren*, 28 F(2d) 936.

—Construction of words creating perpetuity

9. The presumption is against the creation of an unlawful perpetuity: *King v. Beck*, 15 O 559.

10. Where a testator gives property to two daughters and two grandsons for life, and then provides that the portion in which each of them enjoyed a life estate shall "descend and pass absolutely, unconditionally, and in fee simple, respectively, to the children of each, lawfully begotten of the body of each, or to the children or child lawfully begotten of the body of such child or children"; it was held, first, that the words "or to the children or child lawfully begotten of the body of such child or children" were intended to designate persons who might be living at the death of the tenants for life, and not as words of limitation, requiring a succession first to children, and then to children of the children. Second, that the words did not render the devise over, after the determination of the life estate, void for uncertainty, or repugnancy, but that the meaning of the testator was, that upon the death of the tenant for life the children then living were to take, and if any child of the tenant for life had predeceased, leaving a child or children, such child or children should be substituted to the place of the deceased parent: *Stevenson v. Evans*, 10 OS 307; see also *McArthur v. Scott*, 113 US 340, 28 LEd 1015, 5 SCt 652, 5 OFD 357.

—Effect of perpetuity

11. The invalidity of a gift in a will under this

section is not a ground for contesting the will; but the effect of such gift, if invalid, upon the remaining provisions of the will, is a matter for subsequent determination after the validity of the will as a whole is established by proceedings in contest: *Mears v. Mears*, 15 OS 90.

12. The invalidity of a part of a will by reason of this section does not necessarily make other gifts invalid, if the will does not show the intention of testator that the gifts must stand or fall as a whole: *Hatch v. Hatch*, 1 OD(NP) 270, 31 Bul 57.

Entailments—constitutional

13. This section was enacted December 17, 1811 (2 Curwen, 2293). It was held that this statute applied to estates in fee tail, which were created before that time as well as to those which might be created thereafter; and that such change of estate in fee tail into estates in fee simple in the issue of the first donee in tail was not an unauthorized exercise of legislative power; and was not unconstitutional as interfering with the vested rights: *Pollock v. Speidel*, 27 OS 86.

14. If an estate in fee tail was created in 1807 and the statute changing a fee tail to a fee simple in the first donee in tail was enacted in 1811, the immediate issue of the first donee in tail acquired a fee simple; and if he conveyed such premises in 1836 by a deed containing covenants of general warranty, the title to such realty passed in fee simple, and neither such grantor nor his heirs could thereafter claim title thereto as against such grantee, his heirs or assigns: *Pollock v. Speidel*, 27 OS 86.

15. General Code § 11925 (RC § 5303.21) et seq, which provides for the sale of entailed estates, cannot apply to estates tail which were created before the enactment of such statute: *Gilpin v. Williams*, 25 OS 283; *Ream v. Wolls*, 61 OS 131, 55 NE 176.

16. Such statute is valid and constitutional as applying to estates tail created after the enactment of such statute: *Oyler v. Scanlan*, 33 OS 308.

—Interest of first donee

For the effect and application of the rule in *Shelley's* case, see case notes under RC § 2107.49.

17. If A devises an estate tail to B, and B dies without issue surviving, such realty reverts to the heirs of A: *Evangelical Lutheran Confession v. Sheffield*, 90 OS 467, 108 NE 1119.

18. The first donee takes merely fee tail; and he cannot convey a fee simple so as to defeat the right of his issue: *Pollock v. Speidel*, 17 OS 439.

19. This section does not reduce the interest of the first donee from an estate tail to a life estate; and accordingly the surviving spouse of the first donee in tail is entitled to dower or curtesy in accordance with the statutes then in force: *Harkness v. Corning*, 24 OS 416.

20. The rule in *Shelley's* case did not convert the fee tail into a fee simple: *Pollock v. Speidel*, 27 OS 86.

21. The first donee in tail cannot by conveying such realty to his issue and the heirs of their bodies restrict their interest to a fee tail: *Pollock v. Speidel*, 27 OS 86.

—Interest of issue during life of first donee

22. During the life of the first donee in tail, the issue of such donee has no estate or interest in the lands entailed which he can alienate; and a deed given by such issue during the life of the first donee in tail passes no interest where such issue die before the death of the first donee in tail, themselves leaving issue surviving: *Dungan v. Kline*, 81 OS 371, 90 NE 938; *In re Youtsey*, 260 Fed 423.

23. The recital of the consideration of one dollar is

sufficient to support a deed, but it is insufficient to make such deed enforceable in equity as a contract if it is inoperative at law, because given by the child of a donee in tail during the lifetime of such donee; when the grantor had no interest in such realty, but had merely the hope of inheriting it: *Carter v. Grossnickle*, 11 NP(NS) 465, 22 OD 680 [affirmed without opinion, *Grossnickle v. Carter*, 88 OS 577].

24. Where by the terms of a will, lands are entailed to a son and the heirs of his body, and the son brings suit to contest such will, his children then in being are "interested persons" within the meaning of GC § 12080 (RC § 2741.02), and such children as survive their father will not be bound by a judgment setting such will aside in a proceeding to which they were not parties: *Harris v. Maholm*, 20 NP(NS) 439, 28 OD 228.

—Interest of issue on death of first donee

25. The effect of this provision is to pass to the issue of the first donee in tail an estate in fee simple upon his death: *Pollock v. Speidel*, 17 OS 439; *Harkness v. Corning*, 24 OS 416; *Broadstone v. Brown*, 24 OS 430; *Richardson v. Cincinnati Union Stockyard Co.*, 8 NP 213, 11 OD 367; *In re Youtsey*, 260 Fed. 423.

26. A devise of realty by a testator to his granddaughter A and her issue, with an habendum "to A and her issue and their heirs" gives to A an estate in fee tail, the word "heirs" being used as a word of limitation and not of purchase: *Harkness v. Corning*, 24 OS 416.

27. The fact that the first donee in tail has himself conveyed the entailed realty to his issue and to the heirs of their bodies forever, does not reduce their interest on his death from a fee simple to a fee tail: *Pollock v. Speidel*, 27 OS 86.

28. Under a devise of certain real estate to a son "to have and to hold the said property for his life, and the remainder over at his death to the heirs of his body, their heirs and assigns forever, share and share alike," the children of said son take the fee and not an estate tail: *Poor v. Hart*, 21 OD(NP) 260 [affirmed without report, *Hart v. Poor*, 84 OS 487].

29. For other cases of construction of words creating a fee tail or using the word "heirs," "children" or other words of like import, see *King v. Beck*, 12 O 390; *Stevenson v. Evans*, 10 OS 307; *Gibson v. McNeely*, 11 OS 131; *Gilpin v. Williams*, 25 OS 283; *Smith v. Block*, 29 OS 488; *Nimmons v. Westfall*, 33 OS 213; *Evangelical Lutheran Confession v. Sheffield*, 90 OS 467, 108 NE 1119 [explained in *Edwards v. Edwards*, 14 App 49, 31 OCA 561].

§ 2131.09 Exemption of certain trusts. (GC § 10512-8a)

A trust of real or personal property created by an employer as part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, for the benefit of some or all of the employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees or their beneficiaries the earnings or the principal, or both earnings and principal, of the fund so held in trust, is not invalid as violating the rule against perpetuities, any other existing law against perpetuities, or any law restricting or limiting the duration of trusts; but such trust may continue for such time as is necessary to accomplish the

purposes for which it was created.

The income arising from any trust within the classifications mentioned in this section may be accumulated in accordance with the terms of such trust for as long a time as is necessary to accomplish the purposes for which the same was created, notwithstanding any law limiting the period during which trust income may be accumulated.

No rule of law against perpetuities or the suspension of the power of alienation of the title to property invalidates any such trust unless such trust is terminated by decree of a court in a suit instituted within two years after June 25, 1951.

HISTORY: GC § 10512-8a; 124 v 18, § 1. Eff 10-1-53.

Research Aids

Trusts for benefit of employees:

O-Jur2d: Perpetuities §§ 47, 63

Law Review

The rule against perpetuities and pension trusts—an obstacle in tax planning. 19 OSLJ 336.

§ 2131.10 Deposit payable on death.

A natural person, adult or minor, referred to in sections 2131.10 and 2131.11 of the Revised Code as the owner, may enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings, authorized to receive money on an investment share certificate, share account, deposit, or stock deposit, and transacting business in this state, whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit may be made payable on the death of the owner to another person, referred to in such sections as the beneficiary, notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code. In creating such accounts, "payable on death" or "payable on the death of" may be abbreviated to "P.O.D."

Every contract of an investment share certificate, share account, deposit, or stock deposit authorized by this section shall be deemed to contain a right on the part of the owner during his lifetime both to withdraw the proceeds of such investment share certificate, share account, deposit, or stock deposit, in whole or in part, as though no beneficiary has been named, and to designate a change in beneficiary. The interest of the beneficiary shall be deemed not to vest until the death of the owner.

No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the bank, building and loan or savings and loan association, credit union, or society for savings.

HISTORY: 129 v 245, § 1 (Eff 7-25-61); 130 v 619, § 1. Eff 1-23-63.

Style deviations in this section were corrected by

the amendment in HB 1 (130 v 619). No change in the law was intended; see RC § 1.26.

Cross-References to Related Sections

Joint accounts and deposits payable on death, RC § 1107.08.

Forms

1 A&H Probate FORM 2131.10a et seq.

Research Aids

P.O.D. Accounts:

O-Jur2d: Bonds § 128; Building and Loan Assns. § 26

Law Reviews

Legislature provides for "P. O. D." certificates of deposit. (Case note.) 23 OSLJ 594.

Bank deposits; accounts payable on death to a named beneficiary are valid testamentary dispositions. Case note. 37 CinLRev 655.

O.S.B. Service Letter

Types of bank accounts. Commercial Law Edition, Sept. 1965.

CASE NOTES AND OAG

1. A lease agreement executed by two parties as co-lessees for a safe deposit box, which agreement provides that such co-lessees are joint tenants with right of survivorship, is a contract vesting inter vivos a present and equal joint interest in such co-lessees, and where the evidence of decedent's intention confirms the written provisions of the contract, then upon the death of one of the co-lessees the survivor becomes the absolute owner of the entire contents of the box by operative provisions of that contract: *Steinhauser v. Repko*, 30 OS(2d) 262, 59 OO(2d) 334, 285 NE(2d) 55 (1972).

2. A lease agreement executed by two parties as co-lessees for a safe deposit box, which agreement provides that such co-lessees are joint tenants with right of survivorship, raises a rebuttable presumption that the parties to the agreement have a present, equal joint interest in the res, and, in the absence of any evidence, that presumption is sufficient, as a matter of law, to sustain a judgment declaring the survivor the absolute owner of the entire contents of the box: *Steinhauser v. Repko*, 30 OS(2d) 262, 59 OO(2d) 334, 285 NE(2d) 55 (1972).

3. Where a natural adult person enters into a contract with his bank, as provided for by this section, depositing therein various sums of money in savings accounts, payable on death to certain named individuals, such savings accounts, upon the death of the depositor, are, by such statute, expressly exempt from the statute of wills: *Tonsic v. Holub*, 13 OApp(2d) 195, 42 OO(2d) 341, 235 NE(2d) 239.

4. A payable on death (P. O. D.) account created under RC § 2131.10 is one where funds are made payable upon the death of the owner to another without the documents having complied with the formalities of the statute of wills. The funds involved do not become part of the decedent's estate. In a P. O. D. account the owner retains sole ownership of the account and only he may withdraw the proceeds or change the beneficiary during his lifetime. The beneficiary's interest does not vest until the death of the owner: *Eger v. Eger*, 39 OApp(2d) 14, 68 OO(2d) 150, 314 NE(2d) 394 (1974).

5. Where the decedent merely signed blank signature cards which were returned to several banks for the purpose of establishing joint and survivorship accounts,

such act does not sufficiently show an intention to create a present existing interest in the survivors: *In re Kapatch*, 73 OO(2d) 422 (CP 1975).

§ 2131.11 Release and discharge upon payment.

When an investment share certificate, share account, deposit, or stock deposit is made, in any bank, building and loan or savings and loan association, credit union, or society for savings, payable to the owner during his lifetime, and to another on his death, such investment share certificate, share account, deposit, or stock deposit or any part thereof or any interest or dividend thereon, may be paid to the owner during his lifetime, and on his death such investment share certificate, share account, deposit, or stock deposit or any part thereof or any interest or dividend thereon, may be paid to the designated beneficiary, and the receipt of acquittance of the person paid is a sufficient release and discharge of the bank, building and loan or savings and loan association, credit union, or society for savings for any payment so made.

HISTORY: 129 v 245 (246), § 1. Eff 7-25-61.

Cross-References to Related Sections

Joint accounts and deposits payable on death, RC § 1107.08.

See RC § 2131.10 which refers to this section.

Forms

1 A&H Probate FORM 2131.10a et seq: Payable on death savings account.

Research Aids

P.O.D. Accounts:

O-Jur2d: Banks § 128; Building and Loan Assns. § 26

CASE NOTES AND OAG

See case notes under 2131.10

[SECURITIES HELD BY FIDUCIARY]

§ 2131.21 [Deposit of securities held in fiduciary capacity.]

Any person holding securities in a fiduciary capacity, or any state bank, trust company, or national bank, any of which is holding securities as a custodian, managing agent, or custodian for a fiduciary, is authorized to deposit or arrange for the deposit of the securities in a federal reserve bank, a clearing corporation, or a securities depository. When the securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of the federal reserve bank, clearing corporation, or securities depository with any other such securities deposited

in the federal reserve bank, clearing corporation, or securities depository by any person, regardless of the ownership of the securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of the fiduciary and the records of a state bank, trust company, or national bank acting as custodian, managing agent, or custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. Title to the securities may be transferred by bookkeeping entry on the books of the federal reserve bank, clearing corporation, or securities depository without physical delivery of certificates representing the securities. A state bank, trust company, or national bank depositing securities pursuant to this section shall be subject to the rules as, in the case of state chartered institutions, the superintendent of banks or state bank commissioner of another state, and in the case of national banking associations, the comptroller of the currency, may issue. A state bank, trust company, or national bank, acting as custodian for a fiduciary, shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by the state bank, trust company, or national bank in the federal reserve bank, clearing corporation, or securities depository for the account of the fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of the fiduciary's account, or on demand by the attorney for such a party, certify in writing to the party the securities deposited by the fiduciary in the federal reserve bank, clearing corporation, or securities depository.

This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any state bank, trust company, or national bank holding securities as a custodian, managing agent, or custodian for a fiduciary, or who thereafter may act, regardless of the date of the agreement, instrument, or court order by which it is appointed, and regardless of whether or not the fiduciary, custodian, managing agent, or custodian for a fiduciary owns capital stock of the clearing corporation or securities depository.

HISTORY: 136 v S 145. Eff 1-1-76.

See provisions, § 3 of SB 145 (136 v —) following RC § 2101.01.

Cross-References to Related Sections

See RC § 2109.30 which refers to this section.

Research Aids

Deposit of securities held in fiduciary capacity:

O-Jur2d: Fiduciaries § 50

CHAPTER 2151: JUVENILE COURT

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- 2151.65 Single-county and joint-county juvenile facilities.
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- 2151.66 District tax levies.
- 2151.67 Gifts and bequests.
- 2151.68 Appointment of district boards of trustees.
- 2151.69 Procedures of district boards of trustees.
- 2151.70 Employees of juvenile facilities.
- 2151.71 Manner of operating facilities.
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- 2151.76 Authority for choice, construction, and furnishing of district facility.
- 2151.77 Capital and current expenses of district.
- 2151.78 Withdrawal of county from district; continuity of district tax levy.
- 2151.79 Designation of fiscal officer of district; duties of county auditors in district.
- 2151.80 Expenses of members of boards of county commissioners.
- 2151.99 Penalties.

§ 2151.01 Construction; purpose.

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code;

(B) To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation;

(C) To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety;

(D) To provide judicial procedures through which Chapter 2151. of the Revised Code is executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

HISTORY: 133 v H 320. EF 11-19-63.

Not analogous to former RC § 2151.01, repealed, 133 v H 320. For an analogous provision to former RC § 2151.01, see now RC § 2151.01.1

Cross-References to Related Sections

Annual review of every child in custody, procedures, RC § 5103.15.1.

Courts inferior to common pleas, practice and procedure in criminal cases uniform, exception, RC § 2938.02.

Commitment to youth commission, RC § 2151.35.
Domestic relations judges in certain counties to hear cases, RC § 2301.03

Exceptions to required consent to adoption, RC § 3107.07.

Judges of court of domestic relations, juvenile court responsibilities, RC § 2301.03.

Point system, driver's license suspension law, RC § 4507.40.

Removal of child from possession of parents, etc., RC § 1717.14.

Youth commission, placement and treatment of child in accordance with purposes of this chapter, RC § 5139.04.

See Juv.R. 2(13), (14), RC §§ 2151.01.1, 2151.08, 2153.16 which refer to this chapter.

See RC §§ 2151.02, 2151.02.2, 2151.03, 2151.03.1, 2151.04 to 2151.07, 2151.12, 2151.14, 2151.15, 2151.20, 2151.29, 2151.34, 2151.36, 2151.37, 2151.40, 2151.43, 2151.45 to 2151.49, 2151.52, 2151.53, 2151.65 which refer to § 2151.01 et seq.

Comparative Legislation

Juvenile courts:

Cal.—Welf & Inst. Code, § 550

Ill.—Rev Stat, ch 37, § 701-1

Ind.—Burns' Stat, § 33-12-2-1

Ky.—KRS, § 208.030

Mich.—MCLA, § 712A.1

N.Y.—Jud—Family Court, § 111

Pa.—Purdon's Stat, Tit. 11, § 50-101

Fla.—FSA, § 39.02

Text Discussion

2 Anderson Fam. L. §§ 1.3, 13.24.

1 OCP&P §§ 51.7c(4), 60.5.

Research Aids

Purpose and construction of juvenile court law:

O-Jur2d: Juvenile Courts § 4

Am-Jur2d: Juvenile Courts etc. § 12

Law Reviews

Practice in the juvenile court. Judge Harry L. Eastman. 13 ClevBJ (No. 3) 35.

Domestic relations; legitimization of illegitimates. (Case note.) 6 OSLJ 198.

Practice and procedure in the juvenile court. Walter G. Whitlatch. 21 ClevBJ (No. 7) 107.

The Juvenile Court; a court of law. Hon. Walter G. Whitlatch. 18 WestResLRev 1239.

Ohio's mandatory reporting statute for cases of child abuse. Mario C. Ciano. 18 WestResLRev 1405.

Ohio's post-Gault juvenile court law. Robert J. Willey. 3 AkronLRev 152.

Ohio's revised Juvenile Court Act. Hon. Walter G. Whitlatch. 42 OBar (No. 43) 1389.

Welfare and social progress in the prevention and treatment of juvenile delinquency. Hon. William F. Burns. 5 ClevMarLRev 35.

The lawyer and social services in the juvenile court. John J. Mayar. 29 ClevBJ (No. 7) 99.

Evidence in Cuyahoga county juvenile court. Elaine J. Columbro. 10 ClevMarLRev 524.

Treatment practices in juvenile court. Eleanor A. Blackley. 10 ClevMarLRev 533.

Death damages and conflicts of laws. Marvin D. Silver. 10 ClevMarLRev 461.

Practice in Cuyahoga county juvenile court. Ronald J. Harpst. 10 ClevMarLRev 507.

A synopsis of Ohio juvenile court law. Hon. Don J. Young, Jr. 31 CinLRev 131.

Juvenile delinquent and unruly proceedings in Ohio: unconstitutional adjudications. Note. 24 ClevStLRev 602 (1975).

Juvenile court: time for change. Charles Auerbach. 37 ClevBJ (No. 7) 145; 37 ClevBJ (No. 8) 179.

Ohio Rules

This section is affected by Juv.R. 1(A), (B), 3, 9(A), 45; and is related to Crim.R. 1(C).

CASE NOTES AND OAG

1. Extracurricular activities are an integral part of the total school program and cannot be denied to a high school student because he is married: *Davis v. Bd. of Education*, 32 OMisc 43, 344 FSupp 298, 61 OO(2d) 65 (ND Ohio 1972).

2. A complaint alleging a child to be a juvenile traffic offender is neither a criminal nor a civil proceeding: *In re C.*, 43 OMisc 98, 73 OO(2d) 77, 335 NE(2d) 758 (CP 1975).

3. When and how to act in determining the necessity of advancing the child's welfare, and at once protecting the public safety, falls within the discretion of the Ohio youth commission and its employees, so as not to subject the state to liability under the state's waiver of sovereign immunity as set out in RC § 2743.02, where the exercise of such discretion results in damage: *Adamov v. State*, 46 OMisc 1, 75 OO(2d) 41 (1975).

4. Delinquency has not been declared a crime in Ohio and the Ohio juvenile act is neither criminal nor penal in its nature, but is an administrative police regulation of a corrective character. Proceedings instituted in a juvenile court are not criminal in nature nor are they conducted with the objective of convicting a minor of a crime and punishing him, therefore; they are informal hearings through a medium of the juvenile court to determine whether the child needs intervention of the state as guardian and protector of his person: *In re L., Jr.*, 92 OLA 475.

5. Under the juvenile court act of Ohio, the juvenile offender is surrounded with every protection to avoid publicity in newspapers, to avoid public hearings and to prevent him from being charged with a criminal record: *Allstate Ins. Co. v. Cook*, 26 OO(2d) 192, 324 F(2d) 752.

[§ 2151.01.1] § 2151.011 Definitions.

(A) As used in the Revised Code:

(1) "Juvenile court" means the division of the court of common pleas or a juvenile court separately and independently created having jurisdiction under Chapter 2151. of the Revised Code.

(2) "Juvenile judge" means a judge of a court having jurisdiction under Chapter 2151. of the Revised Code.

(B) As used in sections 2151.01 to 2151.99, inclusive, of the Revised Code:

(1) "Child" means a person who is under the age of eighteen years, with the exception that any child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of his age at the time the complaint is filed or hearing had thereon.

(2) "Adult" means an individual eighteen years of age or older.

(3) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.

(4) "Shelter" means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition.

(5) "Foster home" means a family home in which any child is received apart from his parents for care, supervision, or training.

(6) "Certified foster home" means a foster home operated by persons holding a permit in force, issued under sections 5103.03 to 5103.05, inclusive, of the Revised Code.

(7) "Approved foster care" means facilities approved by the youth commission under sections 5139.36 to 5139.40, inclusive, of the Revised Code.

(8) "Organization" means any institution, public, semipublic, or private, and any private association, society or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in foster homes or elsewhere.

(9) "Certified organization" means any organization mentioned under division (B) (8) of this section which holds a certificate in force, issued under sections 5103.03 to 5103.05, inclusive, of the Revised Code.

(10) "Legal custody" means a legal status created by court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(11) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the person, including but not necessarily limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(12) "Permanent custody" means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county welfare board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural

parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(13) "Temporary custody" means legal custody as defined in division (B) (10) of this section which may be terminated at any time at the discretion of the court.

(14) "Commit" means to vest custody as ordered by the court.

(15) "Probation" means a legal status created by court order following an adjudication that a child is delinquent, a juvenile traffic offender, or unruly whereby the child is permitted to remain in the parent's, guardian's, or custodian's home subject to supervision, or under the supervision of any agency designated by the court and returned to the court for violation of probation at any time during the period of probation.

(16) "Protective supervision" means a legal status created by court order whereby the child is permitted to remain in the parent's, guardian's, or custodian's home under supervision and subject to return to the court during the period of protective supervision.

HISTORY: 133 v H 320. **EF** 11-19-69.

Analogous to former RC § 2151.01.

Cross-References to Related Sections

Temporary or permanent commitment of child to youth commission, RC § 5139.05.

See RC § 5139.05 which refers to this section.

Text Discussion

2 Anderson Fam. L. §§ 11.30, 13.2.
1 OCP&P § 51.7c(4)

Forms

2 Anderson Fam. L. No. 3.

Research Aids

Definition of terms:

O-Jur2d: Juvenile Courts § 8

Ohio Rules

This section is affected by Juv.R. 2, 7(A), 15(B)(5), 34(C), and is related to Crim.R. 1(C).

CASE NOTES AND OAG

1. Where a child, as defined by RC § 2151.01.1 (B)(1), who has been adjudicated a delinquent, leaves the jurisdiction of the juvenile court so that such court can not dispose of his case until he is over twenty-one years of age, he is an adult within the meaning of RC § 2151.01.1: In re Cox, 36 OApp(2d) 65, 65 OO(2d) 51, 301 NE(2d) 907 (1973).

2. Revised Code § 2151.01.1(B)(1) provides for a statutory definition of a "child" which includes any person who violates any law whether federal, state or municipal ordinance prior to attaining eighteen years of age irrespective of his age at the time the complaint is filed or hearing had thereon: In re Cox, 36 OApp(2d) 65, 65 OO(2d) 51, 301 NE(2d) 907 (1973).

3. For definitions of the terms "foster home" and "boarding home," see 1943 OAG No. 6451.

4. The term "legal settlement," as used in RC § 2151.01 et seq, with respect to parents, guardians, or

persons standing in the relation of loco parentis of children within the jurisdiction of the juvenile court, has reference to that term as defined in RC § 5113.05. 1956 OAG No. 7008. (Approved and followed 1956 OAG No. 6542.)

5. A foster home is not an educational facility within the meaning of RC § 2151.35.7, and the section has no application to a foster home: 1970 OAG No. 70-166.

6. A child of kindergarten age is included within the meaning of the word "child" as it is used in RC § 2151.35.7: 1972 OAG No. 72-099.

§ 2151.02 "Delinquent child" defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "delinquent child" includes any child:

(A) Who violates any law of this state, the United States, or any ordinance or regulation of a political subdivision of the state, which would be a crime if committed by an adult, except as provided in section 2151.021 [2151.02.1] of the Revised Code;

(B) Who violates any lawful order of the court made under this chapter.

HISTORY: GC § 1639-2; 117 v 520; 127 v 547 (EF 9-14-57); 133 v H 320. **EF** 11-19-69.

Analogous to former GC § 1644.

The several sections, parts of sections, sentences, and parts of sentences of this act (amending RC §§ 2151.02, 2151.18, 2151.23, 2151.27 and 2151.35, and enacting RC § 2151.02.1) are declared to be separate and independent sections, parts of sections, sentences, and parts of sentences, and a decision holding any section, part of section, sentence, or part of sentence thereof for any reason to be unconstitutional and void shall not affect the validity of the remaining portions of the act (127 v 547 (551), § 3).

Cross-References to Related Sections

Truancy, RC § 3321.04 et seq.

See cross-references under RC § 2151.01.

Comparative Legislation

Delinquent children:

Cal.—Welf. & Inst. Code, § 600

Ill.—Rev Stat, ch 37, § 702-2

Ind.—Burns' Stat, § 31-5-7-4.1

Ky.—KRS, § 208.020

Mich.—MCLA, § 712A.2

N.Y.—Jud—Family Court, § 712

Pa.—Purdon's Stat, Tit. 11, § 50-102

Fla.—FSA, § 39.01

Text Discussion

2 Anderson Fam. L. § 9.1.

Research Aids

Delinquency:

O-Jur2d: Juvenile Courts § 27

Am-Jur2d: Juvenile Courts, etc. § 23

Law Review

Alternatives to detention and institutional placement of juveniles. Hon. Don J. Young. 1 ToledoL Rev 326.

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULR 53 (1973).

Juvenile delinquent and unruly proceedings in Ohio: unconstitutional adjudications. Note. 24 ClevStLR 602 (1975).

Practice in the juvenile court. Judge Harry L. Eastman. 12 ClevBJ (No. 3) 35.

Welfare and social progress in the prevention and treatment of juvenile delinquency. Hon. William F. Burns. 5 ClevMarLRev 35.

Charges against adult offenders in the Juvenile Court. Judge Don J. Young, Jr. 32 OBar (No. 11) 224.

A synopsis of Ohio juvenile court law. Hon. Don J. Young, Jr. 31 CinLRev 131.

Evidence problems in juvenile delinquency proceedings. Ronald J. Harpst. 11 ClevMarLRev 486.

Ohio Rules

This section is affected by Juv.R. 2, 3, 10(A), 29(B), 30.

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1. [I]n the sense that violation of law by a minor constitutes delinquency, as defined in GC § 1644, the juvenile court has jurisdiction of any crime committed by an infant: *State v. Klingenberg*, 113 OS 425, 149 NE 395.

2. Ordinarily, a minor child does not commit any act of delinquency so long as he or she acts under and in accordance with instructions of duly constituted law enforcement officers who are acting within the course of their duties as such: *State v. Miclau*, 167 OS 38, 4 OO(2d) 6, 146 NE(2d) 293.

3. Where the parents of a female person under 16 years of age actively participate in enabling such person to enter into a marriage relationship, such participation constitutes acts tending to cause the child to become a "delinquent child" as defined by RC § 2151.02, and the parents "act in a way tending to cause delinquency in such child," in violation of RC § 2151.41: *State v. Gans*, 168 OS 174, 5 OO(2d) 472, 151 NE(2d) 709.

4. Marriage of girl of nearly 15 to man of 41 years of age without parent's consent did not constitute her a "delinquent," nor render man guilty of contribution to her delinquency: *Peefer v. State*, 42 App 276, 182 NE 117.

5. No violation of law is involved in the purchase of beer, and a minor by making such a purchase, does not by reason of such purchase become a delinquent child within the meaning of the provisions of subdivision 1 of Section 1639-2, General Code: *State v. Zaras*, 81 App 152, 36 OO 460, 78 NE(2d) 74.

6. [A] mere preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute has been violated by such minor: *State v. Shardell*, 107 App 338, 8 OO(2d) 262, 153 NE(2d) 510.

7. Under existing Ohio law, proceedings in juvenile court are civil in nature and not criminal. A juvenile court judge acts within his authority when, in a hearing to determine the delinquency status of a child under RC § 2151.02, he denies a request for a

jury trial and decides the case on the preponderance of the evidence: *In re Benn*, 18 OApp(2d) 97, 47 OO(2d) 170, 247 NE(2d) 335.

8. Proof of possession, use, or control by a juvenile of an hallucinogen is sufficient evidence upon which a Juvenile Court can find such juvenile a delinquent under Chapter 2151 of the Revised Code: *In re Baker*, 18 OApp(2d) 276, 47 OO(2d) 411, 248 NE(2d) 620 (1969).

9. A sixteen year old boy having carnal knowledge of a female under sixteen years of age cannot be held delinquent for violating RC § 2905.03, since the statute specifically identifies the class of persons who are criminally liable for statutory rape as being eighteen years of age or over: *In re J. P.*, 61 OO(2d) 24, 32 OMisc 5, 287 NE(2d) 926 (CP 1972).

10. Causing minor to be in possession of intoxicating liquor constitutes contributing to delinquency under GC §§ 1644 and 1654 (see now RC §§ 2151.02 and 2151.41): *Summers v. State*, 6 OLA 475.

11. A child who is guilty of immoral conduct is delinquent under former GC § 1644 (see now RC § 2151.02): *State v. Hannawalt*, 26 OLA 641.

12. The gravamen of the offense of contributing to the delinquency of a child is that the child so deported itself as to injure or endanger the morals or health of itself or others and that the accused contributed to such deportment on the part of the child: *State ex rel Farrell v. Hornavius*, 31 OLA 460.

13. A charge that the defendant "did have indecent and immoral relations with the" child is sufficiently specific because so characterized by this section, defining the acts which constitute a delinquent child, to constitute acting in a manner tending to cause the delinquency of such child: *State v. Van Horn*, 32 OLA 406.

14. A minor, by "improperly" associating with defendant, a married man, "until late hours at night", so deported herself "as to injure or endanger" her "morals or health" and by such acts she became a delinquent child as defined in subdivision 4 of Section 1639-2, General Code: *State v. Mahoney*, 54 OLA 218, 87 NE(2d) 496 (App).

15. The selling or handling of intoxicating liquors by a minor under eighteen years of age constitutes an act of delinquency under this section: *State v. Butler*, 25 OO 567, 11 OSupp 18 (JC).

16. "Delinquent child" was defined with sufficient accuracy under a former statute (98 v 314): *Travis v. State*, 12 CC(NS) 374, 21 CD 492.

17. In prosecution of a minor under seventeen, as prescribed by this section, evidence of complainant's bad reputation or immoral conduct is not admissible: *State v. Hawkins*, 56 Bull 166.

18. Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal or penal in its nature, but is an administrative police regulation of a corrective character; and while the commission of a crime may set the machinery of the juvenile court in motion, the accused was not tried in that court for his crime, but for incorrigibility: *In re Januszewski*, 196 Fed 123, 10 OLR 151.

19. While GC § 1648 (see now RC § 2151.28 et seq) provides for an affidavit, and not for an indictment, it is not invalid under Art. I, § 10 of the constitution of Ohio, which provides that the accused can be held to answer for an infamous crime only upon presentation by the grand jury; since delinquency is not made a crime by this section: *In re Januszewski*, 196 Fed 123, 10 OLR 151.

[§ 2151.02.1] § 2151.021 "Juvenile traffic offender" defined.

A child who violates any traffic law, traffic

ordinance, or traffic regulation of this state, the United States, or of any political subdivision of this state, shall be designated as a "juvenile traffic offender."

HISTORY: 127 v 547 (Eff 9-14-57); 133 v H 320. Eff 11-19-69.

Cross-References to Related Sections

See RC § 2151.02 which refers to this section.

Text Discussion

2 Anderson Fam. L. §§ 9.1, 12.1, 12.2.

Research Aids

Juvenile traffic offender:

O-Jur2d: Juvenile Courts § 27.6

Ohio Rules

This section is affected by Juv. R. 2(1), 10(C), 15(B)(2), and is related to Crim.R. 57(A).

CASE NOTES AND OAG

1. A complaint alleging a child to be a juvenile traffic offender is neither a criminal nor a civil proceeding: In re C, 43 OMisc 98, 72 OO(2d) 421 (CP 1975).

[§ 2151.02.2] § 2151.022 Unruly child defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "Unruly child" includes any child:

(A) Who does not subject himself to the reasonable control of his parents, teachers, guardian, or custodian, by reason of being wayward or habitually disobedient;

(B) Who is an habitual truant from home or school;

(C) Who so deports himself as to injure or endanger the health or morals of himself or others;

(D) Who attempts to enter the marriage relation in any state without the consent of his parents, custodian, legal guardian, or other legal authority;

(E) Who is found in a disreputable place, visits or patronizes a place prohibited by law, or associates with vagrant, vicious, criminal, notorious, or immoral persons;

(F) Who engages in an occupation prohibited by law, or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others;

(G) Who has violated a law applicable only to a child.

HISTORY: 133 v H 320. Eff 11-19-69.

Text Discussion

2 Anderson Fam. L. §§ 9.1, 10.1-10.11.

Research Aids

Unruly child:

O-Jur2d: Juvenile Courts § 27.5

Law Review

A proposal for the more effective treatment of the

unruly child in Ohio. G. David Schiering. 39 CinL Rev 275.

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULR 53 (1973).

Juvenile delinquent and unruly proceedings in Ohio: unconstitutional adjudications. Note. 24 ClevStLR 602 (1975).

Ohio Rules

This section is affected by Juv. R. 2(1), 10(A).

CASE NOTES AND OAG

1. Although a sixteen year old boy having carnal knowledge of a female under sixteen years of age cannot be held delinquent for violating RC § 2905.03, since the statute specifically identifies the class of persons who are criminally liable for statutory rape as being eighteen years of age or over, the court may find said juvenile to be an unruly boy by "deporting himself so as to injure or endanger the health or morals of himself or others: In re J. P., 32 OMisc 5, 61 OO(2d) 24, 287 NE(2d) 926 (1972).

§ 2151.03 "Neglected child" defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "neglected child" includes any child:

(A) Who is abandoned by his parents, guardian, or custodian;

(B) Who lacks proper parental care because of the faults or habits of his parents, guardian, or custodian;

(C) Whose parents, guardian, or custodian neglects or refuses to provide him with proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals, or well being;

(D) Whose parents, guardian, or custodian neglects or refuses to provide the special care made necessary by his mental condition;

(E) Whose parents, legal guardian, or custodian have placed or attempted to place such child in violation of sections 5103.16 and 5103.17 of the Revised Code.

A child who, in lieu of medical or surgical care or treatment for a wound, injury, disability, or physical or mental condition, is under spiritual treatment through prayer in accordance with the tenets and practices of a well-recognized religion, is not a neglected child for this reason alone.

HISTORY: GC § 1639-3; 117 v 520; 133 v H 320. Eff 11-19-69.

Comment

The definition is taken almost entirely from the standard juvenile court law. These subdivisions are clear and unambiguous. In determining whether a child is neglected or dependent, the following distinction may be kept in mind:

The word "neglect" indicates a wilful disregard of a duty on the part of a parent, guardian or custodian, toward a child;

"Dependency" indicates the inability of a parent, guardian, or custodian to discharge his legal responsibility, or the nonexistence of such persons.

Cross-References to Related Sections

Duty of parent to support child, RC § 3103.03.

See RC § 2151.31 which refers to this section.

Text Discussion

2 *Anderson Fam.L.* §§ 11.2-11.17.

Research Aids

Neglected child:

O-Jur2d: *Juvenile Courts* § 28

Am-Jur2d: *Juvenile Courts etc.* §§ 24, 25

Law Review

Blood transfusions and elective surgery: a custodial function of an Ohio juvenile court. *M. J. Zaremski*. 23 *ClevStLRev* 231.

Child neglect: the environmental aspects. *Michael F. Sullivan*. 29 *OSLJ* 85.

The law of adoption in Ohio. *Beverly E. Sylvester*. 2 *CapitalULR* 23 (1973).

Ohio Rules

This section is affected by *Juv. R.* 2(1).

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1. Where the father of a minor child endeavors to send such child to a proper public school but, pursuant to a valid regulation of the board of education, such child is excluded from the public school because he has not been vaccinated, and where there is no showing that the father had done anything to prevent the vaccination of such child, such child is not a neglected child within the meaning of this section: *State v. Dunham*, 154 OS 63, 42 OO 133, 93 NE(2d) 286.

1.1 An order of the juvenile court made pursuant to a finding that children are "neglected" children within the meaning of this section, and committing said children to the permanent custody of a child welfare board for the purpose of placing them for adoption is a final appealable order under Const., art. IV, § 6: *In re Masters*, 165 OS 503, 60 OO 474, 137 NE(2d) 752.

1.2 Evidence of the confinement of a mother of minor children in a state hospital by reason of mental illness, during which confinement she had no funds with which to support the children and during which she was unaware of their whereabouts, is not sufficient evidence to support a finding by the juvenile court that such children are "neglected" within the meaning of this section: *In re Masters*, 165 OS 503, 60 OO 474, 137 NE(2d) 752.

1.3 To constitute "abandonment" of a child, under subdivision (A) of this section, there must be a willful leaving of a child by his parent, with an intention of causing perpetual separation; and to constitute

"neglect," under subdivision (C) of said section, there must be a willful or indifferent disregard of the duty owed by a parent to his child: *In re Kronjaeger*, 166 OS 172, 1 OO(2d) 459, 140 NE(2d) 773.

1.4 The determination of the lack of proper parental care because of the faults or habits of a parent as a basis for a finding that a child is neglected under subdivision (B) of this section, must be made as of the time of the hearing on the charge of neglect: *In re Kronjaeger*, 166 OS 172, 1 OO(2d) 459, 140 NE(2d) 773.

2. In a proceeding under GC § 1639-1 (RC § 2151-01), on a complaint charging that a child is neglected, evidence of immoral conduct of the father may be introduced in order to show that the child lacked proper parental care "by reason of the faults or habits of its parents" as defined by this section, although such acts occurred prior to the effective date of such sections: *In re Hayes*, 62 App 289, 16 OO 10, 23 NE(2d) 956.

3. Under the provisions of GC § 1639-3 (RC § 2151.03), a "neglected child" is a child "who lacks proper parental care by reason of the faults or habits of its parents," and, under the provisions of GC § 1639-4 (RC § 2151.04), a "dependent child" is a child "whose condition or environment is such as to warrant the state, in the interests of the child, in assuming its guardianship: *State v. Griffin*, 93 App 299, 51 OO 47, 106 NE(2d) 668.

4. The court of appeals has jurisdiction to review upon appeal on questions of law a final judgment of the division of domestic relations of the court of common pleas, entered in a proceeding brought to determine the status of a minor alleged to be a "neglected child" as defined in this section: *In re Hock*, 55 OLA 73 (App).

5. In order to sustain a judgment of the division of domestic relations of the court of common pleas finding the natural child of legally married parents, living together in an established home, in a respectable community, to be a neglected child as defined by this section [par. (B)], upon a charge in the petition that it lacks proper parental care by reason of the faults or habits of such parents, it is necessary that the evidence produced shows that any fault of the parents occurring in the past is at the time of the hearing of such charge effective to render such parents unfit and unsuitable to have the custody and care of such child, and that they are then at such time, by reason of such fault, incapable of extending to such child proper parental care: *In re Hock*, 55 OLA 73 (App).

6. In a prosecution for contributing to the neglect or dependency of a minor child, the record of a separate proceeding adjudicating the child to be a neglected and dependent child, and the testimony of the child's mother that she and the defendant engaged in acts of illicit sexual relations in the presence of the child, is sufficient competent evidence to prove the child to be a neglected or dependent child within the meaning of GC § 1639-45 (now RC §§ 2951.03 and 2951.04): *State v. Griffin*, 93 App 299, 51 OO 47, 106 NE(2d) 668.

7. In a proceeding in the juvenile court, instituted by the filing of a complaint under the provisions of RC § 2151.27, a finding by the court that a child is "neglected," in that it "lacked proper parental care because of the faults and habits of his parents" (RC § 2151.03[B]), and "dependent," in that its "condition and environment... is such as to warrant the court... in assuming his guardianship" (RC § 2151.04[C]), must be based on evidence with respect to whether the child was receiving proper parental care in a proper environment in its home at the time of the hearing: *In re Minton*, 112

App 361, 16 OO(2d) 283, 176 NE(2d) 252.

8. Where a neglected-child proceeding is instituted in the juvenile court, pursuant to this section by a parent of such child, and a divorce action is later instituted by such parent, the juvenile court has exclusive original jurisdiction to determine whether the child is neglected, the power to determine his custody and the authority to place the child with a relative: In re Small, 114 App 248, 19 OO(2d) 128, 181 NE(2d) 503.

9. The mere placing of minor children in a children's home by a parent does not, of itself, constitute evidence of relinquishment of the right to custody or abandonment of such minor children: *Gallagher v. Gallagher*, 115 App 453, 21 OO(2d) 74, 185 NE(2d) 571.

10. An allegation in a motion filed in juvenile court seeking to have that court "determine and award the future care and custody" of a child, that "neither parent is a suitable person to have the care and custody of said child," does not constitute a charge that such child is "neglected" (RC § 2151.03) or "dependent" (RC § 2151.04) and is not sufficiently definite to constitute the "complaint" necessitated by RC § 2151.27: *Welfare Board v. Parker*, 7 OApp(2d) 79, 36 OO(2d) 162, 218 NE(2d) 757.

11. A juvenile court cannot deprive the mother of an adulterine bastard of the custody of such child, in the absence of evidence to warrant a finding that such mother is unfit or that such child is dependent or neglected within the purview of law or that the best interests of the child require such action: In re Gutman, 22 OApp(2d) 125, 51 OO(2d) 252, 259 NE(2d) 128 (1969).

12. The jurisdiction of the juvenile court over a neglected child is sole and exclusive: In re Gail L., 12 OMisc 251, 41 OO(2d) 341, 231 NE(2d) 253.

13. Before the court may consider what disposition should be made of children for their best interest and welfare, there must first be an adjudication that said children are neglected or dependent: In re Burkhardt, 15 OMisc 170, 44 OO(2d) 329, 239 NE(2d) 772.

14. Where neglect and dependency existed at the time of the filing of the complaint, but said cause was not prosecuted further until more than four years afterwards and the conditions of the parents had changed sufficiently that evidence was lacking to establish neglect or dependency at the time of the hearing, said complaint must be dismissed: In re Burkhardt, 15 OMisc 170, 44 OO(2d) 329, 239 NE(2d) 772.

15. The crux of a neglect action is the commission of culpable acts by the parents of the child: In re Infanz East, 61 OO(2d) 38, 32 OMisc 65, 288 NE(2d) 343 (CP 1972).

16. The interracial marriage of the mother of an illegitimate child to a black man in no way affects her right to custody of the child and does not support the putative father's neglect complaint brought under RC § 2151.03: In re Brenda H., 37 OMisc 123, 66 OO(2d) 178, 305 NE(2d) 815 (1973).

17. Every child is entitled, as a minimum, to have **two parents living together in reasonable harmony** with the child and with each other, and parents who are selfish and childish far beyond any reasonable limits, and whose ideas of proper upbringing are to tell their children how vile the other parent has been, are "neglecting" or refusing to provide the children with the care necessary for their morals or well-being: In re Douglas, 11 OO(2d) 340, 164 NE(2d) 475 (JC).

18. In determining whether the condition or environment of a child is such as to warrant the state, in the interests of the child, in assuming his guardianship, the primary consideration should be the welfare of the child: In re Douglas, 11 OO(2d) 340, 164 NE(2d) 475 (JC).

18.1 The children mentioned in GC § 3089 (see now RC § 335.16) fall within the classifications of dependent, neglected or crippled children as defined by the juvenile court act (now RC §§ 2151.01 to 2151.54): In re Howell, 21 OO 379 (JC).

19. The fact that the mother initially gave up her child for the purpose of adoption does not constitute such rejection of the child as to warrant a finding that the child is a neglected child: In re Robert O——, 28 OO(2d) 165, 199 NE(2d) 765 (JC).

20. Where the evidence shows that the mother gave her illegitimate child good care while he was with her prior to his placement in the prospective adoptive home, and that the placement was prompted by considerations other than the mother's desire to be relieved of the child's care, the child is not a neglected child: In re Robert O——, 28 OO(2d) 165, 199 NE(2d) 765 (JC).

[§ 2151.03.1] § 2151.031 "Abused child" defined.

As used in sections 2151.01 to 2151.54 of the Revised Code, an "abused child" includes any child who:

(A) Is the victim of "sexual activity" as defined under Chapter 2907. of the Revised Code, where such activity would constitute an offense under that chapter, except that the court need not find that any person has been convicted of the offense in order to find that the child is an abused child;

(B) Is endangered as defined in section 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child;

(C) Exhibits evidence of any injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it, except that a child exhibiting evidence of corporal punishment or other physical disciplinary measure by a parent, guardian, custodian, person having custody or control, or person in loco parentis of a child is not an abused child under this division if the measure is not prohibited under section 2919.22 of the Revised Code.

HISTORY: 136 v H 85. Eff 11-28-75.

Text Discussion

2 Anderson Fam. L. §§ 11.8-11.29.

Research Aids

Abused child:

O-Jur2d: Juvenile Courts § 29.5

§ 2151.04 Dependent child defined.

As used in sections 2151.01 to 2151.54, inclusive, of the Revised Code, "dependent child" includes any child:

(A) Who is homeless or destitute or without proper care or support, through no fault of his parents, guardian, or custodian;

(B) Who lacks proper care or support by rea-

son of the mental or physical condition of his parents, guardian, or custodian;

(C) Whose condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship.

HISTORY: GC § 1639-4; 117 v 520; 129 v 1778 (Ef 10-27-61); 133 v H 320. Ef 11-19-69.

Analogous to former GC § 1645.

Comment

The definition is brief but comprehensive. Subdivision (C) contains language similar to the last sentence of the former definition of dependency in former GC § 1645.

Cross-References to Related Sections

Attendance officer to make complaint before judge of juvenile court when child truant, RC § 3321-22.

Comparative Legislation

Dependent children:

Cal.—Welf & Inst Code, § 601

Ill.—Rev Stat, ch 37, § 702-5

Ind.—Burns' Stat, § 31-5-7-5

Ky.—KRS, § 208.020

Mich.—MCLA, § 712A.2

N.Y.—Jud—Family Court, § 1012

Pa.—Purdon's Stat, Tit. 11, § 50-102

Fla.—FSA, § 39.01

Text Discussion

2 Anderson Fam. L. §§ 11.2-11.17.

Research Aids

Dependent child:

O-Jur2d: Juvenile Courts § 29

Am-Jur2d: Juvenile Courts §§ 24, 25

Law Reviews

Welfare and social progress in the prevention and treatment of juvenile delinquency. Hon. William F. Burns. 5 ClevMarLRev 35.

A synopsis of Ohio juvenile court law. Hon Don J. Young, Jr. 31 CinLRev 131.

Ohio Rules

This section is affected by Juv.R. 2(1).

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See also case notes under RC §§ 2151.03, 2151.23, and 2151.27.

1. An affidavit charging that the accused con-

tributed to the dependency of a minor child and acted in a way tending to cause such dependency, without charging that the minor was a dependent child as defined in this section, does not charge an offense under the laws of Ohio: State v. Krauss, 81 App 453, 37 OO 282, 80 NE(2d) 164.

2. Where an adopting parent demands the child and is able to provide a good home, such child is not destitute or homeless so as to constitute it a dependent child within the purview of GC § 1639-4 (RC § 2151.04): In re Duncan, 62 OLA 173, 107 NE(2d) 256 (App).

3. In an action in the juvenile court to determine that a child is a dependent child under GC § 1639-4 (RC § 2151.04), the complaint is sufficiently definite if there is an allegation of dependency (GC § 1639-23 [RC § 2151.27]): In re Duncan, 62 OLA 173, 107 NE(2d) 256 (App).

4. The state's interest under this section arises only if there is no one meeting the obligations of care, support and custody which are owed to a child by a parent. The fact that relatives other than a parent are providing such care and support is immaterial to the determination of whether a child is a "dependent child" within the purview of such section: In re Darst, 117 App 374, 24 OO(2d) 144, 192 NE(2d) 287.

5. A judicial determination that a child is "dependent" pursuant to this section, must be based on evidence as to conditions at the time of the hearing held therefor: In re Darst, 117 App 374, 24 OO(2d) 144, 192 NE(2d) 287.

6. The provisions of this section, which define the grounds upon which a child can be found to be "dependent," limit the extent of the juvenile court's authority to remove children from a parent, guardian or custodian, and place them under control of the state: In re Darst, 117 App 374, 24 OO(2d) 144, 192 NE(2d) 287.

7. Upon a showing that a fifteen-year-old mother has a substantial record of delinquency, that her family situation is financially and emotionally unstable, and that a report of a psychologist suggests a poor prognosis for her success in the role of a mother, the court may grant a permanent change of custody of the three day old infant under this section on the grounds of dependency, although the mother has not had physical custody of the child: In re Turner, 41 OO(2d) 264, 12 OMisc 171, 229 NE(2d) 764, 231 NE(2d) 502 (CP).

8. The crux of a dependency action is the condition or environment of the child, not the culpable acts of the parents: In re Infant East, 61 OO(2d) 38, 32 OMisc 65, 288 NE(2d) 343 (CP 1972).

8.1 In a dependency action, where the child's condition or environment warrant it, the child may be removed from the custody of the mother and it is not necessary that she first be given the opportunity to prove that she can properly care for said child: In re Infant East, 61 OO(2d) 38, 32 OMisc 65, 288 NE(2d) 343 (CP 1972).

8.2 Finding a mother unfit to have custody of her child is not a necessary condition precedent to an adjudication that the child is dependent: In re Infant East, 61 OO(2d) 38, 32 OMisc 65, 288 NE(2d) 343 (CP 1972).

8.3 The unfitness of the mother may be a factor in adjudging that the child's condition or environment is such as to warrant the state in the interests of the child in assuming his guardianship: In re Infant East, 61 OO(2d) 38, 32 OMisc 65, 288 NE(2d) 343 (CP 1972).

8.4 The issue of whether a child is dependent is to be determined as of about the date specified in the complaint and does not have to include the time of the hearing: In re Baby Girl S., 61 OO(2d) 439, 32 OMisc 217, 290 NE(2d) 925 (CP 1972).

8.5 As to the mother who was physically, emotionally and financially unable to care and provide for her infant child, the court held the child to be a dependent child, and the fact that the mother has not had the child in her physical custody and control does not preclude the court from a finding of dependency: In re Baby Girl S., 32 OMisc 217, 61 OO(2d) 439, 290 NE(2d) 925 (CP 1972).

9. Children whose parents are adulterous, childish, selfish, who speak vilely of each other to the children, and who allow a close association between the children and vicious, criminal and immoral persons, are dependent children: In re Douglas, 82 OLA 170, 164 NE(2d) 475 (JC).

10. A woman who is so devoid of morals and intelligence as to bring forth a series of illegitimate children who must be supported by public funds is a woman who is incapable of ordering her own life in accordance with the prevailing legal and moral codes and incapable of raising children without a father and she is therefore not entitled to retain the custody of such children, and such children may be declared dependent children under this section: In re Dake, 87 OLA 483, 180 NE(2d) 646 (JC).

11. Before a juvenile court can find that children are dependent in that they lack proper care because of the mental condition of their mother, it is necessary for the petitioner to produce not only evidence of the mother's mental incapacity, but also evidence showing that the children lacked proper care because of the mental incapacity: In re Larry and Scott H., 24 OO(2d) 334, 192 NE(2d) 683 (JC).

12. The mere fact that a mother desires to place her baby for adoption is not enough to constitute dependency: In re Hobson, 44 OLA 86, 62 NE(2d) 510.

13. No person or parent can give their consent to a finding of "dependency" for a child, but the requirements of GC § 1639-4, which defines a dependent child, must be found to exist: In re Hobson, 44 OLA 86, 62 NE(2d) 510.

14. Unless a dependent child is committed to an institution designated by GC § 1639-34 (RC § 2151-36), or a family home, and in conformity with the juvenile court code, no payment for the care and board of such child is authorized, as there is no commitment under the law: 1937 OAG No.983.

DECISIONS UNDER FORMER GC § 1645

15. A child of father who had served a term for felony, but not failing to support and not cruelly treating child, held not "dependent," so as to deprive father of custody: In re Konneker, 30 App 502, 165 NE 850.

15.1 The legislature having defined a dependent child and provided a special court proceeding for determining such dependency, the power thus conferred must be exercised by the court within the jurisdiction granted, and not otherwise: In re Konneker, 30 App 502, 165 NE 850.

16. Minor is not "dependent," within juvenile act, merely because she is daughter of divorced parents: Sonnenberg v. State, 40 App 475, 178 NE 855.

17. "Dependent child" defined with sufficient accuracy under the former statute: Travis v. State, 12 CC (NS) 374, 21 CD 492 [affirmed, without opinion, 82 OS 439].

17.1 Appeal does not lie from an order of commitment in a juvenile proceeding to have a child adjudged to be "dependent": State v. Hoffman, Judge, 32 OCA 193.

18. A parent must provide his child with a proper education, substantially equivalent to the education provided by the common schools: In re Hargy, 23 NP (NS) 129, 32 OD 8.

19. A child which is lawfully excluded from school

because its parents refuse to comply with a valid rule with reference to vaccination, may be declared a "dependent child": In re Hargy, 23 NP(NS) 129, 32 OD 8.

19.1 Under GC § 1645, a child may be dependent in a number of ways but, . . . a child may be dependent in two particulars: 1. If its home, by the neglect of the parents, is an unfit place for it to be, 2. If its environment is such as to warrant the state, in the interest of the child, to assume its guardianship: In re William Decker, 28 NP(NS) 433 (JC).

19.2 The court has jurisdiction under the juvenile code to place a dependent child with either parent or, in the interests of the child, may commit its custody to strangers over the objection of the parents: In re William Decker, 28 NP(NS) 433 (JC).

20. The fact that a child is an illegitimate child does not constitute a dependent child under GC § 1645 (see now RC § 2151.04): Smith v. Privette, 13 OLA 291.

21. As to when an illegitimate child is a "dependent child," see: 1916 OAG vol.1, p.777.

22. Where a mother is a ward of one county, and gives birth to a child in another, the child becomes a ward of the latter county: 1919 OAG vol.1, p.271.

23. The board of education may make and enforce rules and regulations to secure the vaccination of, and prevent the spread of smallpox among pupils attending, or eligible to attend public schools. They may exclude children from the schools who have not been vaccinated, and such exclusion cannot be pleaded by the parents for not providing such children with the education provided by statute: 1925 OAG p.173.

24. Parents who deprive their children of education required by statute because they refuse to comply with the regulations regarding vaccination, may become liable to prosecution therefor as contributing to the dependency of such children: 1925 OAG p.173.

25. Where the mother of an infant child is placed in jail, and there are no relatives or friends to care for such infant, it should be placed in the custody of the juvenile court: 1931 OAG No.3759.

§ 2151.05 Child without proper parental care.

Under sections 2151.01 to 2151.54 of the Revised Code, a child whose home is filthy and unsanitary; whose parents, stepparents, guardian, or custodian permit him to become dependent, neglected, abused, or delinquent; whose parents, stepparents, guardian, or custodian, when able, refuse or neglect to provide him with necessary care, support, medical attention, and educational facilities; or whose parents, stepparents, guardian, or custodian fail to subject such child to necessary discipline is without proper parental care or guardianship.

HISTORY: GC § 1639-5; 117 v 520; 136 v H 85. EF 11-28-75.

Analogous to former GC § 1646.

Comment

This definition is much broader than former GC § 1646. Any child permitted to become dependent, neglected or delinquent, whose parent, stepparent, guardian or custodian refuses or neglects to provide it with proper care, support, medical attention or education, or to properly discipline it, lacks proper parental care.

Research Aids

Child without proper parental care:

O-Jur2d: Juvenile Courts § 30

CASE NOTES AND OAG

See also case note 11 under 2151.03 and case note 11 under 2151.04.

1. Parents have a right to the custody of their children, the same as they have a right to the possession of property which they may acquire; and the fact that some one may think that the children can be reared better by some one else is no justification for judicial interference, because, if this were the rule, there are thousands of children in this community, and in every other, whose parents upon this pretense would be deprived of their custody: In re Konneker, 30 App 502, 165 NE 850.

2. A complaint filed in common pleas court by nonrelatives of a minor child of tender years, who never adopted said child, claiming the right of custody of said child as against the claim for right of custody of the father, where the evidence does not show unfitness and unsuitableness of said parent or his home to have its custody, does not under GC § 8005-4, analogous to the former section of GC § 8033, give the court the authority to grant the custody of said child to a third person or persons and to modify the divorce decree granted the father on December 12, 1950, against the mother, . . . wherein he was granted the exclusive custody of said child: Garabrandt v. Garabrandt, 51 OO 319, 114 NE(2d) 919 (CP).

3. The welfare of the child only becomes an issue to be considered to modify the divorce decree granting custody of the child to the father, when said parent is found to be unfit, and then under GC § 8005-4, the court can only commit the custody of the child to a relative of the child or certify its record and information of said parent's unfitness to the juvenile court. The lack of showing general unfitness of the parent and there then being no certification to the juvenile court of such record, [the court of common pleas] retains continuing jurisdiction [therein]: Garabrandt v. Garabrandt, 51 OO 319, 114 NE(2d) 919 (CP).

4. A stepparent is generally not liable for the support, care, maintenance and education of a minor stepchild as if it were his own. The provisions of the juvenile court chapter generally apply to a stepparent in the same manner as a real parent, where the application is consistent with the intent of the chapter: 1925 OAG p.281.

§ 2151.06 Residence or legal settlement. (GC § 1639-6)

Under sections 2151.01 to 2151.54, inclusive, of the Revised Code, a child has the same residence or legal settlement as his parents, legal guardian of his person, or his custodian who stands in the relation of loco parentis.

HISTORY: GC § 1639-6; 117 v 520 (522); 121 v 557 (558). Eff 10-1-53.

Research Aids

Residence of child:

O-Jur2d: Juvenile Courts § 9

Ohio Rules

This section is affected by Juv. R. 10(A).

CASE NOTES AND OAG

See also case notes 1-3 under § 2151.39.

1. Where there is no existing award of custody of an orphaned minor resident of Ohio by a foreign court, the

Probate Court of the county of such residence has jurisdiction, under RC § 2111.02 to appoint a guardian of the minor, irrespective of the fact that the domicile of such minor may be in another state: In re Fore, 168 OS 363, 56 OO 337, 127 NE(2d) 1.

2. The juvenile court of the county of the children's residence has jurisdiction at the time of the filing of the complaint, even though service is not had on the mother until she has removed herself to another county: In re Goshorn, 82 OLA 599, 167 NE(2d) 148 (JC).

3. When children are committed by a juvenile court to a foster home, they should be extended the privileges and advantages of the public schools of the district in which the home is located: 1941 OAG No. 3353.

4. When a juvenile court exercising jurisdiction over a child under the provisions of GC § 1639-16 terminates such jurisdiction, said child by virtue of GC §§ 1639-6 and 3391-16 immediately acquires a legal settlement in the county of residence of the parents, surviving parent, sole parent, parent having custody awarded by a court having jurisdiction, or guardian of the person of such minor: 1953 OAG No. 2656.

5. Under this section, a child has, for the purposes of the sections enumerated therein, the same residence or legal settlement as his custodian who stands in the relation of loco parentis, and in such case a child may acquire a legal settlement otherwise than in accordance with the definition of legal settlement in RC § 5113.05: 1956 OAG No. 7008. (1956 OAG No. 6542, modified)

[ESTABLISHMENT AND JURISDICTION]

§ 2151.07 Creation and powers of juvenile court.

The juvenile court is a court of record and within the division of domestic relations or probate of the court of common pleas, except that the juvenile courts of Cuyahoga county and Hamilton county shall be separate divisions of the court of common pleas. The juvenile court has and shall exercise the powers and jurisdiction conferred in sections 2151.01 to 2151.99 of the Revised Code.

Whenever the juvenile judge of the juvenile court is absent from the county, or is unable to attend court, or the volume of cases pending in court necessitates it, upon the request of said judge, the presiding judge of the court of common pleas shall assign a judge of the court of common pleas of the county to act in his place or in conjunction with him. If no such judge is available for said purpose, the chief justice of the supreme court shall assign a judge of the court of common pleas, a juvenile judge, or a probate judge from some other county to act in the place of such judge or in conjunction with him, who shall receive such compensation and expenses for his services as is provided by law for judges assigned to hold court in courts of common pleas.

HISTORY: GC § 1639-7; 117 v 520; 122 v 390; 127 v 847 (Eff 9-16-57); 133 v H 320 (Eff 11-19-69); 134 v H 574. Eff 6-29-72.

Analogous to former GC §§ 1639 (par. 1), 1642.

Cross-References to Related Sections

Additional compensation and expenses provided while holding court in another county, RC § 141.07.

Aid to dependent children, RC § 5107.03.

See RC § 2153.08 which refers to this section.

Comparative Legislation**Juvenile jurisdiction:**

Cal.—Welf. & Inst. Code, § 550

Ill.—Rev Stat, ch 37, § 702-1

Ind.—Burns' Stat, § 33-12-2-3

Ky.—KRS, § 208.020

Mich.—MCLA, § 712A.2

N.Y.—Jud—Family Court, § 115

Pa.—Purdon's Stat, Tit. 11 § 50-103

Fla.—FSA, § 39.02

Research Aids**Assignment of judges:**

O-Jur2d: Judges § 43

Assignment of judges—additional compensation:

O-Jur2d: Judges §§ 62, 65

Juvenile court—establishment and powers:

O-Jur2d: Juvenile Courts § 10; Judges § 40; Courts § 173

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Homicide by juvenile as within jurisdiction of a juvenile court. 48 ALR2d 663.

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1. The grant of original jurisdiction, by RC § 2151.23(A) (3), to juvenile courts in habeas corpus actions involving the custody of minors is exclusive only as between Juvenile Courts and those courts given general habeas corpus jurisdiction by RC § 2725.02: In re Black, 36 OS(2d) 124, 65 OO(2d) 308, 304 NE(2d) 394 (1973).

2. No "separate and independent juvenile court" has ever been created in Lucas county, the tribunal authorized to administer the law relating to juveniles being the common pleas court, division of domestic relations, and not the "juvenile court": Burke v. Burke, 76 App 431, 32 OO 176, 64 NE(2d) 683.

3. The juvenile court is a separate and distinct court and provisions of statutes for appeal from probate court are not applicable to juvenile court: In re Morningstar, 24 OO 123 (CP).

4. The juvenile court of Allen County, Ohio, by virtue of this section, is within the probate court and is presided over by the probate judge and is a

court of record: In re Howell, 74 OLA 217, 140 NE(2d) 347 (JC).

4.1 All courts of record have an inherent common law power to enter, where proper, judgments nunc pro tunc: In re Howell, 74 OLA 217, 140 NE(2d) 347 (JC).

5. The juvenile court is a court of record and exercises the power and jurisdiction of such a court: State v. Hershberger, 77 OLA 487, 150 NE(2d) 671 (JC).

6. The power to punish for contempt is an inherent power of the juvenile court: State v. Hershberger, 77 OLA 487, 150 NE(2d) 671 (JC).

7. After the effective date of the new juvenile court code, in all counties of Ohio not having a juvenile court or a court of common pleas, division of domestic relations, separately and independently created, established and functioning as such by law, all juvenile jurisdiction is reposed in a juvenile court within the probate court of such county to be presided over by the probate judge: 1937 OAG No.871.

8. A juvenile court created within a probate court by virtue of this section is subject to the provisions of GC § 3056-2 (RC § 3375.52), which requires the payment to the trustees of a county law library association of certain moneys therein specified collected by a probate court: 1939 OAG No.1478.

9. Under the provisions of SubSB No.223 (122 v 444), and AmSB No.50 (122 v 390), the probate judge of Columbiana county, who is also performing the functions of the judge of the juvenile court, can receive no additional salary or compensation during his present term of office: 1947 OAG No.2159.

10. A county auditor may legally pay to the probate judge presiding over the juvenile court of such county as provided by this section, such of the compensation provided for in SB No.50 (122 v 390), which became effective during the judge's term, as will bring the probate judge's salary up to but not to exceed the salary of the common pleas judge of such county: 1949 OAG No.304.

11. A judge of the court of common pleas may not proceed to hear and pronounce sentence on an adult guilty of acting in a way tending to cause the delinquency of a minor, except under such circumstances as are provided in paragraph two of this section: 1950 OAG No.1901.

12. The office of probate and juvenile judge is incompatible with the office of county court judge: 1957 OAG No. 880.

13. The juvenile court is a court of record: 1968 OAG No. 68-123.

14. The juvenile court is now a part of a division of the common pleas court and subject to the requirement that it provide a court reporter for its proceedings if so requested: 1968 OAG No.68-123.

15. The term "elected state officials," as used in RC § 145.38.1(A) applies to the governor, the lieutenant governor, the secretary of state, the auditor of state, the treasurer of state, the attorney general, the members of the general assembly, and the members of the supreme court, the court of appeals, the court of common pleas, the probate court and the juvenile court: 1971 OAG No. 71-075.

DECISIONS UNDER FORMER GC § 1639**Jurisdiction of probate courts**

16. The probate courts of this state acting as juvenile courts under the provisions of GC § 1639 (see now RC § 2151.01) et seq, are courts of record; and their judgments, where jurisdiction of the person and subject-matter has been acquired and no fraud has intervened, are conclusive and can be assailed in no other court in an independent proceeding: Children's Home v. Fetter, 90 OS 110, 106 NE 761.

Jurisdiction in criminal matters

16.1 The fact that under the juvenile court act (GC § 1639 et seq) the commission of a felony by a minor constitutes him a delinquent and authorizes such court to take charge of him as such delinquent, does not relieve him of the consequences of his crime, or abridge the right of the grand jury to indict him for such crime, or the right of the common pleas court to try him for such crime, where the juvenile court does not acquire jurisdiction of him for such delinquency before the common pleas court acquires jurisdiction of him for such felony: *Gerak v. State*, 22 App 357, 153 NE 902.

Constitutionality

17. This act is constitutional; and the probate judge may be designated to act as judge of the juvenile court: *Travis v. State*, 12 CC(NS) 374, 21 CD 492 [affirmed, without opinion, 82 OS 439].

18. The provisions of Art. I, § 9 of the Ohio constitution to the effect that all persons would be bailable by sufficient surety except for capital offenses where the proof is evident or the presumption great, do not render invalid this and the following sections which create a juvenile court and confer jurisdiction upon it although a juvenile offender under the age of eighteen cannot be admitted to bail unless the juvenile court judge in his discretion thinks it best to bind him over to the court of common pleas to be tried as an offender over eighteen years of age: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

Nature of juvenile court

19. For history of juvenile court legislation, see *State ex rel Fortini v. Hoffman*, 12 App 341, 32 OCA 193.

20. For the nature of the juvenile court law, see *Bleier v. Crouse*, 13 App 69, 31 OCA 453.

21. The legislature has established the juvenile court in the exercise of its police power, to protect children and to remove them from evil influences: *Children's Home v. Fetter*, 90 OS 110, 110, 106 NE 761; *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

22. The probate courts of this state acting as juvenile courts under the provisions of GC § 1639 [see now RC § 2151.01] et seq, are courts of record, and their judgments, where jurisdiction of the person and subject-matter has been acquired and no fraud has intervened, are conclusive and can be assailed in no other court in an independent proceeding: *Children's Home v. Fetter*, 90 OS 110, 106 NE 761.

23. The juvenile court act, which provides for the care of delinquent children, does not declare delinquency a crime; and such statutes are corrective and not criminal: *In re Januszewski*, 196 Fed 123, 10 OLR 151; *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

24. Power of court to deprive parents of custody of children and assume custody of same on behalf of state, is derived from juvenile court act, and can be exercised only within limits provided by such law. State cannot interfere with right of parents to custody of children merely to better moral and temporal welfare of children: *Garcia v. Cardarelli*, 7 OLA 262.

26. General Code § 13562 (see now RC § 2941.63) was intended to apply to criminal cases originating in the court of common pleas upon indictment and said section does not authorize the common pleas court, when acting as the juvenile court, to appoint an attorney to assist the prosecuting attorney in the trial of a case brought in said juvenile court under the provisions of the juvenile act: 1921 OAG vol.1, p.121.

27. Jurisdiction to administer the mothers' pension law is vested exclusively in the juvenile court: 1923 OAG p.23.

28. A probate court, exercising the powers and jurisdiction of a juvenile court, may in accordance with such powers exercise jurisdiction over prosecutions for nonsupport and contributing to the delinquency of a minor, without the filing of an information by the prosecuting attorney: 1932 OAG No.4154.

Procedure

29. Where a delinquent child has become a ward of the juvenile court and it has been committed to an institution, under the provisions of the General Code relating to the juvenile court, a proceeding in habeas corpus by a parent against the institution or its officers for the custody of the child will not lie: *Children's Home v. Fetter*, 90 OS 110, 106 NE 761.

30. The discretion of the juvenile court in relation to the care, custody and control of a delinquent or neglected child is a judicial discretion that must be exercised in good faith, and in the interest of the child, upon evidence introduced in the usual and ordinary course of the administration of justice: *State ex rel Tailford v. Bristline*, 96 OS 581, 119 NE 138.

31. Prosecution in probate court upon affidavit of wife for nonsupport of minor child is erroneous, information being indispensable under statute: *Wilson v. Lasure*, 36 App 107, 172 NE 694.

32. It is said to be error for the court of common pleas to refuse to send to the judge presiding in the court of domestic relations, a case which involves divorce or alimony; but whether such error would be reversible error in case the court of common pleas made the proper order, was not decided in *Dillingham v. Dillingham*, 28 OCA 49, 30 CD 6.

33. If a juvenile offender under the age of eighteen is dealt with by the juvenile court as a delinquent, he is not punished for the felony out of which such delinquency arose, unless under GC § 1681 (see now RC § 2151.26) the judge of the juvenile court in his discretion elects not to deal with such offender but to bind him over to the court of common pleas: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

34. A common pleas court is without power to commit a child to the children's home, but may order a person who is a party in the case to comply with the statutory procedure for the placing of children in such home: 1918 OAG vol.2, p.1515.

§ 2151.08 Juvenile court in Hamilton county.

In Hamilton county the powers and jurisdiction of the juvenile court as conferred by Chapter 2151. of the Revised Code shall be exercised by that judge of the court of common pleas whose term begins on January 1, 1957, and his successors and that judge of the court of common pleas whose term begins on February 14, 1967, and his successors as provided by section 2301.03 of the Revised Code. This conferral of powers and jurisdiction on such judges shall be deemed a creation of a separately and independently created and established juvenile court in Hamilton county, Ohio. Such judges shall serve in each and every position where the statutes permit or require a juvenile judge to serve.

HISTORY: GC § 1639-8; 117 v 520 (522); 127 v 847 (855); § 1 (Eff 9-16-57); 131 v 631. Eff 11-16-65.

Analogous to former GC § 1639 (par. 3).

Cross-References to Related Sections

Aid to dependent children, RC § 5107.03.

Judge of court of common pleas to be judge of domestic relations, RC § 2301.03.

Selection of Hamilton county judge, RC § 2301.03(B).

Research Aids

Hamilton county juvenile court judge:

O-Jur2d: Judges § 41; Juvenile Courts § 10

CASE NOTES AND OAG

1. Mandamus will not lie to require the judge of the juvenile court of Hamilton county "to keep and maintain records of all cases brought before" such court, "correct the errors in...partial records kept...journalize the orders, judgments," etc., and "exhibit to the attorneys" representing a minor charged with a crime "all books, records, papers, [and] dockets...in all cases and proceedings involving" such minor: *State ex rel Hibbard v. Hoffman*, 101 App 547, 1 OO(2d) 454, 137 NE(2d) 606.

2. Under RC §§ 2151.08 and 2151.12, the judge of the juvenile court of Hamilton county is not the clerk of his own court, when exercising the powers and jurisdictions conferred in RC §§ 2151.01 to 2151.54, inclusive, charged with keeping the records sought by the minor: *State ex rel Hibbard v. Hoffman*, 101 App 547, 1 OO(2d) 454, 137 NE(2d) 606.

§ 2151.09 Separate building and site may be purchased or leased.

Upon the advice and recommendation of the juvenile judge, the board of county commissioners may provide by purchase, lease, or otherwise a separate building and site to be known as "the juvenile court" at a convenient location within the county which shall be appropriately constructed, arranged, furnished, and maintained for the convenient and efficient transaction of the business of the court and all parts thereof and its employees, including adequate facilities to be used as laboratories, dispensaries, or clinics for the use of scientific specialists connected with the court.

HISTORY: GC § 1639-15; 117 v 520 (523). **EF** 10-1-53. Analogous to former GC § 1649-1.

Research Aids

Accommodations for court:

O-Jur2d: Juvenile Courts § 11; Counties §§ 202, 203

§ 2151.10 Appropriation for expenses of the court and maintenance of children.

The board of county commissioners shall appropriate such sum of money each year as will meet all the administrative expense of the juvenile court, including reasonable expenses of the juvenile judge and such officers and employees as he may designate in attending conferences at which juvenile or welfare problems are discussed, and such sum each year as will provide for the maintenance and operation of the detention home, the care, maintenance, education, and support of neglected, abused, dependent, and delinquent children, other than children entitled to aid under sections 5107.01 to 5107.16 of the Revised Code,

and for necessary orthopedic, surgical, and medical treatment, and special care as may be ordered by the court for any neglected, abused, dependent, or delinquent children. All disbursements from such appropriations shall be upon specifically itemized vouchers, certified to by the judge.

HISTORY: GC § 1639-57; 117 v 520; 119 v 731; 121 v 557; 136 v H 85. **EF** 11-28-75.

Research Aids

Appropriation for expenses of the court and maintenance of children:

O-Jur2d: Juvenile Courts § 15; Counties § 251

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1. Under this section it is the duty of county commissioners to appropriate annually a sum of money sufficient to meet all the administrative expenses of the juvenile court in their county, inclusive of the salary and traveling expenses of a regularly appointed probation officer, and an action in mandamus will lie to compel the performance of such duty: *State ex rel Clarke v. Commissioners*, 141 OS 16, 25 OO 134, 46 NE(2d) 410.

2. The provisions of this section are mandatory and it is the duty of the county commissioners to make appropriations for such purposes accordingly: *State ex rel Motter v. Atkinson*, 146 OS 11, 31 OO 472, 63 NE(2d) 440.

3. By this section 2151.10, the board of county commissioners is obligated to appropriate annually a sum of money sufficient to meet all the administrative expenses of the juvenile court of its county, including reasonable expenses of the judge and such officers and employees as he may designate in attending conferences: *State ex rel Ray v. South*, 176 OS 241, 27 OO(2d) 133, 198 NE(2d) 919.

4. As used in RC §§ 2101.11 and 2151.10, "administrative expenses" of the juvenile and probate courts, respectively, include expenses of office equipment, stationery and supplies: *State ex rel Ray v. South*, 176 OS 241, 27 OO(2d) 133, 198 NE(2d) 919.

5. The amount necessary for administrative expenses of the juvenile court lies in the sound discretion of the judge and not that of the board of county commissioners, and under the provisions of this section there is a mandatory duty on the board of county commissioners to appropriate the funds requested by a juvenile court judge for the operation of his court unless such request is for an amount which is so unreasonable as to constitute the request an abuse of discretion: *State ex rel. Moorehead v. Reed*, 177 OS 4, 28 OO(2d) 409, 201 NE(2d) 594.

6. Under the provisions of RC § 2151.10 determination of the necessary annual administrative expenses

of the juvenile court lies solely within the sound discretion of the juvenile judge, and the board of county commissioners has no authority to substitute its judgment for that of the juvenile judge by appropriating an amount less than that requested: *State ex rel. Foster v. Wittenberg*, 16 OS(2d) 89, 45 OO(2d) 442, 242 NE(2d) 884; *State ex rel. Milligan v. Freeman*, 31 OS(2d) 13, 60 OO(2d) 7, 285 NE(2d) 352.

7. Under RC § 2151.10, it is the mandatory duty of the board of county commissioners to appropriate annually a sum of money sufficient to meet all the administrative expenses of the juvenile court of its county regardless of competing demands made upon such board by other branches of the county government: *State ex rel. Milligan v. Freeman*, 31 OS(2d) 13, 60 OO(2d) 7, 285 NE(2d) 352.

8. Under the provisions of RC § 2151.10, determination of the necessary annual administrative expenses of the juvenile court lies solely within the sound discretion of the juvenile court judge, and the board of county commissioners has no authority to substitute its judgment for that of the juvenile court judge by appropriating an amount less than that requested: *State ex rel. Milligan v. Freeman*, 31 OS(2d) 13, 60 OO(2d) 7, 285 NE(2d) 352.

9. Under this section the juvenile court is the only "person or tribunal" empowered to incur obligations on behalf of the county for care and treatment of delinquent children: *Cleveland v. Gorman*, 87 App 36, 42 OO 278, 89 NE(2d) 605.

10. By the enactment of this section and GC § 1639-34 (RC § 2151.36) the legislature has granted to the juvenile court authority commensurate with its enlarged responsibility for the welfare of neglected, dependent or delinquent children. The court may obligate the county for the payment of expenses necessary to the proper discharge of its responsibility but it is not contemplated that such action will be taken where the welfare of such children is subserved adequately by their commitment to private or municipal institutions that voluntarily assume the expenses resulting therefrom: *Cleveland v. Gorman*, 87 App 36, 42 OO 278, 89 NE(2d) 605.

11. The provisions of this section and GC § 1639-19 (RC § 2151.13) are mandatory insofar as they refer to appropriations for compensation of a chief probation officer and the administrative expenses of the court; the county commissioners, therefore, must appropriate money for expenses authorized under this act from the date it becomes effective: 1937 OAG No. 1246.

11.1 The authority of the juvenile court to expend public funds to publish and distribute pamphlets discussed: 1944 OAG No. 6877.

12. Before moneys may be expended for administrative expenses, the county commissioners must find the necessity for such attendance and approve the expenditure of moneys so appropriated for such purpose: 1944 OAG 7006.

13. When a child charged with juvenile delinquency in this state is apprehended and detained by the officers of another state and such child is returned to this state without the issuance of a requisition by the governor, the fees charged by the officers of such other state for apprehending and detaining such child may be paid from the funds appropriated under this section for the care of delinquent children: 1956 OAG No. 7308.

14. Where, under division (B) of RC § 2151.35, a juvenile court commits a child to a specialized school in another state, the court, under RC § 2151.36, must itself pay expenses occasioned by the commitment and authorized by the court at the time of commitment, which expenses are paid out of funds appropriated to the court by the board of county commissioners under RC § 2151.10; and pursuant to RC § 2151.36, the court may order the parents, guardian, or person charged with the

child's support to reimburse the court for such payments: 1962 OAG No. 2938.

15. Under RC § 2151.35 a juvenile court may, upon finding that a child is neglected, dependent, or delinquent, commit the child to any person or institution meeting the requirements of RC §§ 5103.02 and 5103.03, even though a county child welfare board exists and could provide care and support for the child; and under this section, the board of county commissioners has a duty to appropriate each year such sum as will provide the court with necessary funds for the care, maintenance, education, and support of neglected, dependent and delinquent children: 1962 OAG No. 3489.

16. When a board of county commissioners fails to appropriate funds under this section for the use of juvenile court in the maintenance and support of a dependent child, the juvenile court may not order the county auditor to issue a warrant for such purpose, as under RC § 5705.41, no expenditure of county funds may be made unless funds have been appropriated for that purpose; but the court may proceed against the board of county commissioners to compel it to appropriate the necessary funds: 1962 OAG No. 3489.

17. A registration prepayment, approved by a board of county commissioners, which is made by a county officer, deputy or employee for a meeting of an association of county officers is an expense which may be reimbursed by the board of county commissioners under RC § 325.20, whether or not such authorized meeting is actually attended: 1964 OAG No. 760.

18. A board of county commissioners may make an allowance under RC § 325.20, for the expenses of a juvenile judge in attending the Ohio state and American bar association meetings and conventions, provided, there is some portion of these meetings devoted to discussion of juvenile or welfare problems: 1964 OAG No. 760.

19. A board of county commissioners can only pass upon the reasonableness of expenses of a juvenile judge, or such officers or employees as he may designate, in attending conferences at which juvenile or welfare problems are discussed, provided that specifically itemized vouchers certified by the judge as stipulated in this section are submitted to the board of county commissioners: 1964 OAG No. 1296.

20. Payment of the expenses of a juvenile judge, or such officers or employees as he designates, for attending conferences at which juvenile or welfare problems are discussed shall be upon the warrant of the county auditor pursuant to RC § 319.16, upon presentation of specifically itemized vouchers certified by the juvenile judge, as provided in this section, and allowed by the board of county commissioners: 1964 OAG No. 1296.

21. Under this section, a juvenile judge and such officers and employees as he may designate may attend conferences at which juvenile or welfare problems are discussed without securing the approval of the board of county commissioners under RC § 325.20: 1964 OAG No. 1296.

22. Revised Code § 2151.10 imposes an absolute duty upon the board of county commissioners to appropriate an amount equal to that which is reasonably requested by a juvenile court judge, and that duty is unaffected by the availability or unavailability of unanticipated or unappropriated funds: 1968 OAG No.68-094.

23. The board of county commissioners is not authorized to dictate to the juvenile court the monthly or daily amount that will be expended for the support, care and maintenance of any child under the juvenile court's control: 1968 OAG No.68-094.

§ 2151.11 Assignment of court employees to combat juvenile delinquency.

A juvenile court may participate with other public or private agencies of the county served by the court in programs which have as their objective the prevention and control of juvenile delinquency. The juvenile judge may assign employees of the court, as part of their regular duties, to work with organizations concerned with combatting conditions known to contribute to delinquency, providing adult sponsors for children who have been found delinquent, and developing wholesome youth programs.

The juvenile judge may accept and administer on behalf of the court gifts, grants, bequests, and devises made to the court for the purpose of preventing delinquency.

HISTORY: GC § 1639-7a; 122 v 390; 123 v 3, § 1; 131 v 631. Eff 11-11-65.

Not analogous to former RC § 2151.11, repealed in 129 v 1072 [GC § 1639-7a; 122 v 390; 123 v 3]. Eff 2-8-61.

Text Discussion

2 Anderson Fam. L. § 13.22.

Research Aids

Juvenile court participation in combatting juvenile delinquency:

O-Jur2d: Juvenile Courts § 2

Ohio Rules

This section is affected by Juv. R. 9(A), (B).

§ 2151.12 Clerk; bond; judge as clerk.

Whenever the courts of common pleas, division of domestic relations, exercise the powers and jurisdictions conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code, the clerks of courts of common pleas shall keep the records of such courts. In all other cases the juvenile judge shall be the clerk of his own court.

In counties in which the juvenile judge is clerk of his own court, before entering upon the duties of his office as such clerk, he shall execute and file with the county treasurer a bond in a sum to be determined by the board of county commissioners, with sufficient surety to be approved by said board, conditioned for the faithful performance of his duties as clerk. Said bond shall be given for the benefit of the county, the state, or any person who may suffer loss by reason of a default in any of the conditions of said bond.

HISTORY: GC § 1639-17; 117 v 520 (524). Eff 10-1-53.

Cross-References to Related Sections

See RC § 2151.13 which refers to this section.

Research Aids

Bond of judge acting as clerk:

O-Jur2d: Courts § 42; Judges § 16

Clerk of juvenile court:

O-Jur2d: Juvenile Courts § 13

CASE NOTES AND OAG

1. Under RC §§ 2151.08 and 2151.12, the judge of the juvenile court of Hamilton county is not the clerk of his own court, when exercising the powers and jurisdictions conferred in RC § 2151.01 to 2151.54, inclusive, charged with keeping the records sought by such minor: *State ex rel Hibbard v. Hoffman*, 101 App 547, 1 OO(2d) 454, 137 NE(2d) 606.

§ 2151.13 Employees; compensation; bond. (GC § 1639-18)

The juvenile judge may appoint such bailiffs, probation officers, and other employees as are necessary and may designate their titles and fix their duties, compensation, and expense allowances. The juvenile court may by entry on its journal authorize any deputy clerk to administer oaths when necessary in the discharge of his duties. Such employees shall serve during the pleasure of the judge.

The compensation and expenses of all employees and the salary and expenses of the judge shall be paid in semimonthly installments by the county treasurer from the money appropriated for the operation of the court, upon the warrant of the county auditor, certified to by the judge.

The judge may require any employee to give bond in the sum of not less than one thousand dollars, conditioned for the honest and faithful performance of his duties. The sureties on such bonds shall be approved in the manner provided by section 2151.12 of the Revised Code. The judge shall not be personally liable for the default, misfeasance, or nonfeasance of any employee from whom a bond has been required.

HISTORY: GC § 1639-18; 117 v 520 (525); 121 v 557 (559). Eff 10-1-53. Analogous to former GC § 1662.

Cross-References to Related Sections

Bureau of delinquency prevention established for purpose of administering state aid to probation department, RC § 5139.17.

Funds appropriated to probation departments of juvenile courts, RC § 5139.17.1.

Lucas county judge of domestic relations to administer this section, RC § 2301.03(D).

Stark county judge of court of domestic relations to administer this section, RC § 2301.03(H).

Youth commission, appointment of probation officers, RC § 5139.17.

County probation department, RC § 2301.27 et seq. General probation laws not applicable to juveniles, RC § 2951.02.

See RC §§ 2151.34, 2151.70 which refer to this section.

Comparative Legislation

Probation and detention:

Cal.—Welf. & Inst. Code, § 625

Ill.—Rev Stat, ch 37, § 703-1

Ind.—Burns' Stat, § 31-5-7-23

Ky.—KRS, § 208.200

Mich.—MCLA, § 712A.16

N.Y.—Jud—Family Court, § 252

Pa.—Purdon's Stat, Tit. 11, § 50-311

Fla.—FSA, § 39.03

Text Discussion

2 Anderson Fam. L. § 13.22.

Research Aids**Bond:****O-Jur2d:** Courts § 42; Juvenile Courts § 13**Employees:****O-Jur2d:** Juvenile Courts § 13**Liability of judge for acts of employees:****O-Jur2d:** Judges § 74**CASE NOTES AND OAG****INDEX**

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See also case note 1 under RC § 2151.10.

1. An administrative judge of the juvenile division of a court of common pleas is not authorized to enter into an employment agreement with employees of the court: *Malone v. Court of Common Pleas*, 45 OS(2d) 245, 74 OO(2d) 413 (1976).

2. A county visitor appointed from a civil service eligible list by a juvenile court judge may be dismissed at the latter's discretion in accordance with this section: *State ex rel Haskins v. Tyroler*, 63 App 88, 16 OO 378, 25 NE(2d) 309; affirmed, 137 OS 24, 17 OO 335, 27 NE(2d) 931.

3. This section does not contravene the provisions of Const., Art. XV, § 10: *State ex rel Haskins v. Tyroler*, 63 App 88, 16 OO 378, 25 NE(2d) 309; affirmed, 137 OS 24, 17 OO 335, 27 NE(2d) 931.

4. There is no statutory inhibition against the same person holding the position of humane officer and probation officer of the juvenile court: 1915 OAG vol.1, p.542.

5. When two or more probation officers are appointed by the court, one of them must be known as chief probation officer: 1917 OAG vol.1, p.403.

5.1 The sheriff of a county may not be appointed or act as probation officer: 1918 OAG vol. 1, p. 120.

6. The superintendent of a detention home may also be appointed probation officer: 1918 OAG vol. 1, p.145.

7. A duly appointed probation officer may not resign his position and be immediately reappointed to fill his own vacancy at an increased salary: 1919 OAG vol.2, p. 1342.

8. The compensation of a probation officer may be increased or decreased at any time by the appointing judge not to exceed the amounts appearing in GC § 1662 (see now RC § 2151.13) and such amounts to be paid from the county treasury: 1921 OAG vol.2, p.961.

9. The county commissioners may not by a refusal to appropriate or by not appropriating sufficient funds reduce or change the compensation fixed by the juvenile judge under GC § 1662 (see now RC § 2151.13): 1926 OAG p.188.

10. Expiration of term of probation officer; whether or not under civil service: 1927 OAG p.462.

11. It was not lawful to unite probation departments under GC § 1554-1 (RC § 2301.27) and GC § 1662 (see now RC § 2151.13): 1927 OAG p.854.

12. Salary of probation officer must be within appropriation of commissioners: 1927 OAG p.2055.

13. Under former GC § 1662 (see now RC § 2151.13), a probate judge could not fix the compensation

of a probation officer or employees in an amount in excess of the aggregate fixed by the county commissioners for such purposes: 1932 OAG No.4045.

14. The offices of a member of the county board of education and probation officer are incompatible: 1933 OAG No.1926.

15. The new juvenile court code expressly takes out of the classified service of the civil service the employees and officers mentioned in this section, all of whom must be appointed by the juvenile court judge and hold their positions subject to his pleasure: 1937 OAG No.1190.

16. The provisions of this section and GC § 1639-57 (RC § 2151.10) are mandatory insofar as they refer to appropriations for compensation of a chief probation officer and the administrative expenses of the court; the county commissioners, therefore, must appropriate money for expenses authorized under this act from the date it becomes effective: 1937 OAG No.1246.

17. A person employed within a juvenile court as chief probation officer and who also acts as county visitor for aid to dependent children serves under the provisions of this section, and is, therefore, within the unclassified civil service: 1939 OAG No.1123.

18. The positions of probation officer of the juvenile court and relief administrator of a city are not in themselves incompatible: 1941 OAG No.3410.

19. A deputy sheriff employed full time, as such, may not lawfully be employed as a probation officer of the juvenile court: 1949 OAG No.1076 [1913 OAG No.633 approved and followed].

20. In the event it is found physically possible for one person to hold both offices, there is no incompatibility in the offices of probation officer in the juvenile court, and executive secretary of the child welfare board, in the same county: 1951 OAG No. 961.

21. The office of probation officer for the juvenile court and that of secret service officer for the prosecuting attorney are compatible and there is no legal reason why one individual may not serve in the two offices at the same time, providing that it is physically possible to properly attend to the duties of both: 1957 OAG No.461.

22. A juvenile judge, acting under this section, may fix as the expense allowance of a bailiff, probation officer, or other employee appointed under this section a fixed sum to be paid periodically, provided that the amount paid shall never exceed the amount of actual compensable expense incurred in that period: 1958 OAG No.2208.

23. The offices of township trustee and juvenile probation officer are compatible: 1973 OAG No. 73-035.

§ 2151.14 Duties and powers of probation department; records; command assistance. (GC § 1639-19)

The chief probation officer, under the direction of the juvenile judge, shall have charge of the work of the probation department. The department shall make such investigations as the juvenile court directs, keep a written record of such investigation, and submit the same to the judge or deal with them as he directs. The department shall furnish to any person placed on probation a statement of the conditions of probation and shall instruct him regarding them. The department shall keep informed concerning the conduct and condition of each person under its

supervision and shall report thereon to the judge as he directs. Each probation officer shall use all suitable methods to aid persons on probation and to bring about improvement in their conduct and condition. The department shall keep full records of its work, keep accurate and complete accounts of money collected from persons under its supervision, give receipts therefor, and make reports thereon as the judge directs.

The reports and records of the department shall be considered confidential information and shall not be made public. A probation officer may serve the process of the court within or without the county, and may make arrests without warrant upon reasonable information or upon view of the violation of sections 2151.01 to 2151.54, inclusive, of the Revised Code, detain the person arrested pending the issuance of a warrant, and perform such other duties, incident to his office, as the judge directs. All sheriffs, deputy sheriffs, constables, marshals, chiefs of police, and other police officers shall render assistance to probation officers in the performance of their duties when requested to do so by any probation officer.

HISTORY: GC § 1639-19; 117 v 520 (525). **Eff** 10-1-53. Analogous to former GC § 1663.

Cross-References to Related Sections

Attendance of child at school, RC § 3321.04 et seq.

Youth commission, bureau of delinquency prevention to aid probation department of juvenile courts, RC § 5139.17.

See RC § 2151.15 which refers to this section.

Research Aids

Juvenile court probation department:

O-Jur2d: Juvenile Courts § 14

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULRev 53 (1973).

The Juvenile Court; a court of law. Hon. Walter G. Whitlatch. 18 WestResLRev 1239.

CASE NOTES AND OAG

1. The provisions of this section, that "the reports and records of the [probation] department [of the juvenile court] shall be considered confidential information and shall not be made public," apply only to the probation department of the juvenile court and have no application to cases where juvenile delinquents have been sentenced and committed to a state institution: *State v. Sherow*, 101 App 169, 1 OO(2d) 100, 138 NE(2d) 444.

2. Under the provisions of RC §§ 2151.14 and 2151.31, it is the manifest duty of enforcement officers to co-operate with and assist the juvenile authorities in the performance of their duties when such officers are specifically requested to do so by the juvenile authorities; and such officers may avoid liability in an action for false imprisonment by showing that they were justified in the detention or restraint of the juvenile made under the specific direction and order of the juvenile authorities: *Garland v. Dustman*, 19 OApp(2d) 292, 48 OO(2d) 408, 251 NE(2d) 153.

3. Although Ohio law generally protects a minor from

the exposure of his acts in another judicial forum, paragraph (G) of this section, does not prohibit the cross-examination, in a criminal trial, of a defendant, or defendant's witnesses, concerning a prior juvenile record, where the defendant's evidence attempts to establish his good character: *State v. Hale*, 21 OApp(2d) 207, 50 OO(2d) 340, 256 NE(2d) 239.

4. An informal procedure is distinguished from the formal procedure by the fact that no written pleadings are filed, and the case is not docketed or recorded, but memoranda are made and kept in the social files of the court which, under the provisions of this section, are confidential: *In re Douglas*, 11 OO(2d) 340, 164 NE(2d) 475 (JC).

5. The offices of township trustee and juvenile probation officer are compatible: 1973 OAG No. 73-035.

§ 2151.15 Powers and duties vested in county department of probation. (GC § 1639-20)

When a county department of probation has been established in the county and the juvenile judge does not establish a probation department within the juvenile court as provided in section 2151.14 of the Revised Code, all powers and duties of the probation department provided for in sections 2151.01 to 2151.54, inclusive, of the Revised Code, shall vest in and be imposed upon such county department of probation.

In counties in which a county department of probation has been or is hereafter established the judge may transfer to such department all or any part of the powers and duties of his own probation department; provided that all juvenile cases shall be handled within a county department of probation exclusively by an officer or division separate and distinct from the officers or division handling adult cases.

HISTORY: GC § 1639-20; 117 v 520 (526); 121 v 557 (560). **Eff** 10-1-53. Analogous to former GC § 1663-1.

Cross-References to Related Sections

Probation department, common pleas court, RC § 2301.27 et seq.

Research Aids

County probation department:

O-Jur2d: Juvenile Courts § 14

§ 2151.16 Referees; powers and duties. (GC § 1639-21)

The juvenile judge may appoint and fix the compensation of referees who shall have the usual power of masters in chancery cases, provided, in all such cases submitted to them by the juvenile court, they shall hear the testimony of witnesses and certify to the judge their findings upon the case submitted to them, together with their recommendation as to the judgment or order to be made in the case in question. The court, after notice to the parties in the case of the presentation of such findings and recommendation, may make the order recommended by the referee, or any other order in the judg-

ment of the court required by the findings of the referee, or may hear additional testimony, or may set aside said findings and hear the case anew. In appointing a referee for the trial of females, a female referee shall be appointed where possible.

HISTORY: GC § 1639-21; 117 v 520 (526). **EF** 10-1-53. Analogous to former GC § 1662-1.

Cross-References to Related Sections

Juvenile court referee to be attorney at law, RC § 3111.04.

Stark county judge of court of domestic relations to administer this section, RC § 2301.03(H).

Comparative Legislation

Juvenile referees:

Cal.—Welf & Inst Code, § 553

Ill.—Rev Stat, ch 37, § 703-8

Ind.—Burns' Stat, § 33-12-2-17

Mich.—MCLA, § 712A.10

Pa.—Purdon's Stat, Tit. 11, § 50-301

Text Discussion

2 Anderson Fam. L. §§ 8.18, 9.59.

Research Aids

Referees:

O-Jur2d: Juvenile Courts §§ 13, 48 et seq.

Ohio Rules

This section is affected by Juv.R. 40.

CASE NOTES AND OAG

1. An evidentiary hearing before the juvenile court judge is discretionary under RC § 2151.16 after a hearing before a juvenile court referee: *In re Stall*, 36 OS2d 139, 65 OO2d 338 (1973).

2. A referee of the juvenile court appointed pursuant to this section has functions and duties similar to those of a master commissioner appointed pursuant to GC §§ 11487 to 11492 (RC §§ 2315.38 to 2315.43), inclusive: *DeVillie v. DeVillie*, 87 App 220, 42 OO 423, 94 NE(2d) 474.

3. While the juvenile court has authority by this section to appoint a referee with power of masters in chancery to hear a case and report his findings and recommendations to the judge, there is no such statutory provision with reference to an investigating counselor, and the action and report of such counselor is ex parte and does not constitute the hearing of "additional testimony" by the judge under such statute: *Dolgin v. Dolgin*, 1 OApp(2d) 430, 30 OO (2d) 435, 205 NE(2d) 106.

4. The action of a juvenile court in postponing a hearing on a matter submitted to a referee who failed to file findings and recommendations and in rectifying such deficiency by taking additional testimony and, thereafter, rendering a decision constitutes a substantial compliance with this section, which sets forth the duties of juvenile court referees: *In re Cutman*, 22 OApp(2d) 125, 51 OO(2d) 252, 259 NE(2d) 128.

5. The findings and recommendations by the referee are required by statute to be in writing; and since the findings and recommendations so certified to the trial judge must be in writing, the findings and recommendations, of which the parties shall have notice, shall likewise be in writing: *In re Hobson*, 44 OLA 86, 62 NE(2d) 510.

6. The practice of hearings before referees is rec-

ognized procedure in the juvenile court: *Allstate Ins. Co. v. Cook*, 26 OO(2d) 192, 324 F(2d) 752.

§ 2151.17 Rules governing practice and procedure.

Except as otherwise provided by rules promulgated by the supreme court, the juvenile court may prescribe rules regulating the docketing and hearing of causes, motions, and demurrers, and such other matters as are necessary for the orderly conduct of its business and the prevention of delay, and for the government of its officers and employees, including their conduct, duties, hours, expenses, leaves of absence, and vacations.

HISTORY: GC § 1639-11; 117 v 520; 121 v 557; 133 v H 320. **EF** 11-19-69.

Cross-References to Related Sections

Stark county judge of court of domestic relations to administer this section, RC § 2301.03(H).

Research Aids

Rules governing officers and employees:

O-Jur2d: Juvenile Courts § 13

Rules governing practice and procedure:

O-Jur2d: Juvenile Courts § 12

Ohio Rules

This section is affected by Juv.R. 2(19), 22, 45.

§ 2151.18 Records; annual report; copies for distribution.

The juvenile court shall maintain records of all official cases brought before it, including an appearance docket, a journal, and a cashbook. The court shall maintain a separate docket for traffic offenses, in which case, all traffic cases shall be recorded thereon instead of on the general appearance docket. The parents of any child affected, if living, or if deceased, the nearest of kin, may inspect such records, either in person or by counsel during the hours in which such court is open.

Not later than June of each year, the court shall prepare an annual report covering the preceding calendar year showing the number and kinds of cases that have come before it, the disposition thereof, and such other data pertaining to the work of the court as the juvenile judge directs or as the department of public welfare requests. Copies of such report shall be filed with such department and with the board of county commissioners. With the approval of such board copies may be printed for distribution to persons and agencies interested in the court or community program for dependent, neglected, abused, or delinquent children and juvenile traffic offenders. The number of copies ordered printed and the estimated cost of each printed copy shall appear on each copy of such report printed for distribution.

HISTORY: GC § 1639-13; 117 v 520 (523); 121 v 557

(558); 123 v 367, § 1; 127 v 547 (548), § 1 (Eff 9-14-57); 136 v H 85. Eff 11-28-75.

Analogous to former GC § 1641.

See text of § 3 of HB 161 [127 v 547 (551)] following RC § 2151.02.

Cross-References to Related Sections

Stark county judge of court of domestic relations to administer this section, RC § 2301.03(H).

Research Aids

Maintenance of records:

O-Jur2d: Juvenile Courts § 12; Courts § 57 et seq; Appearance § 8

ALR

Consideration of accused's juvenile court record in sentencing for offense committed as adult. 64 ALR3d 1291.

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULRev 53 (1973).

CASE NOTES AND OAG

1. Mandamus will not lie to require the judge of the juvenile court of Hamilton county "to keep and maintain records of all cases brought before" such court, "correct the errors in . . . partial records kept . . . journalize the orders, judgments," etc., and "exhibit to the attorneys" representing a minor charged with a crime "all books, records, papers, [and] dockets . . . in all cases and proceedings involving" such minor: *State ex rel Hibbard v. Hoffman*, 101 App 547, 1 OO(2d) 454, 137 NE(2d) 606.

2. Revised Code §§ 2151.18 and 2151.35 recognize both formal (or official) and informal (or unofficial) proceedings in the juvenile court in cases involving children: *In re Douglas*, 11 OO(2d) 340, 164 NE(2d) 475 (JC).

§ 2151.19 Summons; expense. (GC § 1639-52, 1639-53)

The summons, warrants, citations, subpoenas, and other writs of the juvenile court may issue to a probation officer of any such court or to the sheriff of any county or any marshal, constable, or police officer, and the provisions of law relating to the subpoenaing of witnesses in other cases shall apply in so far as they are applicable.

When a summons, warrant, citation, subpoena, or other writ is issued to any such officer, other than a probation officer, the expense in serving the same shall be paid by the county, township, or municipal corporation in the manner prescribed for the payment of sheriffs, deputies, assistants, and other employees.

HISTORY: GC §§ 1639-52, 1639-53; 117 v 520 (536). Eff 10-1-53. Analogous to former GC §§ 1660, 1661.

Research Aids

Expense of serving summons:

O-Jur2d: Juvenile Courts § 56

Summons:

O-Jur2d: Juvenile Courts § 38

CASE NOTES AND OAG

1. On grounds of public policy, an administrative

or executive officer, whether he be constable, policeman, game warden, sheriff, or any other authorized officer of the state, whose duty it is under the law to serve the process of a court having jurisdiction of an offense sought to be charged in a complaint by affidavit, information or indictment, but which complaint is insufficient in law, is exempt from any liability arising from an imprisonment by virtue of such process, which is *prima facie* regular: *Brinkman v. Drolesbaugh*, 97 OS 171, 119 NE 451, LRA 1918F, 1132.

2. The sheriff has no authority to arrest a delinquent child outside of the state and is not entitled to a fee or expenses for so doing: 1918 OAG vol.1, p.980.

§ 2151.20 Seal of court; dimensions.

Juvenile courts within the probate court shall have a seal which shall consist of the coat of arms of the state within a circle one and one-fourth inches in diameter and shall be surrounded by the words "juvenile court . . . county."

The seal of other courts exercising the powers and jurisdiction conferred in sections 2151.01 to 2151.54, inclusive, of the Revised Code, shall be attached to all writs and processes.

HISTORY: GC § 1639-9; 117 v 520 (522); 132 v H 164, § 1. Eff 12-15-67.

Analogous to former GC § 1640.

Research Aids

Seal of court:

O-Jur2d: Juvenile Courts § 12

§ 2151.21 Jurisdiction in contempt. (GC § 1639-10)

The juvenile court has the same jurisdiction in contempt as courts of common pleas.

HISTORY: GC § 1639-10; 117 v 520 (523). Eff 10-1-53.

Research Aids

Jurisdiction in contempt:

O-Jur2d: Juvenile Courts § 24; Contempt § 53

Ohio Rules

This section is affected by Juv.R. 15(B)(4), 17(G).

CASE NOTES AND OAG

1. The power to punish for contempt is an inherent power of the juvenile court: *State v. Hershberger*, 77 OLA 487, 150 NE(2d) 671 (JC), conviction for contempt reversed as against the manifest weight of evidence, 83 OLA 62, 168 NE(2d) 12 (App).

§ 2151.22 Terms of court; sessions.

The term of any juvenile or domestic relations court, whether a division of the court of common pleas or an independent court, is one calendar year. All actions and other business pending at the expiration of any term of court is automatically continued without further order. The judge may adjourn court or continue any case whenever, in his opinion, such continuance is warranted.

Sessions of the court may be held at such places

throughout the county as the judge shall from time to time determine.

HISTORY: GC § 1639-12; 117 v 520; 136 v H 390. EF 8-6-76.

Research Aids

Terms and sessions of court:

O-Jur2d: Juvenile Courts § 11

§ 2151.23 Jurisdiction of juvenile court.

(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who on or about the date specified in the complaint is alleged to be a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To hear and determine any application for a writ of habeas corpus involving the custody of a child;

(4) To exercise the powers and jurisdiction given the probate division of the court of common pleas in Chapters 5122. and 5123. of the Revised Code, if the court has probable cause to believe that a child otherwise within the jurisdiction of the court is a mentally ill person subject to hospitalization by court order, as defined in section 5122.01 of the Revised Code, or a mentally retarded person subject to hospitalization by court order as defined in section 5123.68 of the Revised Code;

(5) To hear and determine all criminal cases charging adults with the violation of any section of Chapter 2151. of the Revised Code;

(6) Under the interstate compact on juveniles in section 2151.56 of the Revised Code;

(7) To hear and determine applications for consent to marry pursuant to section 3101.04 of the Revised Code.

(B) The juvenile court has original jurisdiction under the Revised Code:

(1) To hear and determine all cases of misdemeanors charging adults with any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance;

(2) To determine the paternity of any child alleged to have been born out of wedlock pursuant to Chapter 3111. of the Revised Code;

(3) Under the uniform support of dependents act in Chapter 3115. of the Revised Code.

(C) The juvenile court, except as to juvenile courts which are a separate division of the court of common pleas, or a separate and independent juvenile court, has jurisdiction to hear, determine, and make a record of any action for divorce or alimony involving the custody or care of children filed in the court of common pleas

and certified by the court of common pleas with all the papers filed therein to the court for trial, provided that no such certification shall be made to any court unless the consent of the juvenile judge is first obtained. After such certification is made and consent obtained, the court shall proceed as if such action were originally begun in said court except as to awards for alimony or support due and unpaid at the time of certification, over which the court has no jurisdiction.

(D) The juvenile court has jurisdiction to hear and determine all matters as to custody and support of children duly certified by the court of common pleas to the juvenile court after a divorce decree has been granted, including jurisdiction to modify the judgment and decree of the common pleas court as the same relate to the custody and support of children.

(E) The juvenile court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction if such child comes within the jurisdiction of the court as defined by this section.

HISTORY: 133 v H 320 (EF 11-19-69); 133 v H 931 (EF 8-27-70); 136 v H 85 (EF 11-28-75); 136 v H 244. EF 8-26-76.

Analogous in part to former RC § 2151.23, repealed, 133 v H 320.

Comparative Legislation

Original jurisdiction:

Cal.—Welf & Inst. Code, § 550

Ill.—Rev Stat, ch 37, § 702-1

Ind.—Burns' Stat, § 33-12-2-3

Ky.—KRS, § 208.020

Mich.—MCLA, § 712A.2

N.Y.—Jud-Family Court, § 115

Pa.—Purdon's Stat, Tit. 11, § 50-103

Fla.—FSA, § 39.02

Text Discussion

2 Anderson Fam. L. §§ 2.2, 2.4-2.19, 9.3, 16.1, 17.1, 17.2.

Forms

1 A&H Probate FORM 2151.23a et seq.

Research Aids

Jurisdiction:

O-Jur2d: Juvenile Courts §§ 16-25; Divorce and Separation §§ 129, 130

Am-Jur2d: Juvenile Courts § 16 et seq.

ALR

Marriage as affecting jurisdiction of juvenile court over delinquent or dependent. 14 ALR2d 336.
Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 ALR2d 506.

Law Review

A synopsis of Ohio juvenile court law. Hon. Don J. Young, Jr. 31 CinLRev 131.

Practice in Cuyahoga county juvenile court. Ronald J. Harpst. 10 ClevMarLRev 507.

The law of adoption in Ohio. Beverly E. Sylvester. 2 Capital ULRev 23 (1973).

Ohio Rules

This section is affected by Juv.R. 1(C)(4), (5), 10(A), (E), 11, 42, 44.

CASE NOTES AND OAC

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1. In the part relating to adults, found in subdiv. 3b of this section, the word "exclusive" is not used; it will be observed therefore that exclusive jurisdiction is only conferred by the juvenile court code with respect to offenses from the standpoint of the child: *In re Cooper*, 134 OS 40, 11 OO 416, 15 NE(2d) 634 [affirming 58 App 519].

2. The juvenile court has jurisdiction of a child only if such child is found to be delinquent, neglected or dependent: *Paddock v. Ripley*, 149 OS 539, 37 OO 262, 80 NE(2d) 129.

3. Under the provisions of this section, the juvenile court is invested with original jurisdiction to determine the custody of any child not a ward of another court: *In re Torok*, 61 OS 585, 53 OO 433, 120 NE(2d) 307.

4. In order to determine such right of custody, it is not necessary for the court to find first that such child is delinquent, neglected, dependent, crippled, or otherwise physically handicapped: *In re Torok*, 161 OS 585, 53 OO 433, 120 NE(2d) 307.

5. This section has been construed and applied: *In re Ramsey*, 164 OS 567, 58 OO 431, 132 NE(2d) 469.

6. By the language of this section, the juvenile court is without authority to accept or exercise jurisdiction where the matter has not been referred to it by a court vested with authority to do so: *Haynie v. Haynie*, 169 OS 467, 8 OO(2d) 476, 159 NE(2d) 765; affirming 108 App 342, 9 OO(2d) 301, 161 NE(2d) 549.

7. Under RC §§ 3105.21 and 2151.23, where the court of common pleas in a divorce action dismisses the action for insufficient evidence and without making a determination on the merits, it lacks the power and authority to certify the question of the custody of the minor child of the parties to the juvenile court, and the juvenile court is without power to accept such question:

Haynie v. Haynie, 169 OS 467, 8 OO(2d) 476, 159 NE(2d) 765; affirming 108 App 342, 9 OO(2d) 301, 161 NE(2d) 549.

8. The juvenile court has exclusive original jurisdiction of delinquent minors: *State ex rel Schwartz v. Haines*, 172 OS 572, 18 OO(2d) 130, 179 NE(2d) 46.

9. The statutes of Ohio confer jurisdiction on the juvenile court with respect to custody of a neglected or dependent child: *Byington v. Byington*, 175 OS 513, 26 OO(2d) 176, 196 NE(2d) 588.

10. The grant of original jurisdiction, by RC § 2151.23(A)(3), to juvenile courts in habeas corpus actions involving the custody of minors is exclusive only as between juvenile courts and those courts given general habeas corpus jurisdiction by RC § 2725.02: *In re Black*, 36 OS(2d) 124, 65 OO(2d) 308, 304 NE(2d) 394 (1973).

11. While this section of the new juvenile code gives the juvenile court original jurisdiction to punish persons having the custody of a child or who owes the duty of support, that jurisdiction is not exclusive: *In re Cooper*, 58 App 519, 11 OO 442, 16 NE(2d) 954 [affirmed, 134 OS 40].

12. The juvenile court code, GC § 1639-1 (RC § 2151-01) et seq, does not make the jurisdiction of the juvenile court exclusive throughout. It vests jurisdiction over the infant, not the crime: *In re Evans*, 67 App 66, 21 OO 93, 35 NE(2d) 887.

13. A writ of habeas corpus will not be granted to release from the state reformatory a minor who, upon being arrested and taken before the municipal court, stated his age to be 19 years, when in fact he was but 17 years of age, and thereafter was indicted, pleaded guilty and was convicted in the common pleas court on a criminal charge: *In re Evans*, 67 App 66, 21 OO 93, 35 NE(2d) 887.

14. This section, subdiv. 2, relative to the jurisdiction of the juvenile court to determine custody of minors, is a grant, and not a limitation, of jurisdiction: *McFadden v. Kendall*, 81 App 107, 36 OO 414, 77 NE(2d) 625.

15. Where a child is properly charged with being a delinquent, neglected, or dependent child, and is proven to be such, the juvenile court, by this section, is the special and exclusive tribunal for determining the issue of such child's care, custody and control: *McFadden v. Kendall*, 81 App 107, 36 OO 414, 77 NE(2d) 625.

16. The jurisdiction over minors acquired by the common pleas court in a divorce action is continuing and, as between the parties to a divorce action, no other court has authority to make any order affecting the custody of such minors: *McFadden v. Kendall*, 81 App 107, 36 OO 414, 77 NE(2d) 625.

17. Jurisdiction is conferred by this section, subdiv. A(3), on the juvenile court to determine the paternity of a child born out of wedlock and to provide for its support: *Knox v. Covrett*, 85 App 524, 40 OO 437, 89 NE(2d) 610.

18. There was no proper basis for certification from the probate court to the juvenile court, and, no complaint having been filed charging the child to be a dependent child or any other form of complaint originating in the juvenile court, that court was without jurisdiction to determine that the child was a dependent child or to make an order depriving the mother of custody and committing the child to the custody of a detention home: *State ex rel Clark v. Allaman*, 87 App 101, 42 OO 330, 90 NE(2d) 394.

19. This section confers exclusive original jurisdiction upon the juvenile court to determine the custody of any child not a ward of another court: *Withorow-*

ski v. Withorowski, 89 App 424, 46 OO 259, 102 NE (2d) 896.

20. Under the provisions of this section, the juvenile court is given original jurisdiction in a proper proceeding to determine the right of custody of any child where such child is not a ward of another court, and it is not necessary in the exercise of such jurisdiction that the juvenile court first determine that such child is a dependent, neglected or delinquent child as defined by GC §§ 1639-2, 1639-3, and 1639-4 (RC §§ 2151.02, 2151.03, and 2151.04): *In re Lorok*, 93 App 251, 51 OO 10, 114 NE(2d) 65.

21. By the provisions of this section, jurisdiction is conferred on the juvenile court to "determine the custody of any child not a ward of another court" and "to hear and determine the case of any child duly certified to the court according to law by any court of competent jurisdiction, and to make disposition of said child in accordance with the provisions of this chapter": *State ex rel Sparto v. Williams*, 86 App 377, 41 OO 474, 86 NE(2d) 501 [affirmed, 153 OS 64].

22. The right to custody of a minor child, the duty to support and the right of a parent to reasonable visitation may, where the interest of the child requires it, be determined or altered by a court of this state in whose jurisdiction the child may be, even though a court of another state has determined the right to custody: *Bain v. Rose*, 103 App 297, 3 OO(2d) 326, 145 NE(2d) 319.

23. When the question of custody only comes before a court, under the authority granted in this section, paragraph (A)(2), that court has jurisdiction to include in the award of custody an order for the support of such child: *Kolody v. Kolody*, 110 App 260, 13 OO(2d) 25, 169 NE(2d) 34.

24. The word "custody" as used in this section, paragraph (A)(2) connotes the sum total of all parental rights, among which is the right to support for such child: *Kolody v. Kolody*, 110 App 260, 13 OO(2d) 25, 169 NE(2d) 34.

25. Where a neglected child proceeding is instituted in the juvenile court, pursuant to RC § 2151.27, by a parent of such child, and a divorce action is later instituted by such parent, the juvenile court has exclusive original jurisdiction to determine whether the child is neglected, the power to determine his custody and the authority to place the child with a relative: *In re Small*, 114 App 248, 19 OO(2d) 128, 181 NE(2d) 503.

26. A juvenile court which acquires jurisdiction of a minor child of persons who are subsequently divorced has, by virtue of this section exclusive jurisdiction of such minor, and the common pleas court wherein such divorce is granted has no jurisdiction to make any order respecting the custody of such child: *Patton v. Patton*, 1 OApp(2d) 1, 30 OO(2d) 49, 203 NE(2d) 662.

27. Where the jurisdiction of the juvenile court has been invoked by the arrest of a father of minor children on a charge of nonsupport filed by the mother, and upon trial the father pleads guilty and is sentenced, which sentence is suspended and the defendant put on probation, the condition of the probation being that the defendant will pay a specified sum weekly for support, the minor children thereby become wards of the Juvenile Court and the subject of their support and the power to enforce the condition of probation is exclusively in that court until each child has reached the age of eighteen years (RC §§ 2151.49 and 2151.99): *Anderson v. Anderson*, 4 OApp(2d) 90, 33 OO(2d) 145, 212 NE(2d) 643.

28. The manner of enforcing such order of the juvenile court upon the defendant's default is to seek, by motion filed in the juvenile court, a revocation of the order of probation and to enforce against him the penalty of the

judgment: *Anderson v. Anderson*, 4 OApp(2d) 90, 33 OO(2d) 145, 212 NE(2d) 643.

29. In such case, where the mother files a petition for divorce in the common pleas court subsequent to the action in juvenile court and upon trial a divorce is granted to the mother, the common pleas court in its decree is without jurisdiction to deal with the custody and support of the minor children, jurisdiction of custody and support then being exclusively in the juvenile court: *Anderson v. Anderson*, 4 OApp(2d) 90, 33 OO(2d) 145, 212 NE(2d) 643.

30. The common pleas court is, therefore, without jurisdiction to entertain an action filed by the mother against the father for alleged delinquencies in the weekly payments ordered as a condition of probation by the juvenile court: *Anderson v. Anderson*, 4 OApp(2d) 90, 33 OO(2d) 145, 212 NE(2d) 643.

31. Subsections (A)(1) and (A)(2) of this section are independent grants of jurisdiction to the juvenile court. Subsection (A)(2) does not modify the power granted by subsection (A)(1): *James v. Child Welfare Board*, 9 OApp(2d) 299, 38 OO(2d) 347, 224 NE(2d) 358.

32. An Ohio juvenile court, in a dependency proceeding pursuant to RC § 2151.27 et seq, has no jurisdiction to interfere with mother's legal custody of her children, in the absence of proof, and a finding, of unfitness of such parent, merely for the purpose of releasing such children to the officers of the court of a foreign state; the Ohio juvenile court need not give full faith and credit to a Michigan decree where that decree was obtained by the husband in an ex parte custody determination, subsequent to a divorce decree, in which the Michigan court had no personal jurisdiction over the nonresident wife: *In re Messner*, 19 OApp(2d) 33, 48 OO(2d) 31, 249 NE(2d) 532.

33. Habeas corpus in a court of competent jurisdiction as prescribed in RC Chapter 2725, is the proper proceeding to raise the question of rightful custody of minor children, where it is alleged that the restraint is illegal, or where a parent or other person claims that he or she has been unlawfully deprived of custody of a minor child; and, as part of such proceedings, the best interests and welfare of the child is a primary question and determining factor, and all other matters must yield accordingly, including the comity existing between states: *In re Messner*, 19 OApp(2d) 33, 48 OO(2d) 31, 249 NE(2d) 532.

34. The state of Ohio has the burden of proof in the prosecution of a delinquency complaint to establish the jurisdiction of the juvenile court over the person of the "child": *State v. Mendenhall*, 21 OApp(2d) 135, 50 OO(2d) 227, 255 NE(2d) 307.

35. The amendment of this section, adopted by the Legislature effective November 19, 1969, deprives a municipal court of any jurisdiction to hear and determine any criminal case charging an adult with the violation of any section of RC chapter 2151: *State v. Sanchez*, 22 OApp(2d) 145, 51 OO(2d) 292, 259 NE(2d) 139.

36. A juvenile who submits without challenge to the jurisdiction of a municipal court cannot thereafter secure release in a habeas corpus action on the ground that the judgment and sentence of the municipal court is void for want of jurisdiction: *Hemphill v. Johnson*, 31 OApp(2d) 241, 60 OO(2d) 404, 287 NE(2d) 828 (1972).

37. Prosecution for violation of GC § 1655 (see now RC § 2151.42), based upon an affidavit, is within the jurisdiction of the juvenile court, under the provisions of GC § 1683-1 (see now RC §§ 2151.23, 2151.43), giving such court jurisdiction in all offenses against minors: *Snyder v. State ex rel McCoy*, 53 App 370, 4 OO 537.

38. Under division (A) of this section the juvenile court has exclusive original jurisdiction of any child who is neglected and this excludes action by any

other court not explicitly given jurisdiction: *Hartshorne v. Hartshorne*, 89 OLA 243, 185 NE(2d) 329 (App.).

39. A hearing in juvenile court on a charge of contributing to the delinquency of a minor which resulted in binding the prisoner over to the grand jury upon concluding that a felony over which the juvenile court lacked jurisdiction had been committed, in no way offended the prisoner's federal granted right to be free from double jeopardy: *Grear v. Maxwell*, 35 OO(2d) 333, 8 OMisc 210, 355 F(2d) 991 (6th Cir.).

40. Under the authority derived from RC §§ 2151.23, 2151.27 and 2151.35, the juvenile court has the authority to hear and determine the case of a neglected child notwithstanding the fact that the child is at the time within the continuing jurisdiction of the common pleas court by virtue of a divorce decree: *In re Gail*, 12 OMisc 251, 41 OO(2d) 341, 231 NE(2d) 253 (J.C.).

41. The word "custody" as used in RC § 3109.04 has the same meaning as the word used in RC § 2151.23(A)(2) and in § 3105.21, so that the former section is equally applicable to the other two: *In re Smelser*, 51 OO(2d) 31, 22 OMisc 41, 257 NE(2d) 769 (CP).

42. Since under RC § 2151.23(A) the juvenile court has exclusive original jurisdiction "to hear and determine any application for a writ of habeas corpus involving the custody of a child," the court is empowered to adjudicate fully as to the needs of the child involved: *Baker v. Rose*, 57 OO(2d) 57, 270 NE(2d) 678 (CP).

43. The mother of an illegitimate child cannot be deprived of her superior right of custody simply by the exercise of the juvenile court's discretion upon an application for custody by the putative father under RC § 2151.23(A)(2): *In re Brenda H.*, 66 OO(2d) 178, 37 OMisc 123, 305 NE(2d) 815 (CP 1973).

44. When the common pleas court, under authority of GC § 8034-1 (RC § 3109.06), certified to the juvenile court the matter of arrearages which had arisen on support orders, the common pleas court surrendered all jurisdiction as to that question and thereafter the juvenile court had continuing and exclusive jurisdiction as to any modification of the orders: *Baumgarten v. Baumgarten*, 14 OO 490 (CP).

45. The juvenile court does not have jurisdiction to render a money judgment: *Snyder v. Snyder*, 18 OO 69 (JC).

46. Since August 19, 1937, the juvenile court, subject to the jurisdiction of the common pleas court in divorce cases, has exclusive original jurisdiction over dependent, neglected and crippled children: *In re Howell*, 21 OO 379 (JC).

47. Under this section the juvenile court has exclusive original jurisdiction over delinquent, neglected, dependent, crippled or otherwise physically handicapped children, and if a complaint is filed in the juvenile court alleging that a child is delinquent, neglected, dependent, crippled, or otherwise physically handicapped, the juvenile court may exercise such jurisdiction if the complaint is proven and may make such order as provided by the juvenile court code even though the child is a ward of the common pleas court in a divorce proceeding, except that it may not change the custody of said child as between the parties to the divorce action unless the question of custody is certified to the juvenile court by the court granting the divorce decree: *In re Jones*, 33 OO 331, 68 NE(2d) 97 (JC).

48. The juvenile court has exclusive original jurisdiction under this section to determine the custody of any child not a ward of another court: *Crum v.*

Howard, 1 OO(2d) 399, 137 NE(2d) 654 (CP).

48.1 Where separate complaints, alleging each of petitioner's children to be a neglected child, were filed in the juvenile court before the petitioner filed a habeas corpus proceeding in the common pleas court alleging that he was unlawfully deprived of their custody, the juvenile court acquired jurisdiction over the matter of custody: *In re Ruth*, 16 OO(2d) 408, 176 NE(2d) 187.

49. The words in subsection (A)(2) of this section "ward of another court" cannot be construed as meaning "ward of another court in this state": *In re Wolfe*, 26 OO(2d) 274, 187 NE(2d) 658 (JC).

50. The three subsections of paragraph (A) of this section, relating to the jurisdiction of the juvenile court, are independent of each other, each being a grant of jurisdiction, not limitation thereof; and it is not necessary that the juvenile court first determine that children are delinquent or neglected before making an award of their custody, if the court has the power under the facts to make such an award: *In re Wolfe*, 26 OO(2d) 274, 187 NE(2d) 658 (JC).

51. The physical presence of the child within the geography of the court empowers the juvenile court to determine its custody, provided it is "not a ward of another court": *In re Wolfe*, 26 OO(2d) 274, 187 NE(2d) 658 (JC).

52. When a probate court dismisses an adoption petition and, pursuant to RC § 3107.12, certifies the case to the juvenile court for appropriate action and disposition, the certification of itself does not give the juvenile court jurisdiction to determine custody of an illegitimate child: *In the Matter of Robert O.*, 28 OO(2d) 165, 199 NE(2d) 765 (JC).

53. Where the juvenile court has entertained jurisdiction over a minor, and has by decree, placed the permanent custody of said minor, with the county welfare department, the juvenile court has original and continuing jurisdiction and the probate court is without jurisdiction and authority to grant letters of guardianship in such a case: *In re Brinegar's Guardianship*, 81 OLA 158, 160 NE(2d) 589 (PC).

54. Wherever a probate court designates the board of state charities to care for a child which has been committed to the institution for the feeble-minded and which cannot be received by reason of the incapacity of such institution, such court may properly, in its order of designation, provide that the expense of maintaining the child, until its reception in the institution, shall be charged against the county: 1931 OAG No.3212.

55. The jurisdiction of a juvenile court to commit a crippled child to the division of charities is limited by GC § 1642 (see now RC § 2151.23) to children under the age of eighteen (18) years: 1933 OAG No. 1047.

56. Cases may not be certified to a juvenile court by a common pleas court unless the judge of the juvenile court consents to the certification: 1938 OAG No.2410.

57. When a girl commits an act of delinquency before arriving at the age of eighteen years, and the complaint is not filed until after she becomes eighteen, the juvenile court has jurisdiction to hear such complaint: 1945 OAG No.247.

58. Where an agreement has been entered into pursuant to the provisions of GC § 3070-17 (RC § 335.16), such fact does not divest the courts of jurisdiction over offenses described in GC §§ 1639-46, 13008 and 13012 (RC §§ 2151.42, 3113.01, 3113.06), and the parent may be held criminally liable for failure to support a minor child as provided in said sections: 1946 OAG No.1100.

59. Juvenile courts have no jurisdiction of felonies or offenses described in GC §§ 13008 and 13012 (RC §§ 3113.01 and 3113.06): 1946 OAG No.1100.

60. When a juvenile court exercising jurisdiction over a child under GC § 1639-16 (RC § 2151.23) terminates such jurisdiction, said child by virtue of GC §§ 1639-6 and 3391-16 (RC §§ 2151.06 and 5113.-05) immediately acquires a legal settlement in the county of residence of the parents, surviving parent, sole parent, parent having custody awarded by a court having jurisdiction, or guardian of the person of such minor: 1953 OAG No. 2656.

61. The court of common pleas and municipal courts have jurisdiction in offenses involving adults, concurrent with that of the juvenile court, arising under RC §§ 2151.41 or 2151.42, 1950 OAG No. 1901, overruled: 1958 OAG No. 2016.

62. Under RC §§ 2151.38, 5141.01, and 5141.02, where a juvenile court commits a child to the boys' industrial school, the jurisdiction of the court over the child ceases; and the fact that the court may have attempted to put a condition upon the release of the child, such as making restitution for damages, does not affect the exclusive power of the school and the department of mental hygiene and correction to release the child for satisfactory behavior and progress in training; and the department may so release the child regardless of whether or not such condition has been fulfilled: 1962 OAG No. 3461.

DECISIONS UNDER FORMER GC § 1642

63. When a warrant has been issued by a juvenile court, and a minor has been arrested under such warrant, upon a complaint charging him or her with being a delinquent child, the juvenile court has exclusive jurisdiction over such minor: *State ex rel Heth v. Moloney*, 126 OS 526, 186 NE 362.

63.1 The jurisdiction of the juvenile court is continuing: *In re Crist*, 89 OS 33, 105 NE 71; *Bleier v. Crouse*, 13 App 69, 31 OCA 453; *State v. Mezgar*, 59 Bull 45 (Ed).

64. For the sufficiency of a petition or motion to modify an order of commitment, see *State ex rel Tailford v. Bristline*, 96 OS 581, 119 NE 138.

65. It is not necessary that the negative averments of this section, relating to jurisdiction over and with respect to delinquent and dependent and neglected minors, shall be incorporated in the affidavits under which arrests are made: *Walton v. State*, 3 App 97, 19 CC(NS) 452, 27 CD 12.

66. For a discussion of the jurisdiction of chancery over minors, see *State ex rel Fortini v. Hoffman*, 12 App 341, 32 OCA 193.

67. The proceeding in a juvenile court to have a child adjudged to be a dependent is not a chancery case within the meaning of Art. IV, § 6, and therefore appeal does not lie to the court of appeals from an order committing a child to custody: *State ex rel Fortini v. Hoffman*, 12 App 341, 32 OCA 193.

68. Commission of a felony by a minor makes him a delinquent; but this does not prevent his indictment, or his trial by the common pleas, unless the juvenile court acquires jurisdiction first: *Gerak v. State*, 22 App 357, 153 NE 902.

69. Juvenile court to which divorce case is certified by common pleas court is charged with knowledge of existing orders affecting minor's custody: *Sonnenberg v. State*, 40 App 475, 178 NE 855.

70. Order of common pleas court in divorce case affecting custody of minor is effective until reversed or modified, although case relating to minor is transferred to juvenile court: *Sonnenberg v. State*, 40 App 475, 178 NE 855.

71. Where divorce case affecting minor's custody is certified to juvenile court, one desiring modification of order of common pleas court affecting child's custody may file motion in juvenile court: *Sonnenberg v. State*, 40 App 475, 178 NE 855.

72. Modification of order of common pleas court in divorce case, affecting custody of minor, cannot be accomplished by dependency proceeding in juvenile court to which divorce case is certified, unless dependency be charged and proven: *Sonnenberg v. State*, 40 App 475, 178 NE 855.

73. The court of common pleas has no jurisdiction over offenders under eighteen years of age: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

74. A juvenile offender under the age of eighteen, who is charged with a felony and who fails to interpose such objection at his preliminary examination before the justice of the peace, does not waive such objection. It may be interposed for the first time in the court of common pleas after indictment by a plea in abatement: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

75. General Code § 1642-1 (see now RC § 2151.23) has reference to cases involving custody and support of minor children growing out of divorce actions, and has no application to former GC § 1642 (see now RC § 2151.23), which pertains particularly to dependency and delinquency actions: *Metz v. Metz*, 17 OLA 531.

76. Where the probate court, after acquiring jurisdiction over a minor child, orders it to be committed to the children's home of the county and there kept in custody until the further order of the court, without making an express finding that the child is dependent, and later awards the custody of the child to its mother, in a subsequent habeas corpus proceeding brought by the father against the mother, the common pleas court will not award the custody of the child to the father on the ground that the action of the probate court was illegal, since the jurisdiction of the probate court over the child continues during its minority: *State v. Mezgar*, 59 Bull 45 (Ed).

77. If the probate court, after acquiring jurisdiction over a minor, finds that its best interests require that it should be committed to the children's home and orders it to be so committed and there received, cared for, educated and kept in custody until further orders of the court, and the child is so committed, without making an express finding that the child is dependent, in a later proceeding in habeas corpus, the common pleas court will not inquire whether the action of the probate court was sustained by the evidence taken before it: *State v. Mezgar*, 59 Bull 45 (Ed).

78. The jurisdiction of the juvenile court to prosecute an adult must be predicated on delinquency, dependency or neglect of minor under eighteen years of age: 1915 OAG vol.1, p.143.

79. The juvenile court has no jurisdiction in a bastardy proceeding, even where the defendant and the mother are both under sixteen years of age: 1917 OAG vol.3, p.2228.

80. The juvenile court has jurisdiction over all delinquent, neglected or dependent minors within the county. The fact that acts of delinquency upon which the charge is based were committed outside the county does not rob the court of its jurisdiction to determine the status of the child and proceed accordingly: 1918 OAG vol.1, p.840.

81. Where an affidavit charging delinquency is filed in juvenile court against a minor, and service is duly had on said minor while he or she is yet under age, the fact that said minor becomes of age does not take away jurisdiction of said court to proceed against said minor as a juvenile delinquent person: 1920 OAG vol.1, p.296.

81.1 The juvenile court may not take jurisdiction of the minor children where the jurisdiction of the common pleas court has attached in a divorce proceeding, unless the minor child is charged with being delinquent: 1924 OAG p. 639.

82. When orders made in common pleas or probate courts as to the care and custody of minor children are certified to the juvenile court under GC § 8034-1 (RC § 3109.06) for further proceedings, the juvenile court may then exercise jurisdiction over said minors under the provisions of GC § 1642-1 (see now RC § 2151.23), in the same manner as in cases originally brought in said juvenile court: 1925 OAG p.159.

83. The juvenile court has jurisdiction to declare any child dependent which is found within the county under facts and circumstances constituting dependency. The legal residence of the child or its parents, or those standing in loco parentis, does not determine the jurisdiction of the court: 1935 OAG No.4172.

84. The county in which a juvenile court assumes jurisdiction of a child and declares such child to be dependent, will be responsible for the support of the child: 1935 OAG No.4172.

§ 2151.24 Separate room for hearings.

The board of county commissioners shall provide a special room not used for the trial of criminal or adult cases, when available, for the hearing of the cases of dependent, neglected, abused, and delinquent children.

HISTORY: GC § 1639-14; 117 v 520; 136 v H 85. Eff 11-28-75.

Analogous to former GC § 1649.

Research Aids

Separate room for hearings:

O-Jur2d: Juvenile Courts § 11

[PROCEDURE IN CHILDREN'S CASES]

§ 2151.25 Transfer to juvenile court.

When a child is arrested under any charge, complaint, affidavit, or indictment, whether for a felony or a misdemeanor, proceedings regarding such child shall be initially in the juvenile court in accordance with this chapter. If the child is taken before a judge of a county court, mayor, judge of the municipal court, or judge of the court of common pleas other than a juvenile court, such judge of a county court, mayor, judge of the municipal court, or judge of the court of common pleas shall transfer the case to the juvenile court, whereupon proceedings shall be in accordance with this chapter. Upon such transfer all further proceedings under the charge, complaint, information, or indictment shall be discontinued in the court of said judge of a county court, mayor, municipal judge, or judge of the court of common pleas other than a juvenile court, and the case relating to such child shall thenceforth be within the exclusive jurisdiction of the juvenile court.

HISTORY: GC § 1639-29; 117 v 520; 121 v 557; 129 v 582 (738) (Eff 1-10-61); 133 v H 320 (Eff 11-19-69); 136 v H 205. Eff 1-1-76.

Analogous to former GC § 1659.

Cross-References to Related Sections

Confinement of minors in county jail, RC §§ 341.11, 2151.34.

Text Discussion

2 Anderson Fam. L. §§ 6.14, 6.17.

Research Aids

Transfer to juvenile court following arrest:

O-Jur2d: Juvenile Courts § 22; Criminal Practice and Procedure § 40

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Ohio Rules

This section is affected by Juv. R. 2(2).

CASE NOTES AND OAG

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1. The provisions of RC § 5141.16 have been repealed by the subsequently enacted provisions of this section and RC § 2151.26: State v. Worden, 162 OS 593, 55 OO 483, 124 NE(2d) 817.

2. A minor who went to California to avoid arrest, after committing a murder in Ohio, was arrested in California, brought back to Ohio by Ohio officers pursuant to instructions from the juvenile court judge of Los Angeles county, and taken to the juvenile detention home, cannot complain that he was not taken directly before the juvenile court upon arrest, as required by RC § 2151.25 and not taken immediately to the place of detention upon being taken into custody, as required by RC § 2151.31: State v. Stewart, 176 OS 156, 158, 27 OO(2d) 42, 198 NE(2d) 439.

3. The provisions of this section contemplate only a situation where a juvenile is actually charged with a crime. It does not apply nor would it be practicable to apply it to every juvenile picked up for interrogation by the authorities: State v. Carder, 9 OS(2d) 1, 38 OO(2d) 1, 222 NE(2d) 620.

4. This section, providing for certification of certain criminal cases to the juvenile court, provides analogy to and requires differentiation from GC § 10512-21(b) (RC § 3107.12): State ex rel Clark v. Allaman, 87 App 101, 42 OO 330, 90 NE(2d) 394.

5. Revised Code §§ 2151.25 and 2151.26 provide the procedure to be followed where a juvenile is charged with an act which could be a felony if committed by an adult: Mellott v. Alvis, 109 App 486, 12 OO(2d) 23, 162 NE(2d) 623.

6. A juvenile like other individuals can waive his rights and where the minor charged with a felony

does not object to the jurisdiction of the court of common pleas on the ground of his minority by raising that question before the trial court, he has lost his right to object after sentence by that court: *Mellett v. Alvis*, 109 App 486, 12 OO(2d) 23, 162 NE (2d) 623.

7. There is no prohibition in this section against the interrogation of a minor by police officers following his arrest, and before he is taken before a juvenile court: *State v. Stewart*, 120 App 199, 205, 29 OO(2d) 4, 201 NE(2d) 793.

8. A voluntary confession to the perpetration of murder, obtained from a seventeen-year-old high school senior, which confession was made before indictment on said charge and while the accused was under arrest for a misdemeanor, is admissible in evidence (1) where the accused was first advised that "he would not be compelled to give a statement. . . if he wanted to give a statement it would be by his own free will and that statement would be used for or against him in court"; (2) where the accused was further advised that "he could secure the services of an attorney"; and (3) where there is no showing that the confession was obtained by inquisitorial processes, without the procedural safeguards of due process, and by such compulsion that the confession is irreconcilable with the possession of mental freedom: *State v. Stewart*, 120 App 199, 29 OO(2d) 4, 201 NE(2d) 793.

9. A voluntary confession to the perpetration of murder obtained from a 16-¾ year old high school junior, which confession was made before indictment, and while the accused was detained for investigation, is admissible in evidence (1) where the accused had been allowed to consult with an attorney prior to being questioned; (2) where the accused first was advised that he did not have to talk; (3) where the accused when told that his parents and another attorney were there and waiting to see him stated that he did not want to see them; and (4) where there is no showing that the confession was obtained by inquisitorial processes: *State v. Gardner*, 3 OApp(2d) 381, 32 OO(2d) 524, 210 NE(2d) 714.

10. A juvenile who submits without challenge to the jurisdiction of a municipal court cannot thereafter secure release in a habeas corpus action on the ground that the judgment and sentence of the municipal court is void for want of jurisdiction: *Hemphill v. Johnson*, 31 OApp(2d) 241, 60 OO(2d) 404, 287 NE(2d) 828 (1972).

10.1 The juvenile and general divisions of a court of common pleas possess concurrent jurisdiction over a juvenile accused of a crime, and the juvenile division has not been divested of personal jurisdiction over one whose disposition is returned to it after the accused initially waived his right to be judged in that tribunal: *State ex rel. Leis v. Black*, 45 OApp(2d) 191, 74 OO(2d) 270 (1975).

11. The juvenile court does not have exclusive jurisdiction over a criminal matter involving a minor until the case is transferred to such court: *Harris v. Alvis*, 61 OLA 311, 104 NE(2d) 182 (App).

12. The procedure required by this section applies to fact situations in which the minority is discovered or disclosed prior to the hearing or trial: *State v. Peterson*, 38 OO(2d) 220, 9 OMisc 154, 223 NE(2d) 838 (MC).

13. The superintendent of the Ohio state reformatory has no right to refuse to receive a person committed to that institution by a court having general jurisdiction to try felonies, even though he has reason to believe that the person committed was under eighteen years of age at the time of his arraignment and conviction: 1944 OAG No.6813.

14. A person, who may be a child under eighteen years of age, charged with a crime in this state and who fled to another state, may be returned to this state upon requisition of the governor, as provided in

GC §§ 109-1 to 109-31 (RC §§ 2963.01 to 2963-27). Upon the return of such person, if he was a child at the time the crime was committed, he should be taken before the juvenile judge or, if taken before any other court, such other court is required to transfer the case to the juvenile judge: 1945 OAG No.395.

DECISIONS UNDER FORMER GC § 1659

15. Habeas corpus will not lie to secure the discharge of a minor who was indicted for a felony and convicted in the court of common pleas, but did not challenge the jurisdiction of the court until motion for new trial, or prosecute error, on the ground that he was under eighteen years of age and should have been first taken before the juvenile court, in accordance with the provisions of GC § 1659 (see now RC § 2151.25): *In re Pharr*, 10 App 395, 31 OCA 465.

15.1 Commission of a felony by a minor makes him a delinquent; but this does not prevent his indictment, or his trial by the common pleas, unless the juvenile court acquires jurisdiction first: *Gerak v. State*, 22 App 357, 153 NE 902.

16. One over eighteen years old when tried for crime committed when under such age held not entitled to have trial transferred to juvenile court: *Scopillitti v. State*, 41 App 221, 180 NE 740.

17. This section applies only to arrests in criminal cases: *Durst v. Griffith*, 43 App 44, 182 NE 519, 37 OLR 183.

18. Bastardy proceeding is "civil proceeding," and therefore one arrested therein need not be taken before juvenile judge: *Durst v. Griffith*, 43 App 44, 182 NE 519, 37 OLR 183.

18.1 If a minor under the age of eighteen is indicted for an offense such as murder in the first degree such minor may interpose as a plea in abatement the fact that he is under the age of eighteen and that he is accordingly within the exclusive jurisdiction of the juvenile court: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

19. A juvenile offender under the age of eighteen who is charged with a felony and who fails to interpose such objection at his preliminary examination before the justice of the peace, does not waive such objection, since neither the justice of the peace nor the court of common pleas had jurisdiction over him unless he was first brought before the juvenile court and bound over in the discretion of the juvenile court to the court of common pleas under GC § 1681 (see now RC § 2151.26). Such defense may therefore be interposed for the first time in the court of common pleas, after indictment, by a plea in abatement: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

20. A minor child under the age of eighteen years is arrested and taken before a justice of the peace and the latter transfers the case to the judge of the juvenile court as provided in GC § 1659 (see now RC § 2151.25); costs are chargeable in favor of the justice of the peace and the constable and should be paid as provided in GC § 1682 (see now RC § 2151.54): 1919 OAG vol.1, p.260.

21. When a justice of the peace has transferred the case of a minor to the juvenile court, fees and costs of the justice of the peace and his constable, originally made, are to follow the case for allowance and payment under GC § 1682 (see now RC § 2151.54): 1935 OAG No.4109.

§ 2151.26 Relinquishment of jurisdiction for purpose of criminal prosecution.

(A) After a complaint has been filed alleging that a child is delinquent by reason of having committed an act which would constitute a felony if committed by an adult, the court at a hearing

may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making the following determinations:

(1) The child was fifteen or more years of age at the time of the conduct charged;

(2) There is probable cause to believe that the child committed the act alleged;

(3) After an investigation including a mental and physical examination of such child made by the Ohio youth commission, a public or private agency, or a person qualified to make such examination, that there are reasonable grounds to believe that:

(a) He is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;

(b) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.

(B) The child may waive such examination if the court finds such waiver competently and intelligently made. Refusal to submit to a mental and physical examination by the child constitutes waiver thereof.

(C) Notice in writing of the time, place and purpose of such hearing shall be given to his parents, guardian, or other custodian and his counsel at least three days prior to the hearing.

(D) No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen unless the child has been transferred as provided in this section. Any prosecution that is had in a criminal court on the mistaken belief that the child was over eighteen years of age at the time of the commission of the offense shall be deemed a nullity and the child shall not be considered to have been in jeopardy on the offense.

(E) Upon such transfer the juvenile court shall state the reasons therefor and order such child to enter into a recognizance with good and sufficient surety for his appearance before the appropriate court for such disposition as such court is authorized to make for a like act committed by an adult. Such transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint.

HISTORY: 133 v H 320 (E# 11-19-69); 134 v S 325. E# 1-14-72.

Analogous in part to former RC § 2151.26, repealed, 133 v H 320.

Text Discussion

2 *Anderson Fam. L.* § § 2.3, 9.47-9.56.

Research Aids

Relinquishment of jurisdiction for purpose of criminal prosecution:

O-Jur2d: *Juvenile Courts* § 22; *Criminal Practice and Procedure* § 40

ALR

Homicide by juvenile as within jurisdiction of juvenile court. 48 ALR2d 663.

Constitutional or statutory provisions regarding release on bail as applicable to children subject to juvenile delinquency act. 160 ALR 287.

Law Reviews

Practice and procedure in the Juvenile Court. Walter G. Whitlatch. 21 ClevBJ (No. 7) 107.

Constitutional guarantees in the juvenile court. Hon. Benjamin S. Schwartz. 39 OBar (No. 47) 1385.

The Juvenile Court; a court of law. Hon. Walter G. Whitlatch. 18 WestResLRev 1239.

Juvenile court; "neglected child" of the judiciary. Hon. Albert A. Woldman. 37 ClevBJ (No. 11) 257.

Charges against adult offenders in the Juvenile Court. Judge Don J. Young, Jr. 32 OBar (No. 11) 224.

Waiver of jurisdiction in juvenile courts. Comment. 30 OSLJ 132.

Juvenile courts—burden of proof—where a juvenile is charged with misconduct which would be criminal if committed by an adult the misconduct is to be proved by a preponderance of the evidence. Case note. 37 CinLRev 851.

Juvenile courts; waiver of jurisdiction. Case note. 31 OSLJ 623.

In re Becker: Appealability of a relinquishment of jurisdiction order of the juvenile court. Case Note. 2 ONorthLRev 382.

Ohio Rules

This section is affected by Juv. Rules 3 and 30(A), (B), (C), (E).

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See also case note 10.1 under RC § 2151.25.

1. Where the judge of the juvenile court after a hearing and examination, as required by this section, binds a minor under eighteen years of age accused of murder in the first degree over to the court of common pleas for such disposition as the latter court is authorized to make for a like act committed by an adult, and such minor after indictment by a grand jury and a plea of not guilty upon arraignment, appears before the judge of the common pleas court presiding at the time in the trial of criminal cases in open court with counsel of his own choosing, elects to be tried by the court without a jury by signing in open court a waiver (GC § 13442-4 [RC § 2945.05]), and who later appears with his counsel before a three-judge court (GC § 13442-5 [RC § 2945.06]), makes application to such judges for permission to withdraw his former plea of not guilty and to enter a plea of

guilty and such judges are satisfied that defendant has an intelligent understanding of the effect of his plea of guilty and waiver of trial by jury, no error may be predicated on the refusal of a trial by jury after such court has determined the degree of crime and pronounced sentence accordingly: *State v. Frohner*, 150 OS 53, 37 OO 406, 80 NE(2d) 868.

2. Pursuant to this section, as it existed immediately prior to November 19, 1969, where the evidence before a juvenile court was sufficient to support a finding that there was probable cause to believe a delinquent child had committed an act which could be a felony if committed by an adult, that court could properly bind the child over to the court of common pleas: *In re Jackson*, 21 OS(2d) 215, 50 OO(2d) 447, 257 NE(2d) 74.

3. Pursuant to this section, as it existed immediately prior to November 19, 1969, where a juvenile was charged with being a delinquent child, and where the juvenile court sought to bind that child over to the court of common pleas, the child must first have been found to be a delinquent child; and, if so found, the juvenile court must also have found that the child could not be rehabilitated within the exercise of the exclusive jurisdiction of the juvenile court: *In re Jackson*, 21 OS(2d) 215, 50 OO(2d) 447, 257 NE(2d) 74.

4. Revised Code § 2151.26 does not require specific language to be used by a juvenile court in journalizing its finding that a child is delinquent. It can do so without ever using the word "delinquent" as long as a reading of its entry reasonably apprises the reader that such a finding was made: *State v. Carter*, 27 OS(2d) 135, 56 OO(2d) 75, 272 NE(2d) 119.

5. The juvenile code vests jurisdiction of the juvenile court over the infant, not the crime: *In re Evans*, 67 App 66, 21 OO 93, 35 NE(2d) 887.

6. Revised Code §§ 2151.25 and 2151.26 provide the procedure to be followed where a juvenile is charged with an act which could be a felony if committed by an adult: *Mellott v. Alvis*, 109 App 486, 12 OO(2d) 23, 162 NE(2d) 623.

7. The order of a juvenile court pursuant to this section for a child charged with a felony to appear before the common pleas court, is a final order under RC § 2505.02: *State v. Yoss*, 10 OApp(2d) 47, 39 OO(2d) 81, 225 NE(2d) 275.

8. Under the provision of this section a child who is charged with committing a felony is entitled to a hearing at which he may present evidence as to his mental condition: *State v. Yoss*, 10 OApp(2d) 47, 39 OO(2d) 81, 225 NE(2d) 275.

9. A proceeding against a juvenile charged with being a delinquent is civil in nature and not criminal, and a preponderance of the evidence is sufficient to warrant a determination that such juvenile is a delinquent, notwithstanding that acts are charged which, if committed by an adult and proved beyond a reasonable doubt, would constitute a felony: *In re Whittington*, 13 OApp(2d) 11, 42 OO(2d) 39, 233 NE(2d) 333.

10. An order made under the provisions of RC § 2151.26 recognizing a juvenile to appear before the common pleas court is a final appealable order: *In re Whittington*, 17 OApp(2d) 164, 46 OO(2d) 237, 245 NE(2d) 364. [overruling 13 OApp(2d) 11, 42 OO(2d) 39, 233 NE(2d) 333 cited in Case Note 1.3 under this section in the bound volume.]

11. It is an abuse of discretion for the juvenile court under the provisions of RC § 2151.26 to recognize a fourteen-year-old youth to appear before the common pleas court when the evidence is insufficient

to support a finding that he is other than a fit subject for rehabilitation under the provisions of the juvenile code, and insufficient to support a finding that recognizing him to common pleas court is necessary as a protection to the public: *In re Whittington*, 17 OApp(2d) 164, 46 OO(2d) 237, 245 NE(2d) 364.

12. By virtue of the provisions of this section, a juvenile court must, as a condition of an order for a juvenile to appear before the common pleas court, find such juvenile to be a delinquent under RC §§ 2151.01 to 2151.54, inclusive: *In re Mack*, 22 OApp(2d) 201, 51 OO(2d) 400, 260 NE(2d) 619.

13. It is an abuse of discretion for a juvenile court to recognize a juvenile to the common pleas court, in the absence of a finding that such juvenile was a delinquent and where the evidence fails to disclose that such juvenile would not be a proper subject for rehabilitation under the provisions of the juvenile code, or that such recognizance was necessary as a protection to the public: *In re Mack*, 22 OApp(2d) 201, 51 OO(2d) 400, 260 NE(2d) 619 (1970).

14. An indigent juvenile offender is entitled to a record in a hearing conducted for the purpose of determining whether the juvenile court may waive jurisdiction and bind the offender over to the court of common pleas for criminal prosecution: *State v. Ross*, 23 OApp(2d) 215, 52 OO(2d) 332, 262 NE(2d) 427 (1970).

15. The commitment of a fifteen year old to a state institution pursuant to RC § 2151.26 for the purpose of examination is not an act for which a writ of prohibition will issue: *State ex rel. Harris v. Common Pleas Court*, 25 OApp(2d) 78, 54 OO(2d) 115, 266 NE(2d) 589.

16. The transfer of a case by the juvenile court to the common pleas court, pursuant to RC § 2151.26, permitting a child to be tried as an adult, does not violate any constitutional rights of such child: *State v. Anderson*, 28 OApp (2d) 234, 57 OO(2d) 345, 277 NE(2d) 64.

17. What constitutes "reasonable grounds" for relinquishing jurisdiction under RC § 2151.26(A)(3) is within the sound discretion of the court, after an "investigation" is made: *State v. Carmichael*, 35 OS(2d) 1, 64 OO(2d) 1, 298 NE(2d) 568 (1973).

18. A hearing under RC § 2151.26 is a preliminary stage of the juvenile judicial process and contemplates that the court should have considerable latitude within which to determine whether it should retain jurisdiction: *State v. Carmichael*, 35 OS(2d) 1, 64 OO(2d) 1, 298 NE(2d) 568 (1973).

19. An order by a juvenile court, pursuant to RC § 2151.26, transferring a child to the court of common pleas for criminal prosecution, is not a final appealable order: *In re Becker*, 39 OS(2d) 84, 68 OO(2d) 50, 314 NE(2d) 158 (1974).

20. When a minor is held by the juvenile court for acts which would be a felony, and the juvenile court relinquishes jurisdiction over the minor, the 90-day time limit of RC § 2945.71 for bringing him to trial as an adult felon starts to run at the time the juvenile court relinquishes jurisdiction: *State ex rel. Williams v. Court of Common Pleas of Lucas County*, 42 OS(2d) 433, 71 OO(2d) 410, 329 NE(2d) 680 (1975).

21. In no case, however serious, is the juvenile court justified in transferring a case to the criminal courts unless the child's own good and the best interests of the state cannot be attained by the juvenile court's retaining jurisdiction: *In re Heist*, 11 OO 537 (JC).

22. The juvenile court having once waived jurisdiction to handle a case under the juvenile code must order further proceedings under the regular procedural provisions of the criminal law: *In re Davis*, 22 OO(2d) 108, 179 NE(2d) 198 (JC).

23. The determination of the juvenile court whether to waive its exclusive jurisdiction over a juvenile charged with what will be serious criminal offenses if he permits the minor to be tried as though an adult is a critically important action determining vitally important statutory rights of the juvenile: *Kent v. United States*, 383 US 541, 40 OO(2d) 270, 16 LEd(2d) 84, 86 Sct 1045.

24. The juvenile court's discretion to waive its exclusive jurisdiction over a child and remit him for trial as though an adult assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness: *Kent v. United States*, 383 US 541, 40 OO(2d) 270, 16 LEd(2d) 84, 86 Sct 1045.

25. The provision of the juvenile court act of the District of Columbia, that in order to waive its exclusive jurisdiction over a juvenile, the court must make a "full investigation" and that its records be available to persons having a legitimate interest in the protection of the child, when read in the context of the constitutional principles relating to due process and the assistance of counsel, entitle the juvenile to a hearing on the question of such waiver, to access by his counsel to records which presumably are considered by the court, and to a statement of the reasons for the court's decision sufficient to enable meaningful appellate review thereof: *Kent v. United States*, 383 US 541, 40 OO(2d) 270, 16 LEd(2d) 84, 86 Sct 1045.

26. Where an Ohio court has not had the opportunity to assess the impact of the Gault decision on petitioner's claim, it is appropriate for the Supreme Court of the United States to vacate the judgment of the Ohio court and remand the case for reconsideration: *In re Whittington*, 391 US 341, 45 OO(2d) 31, 20 LEd(2d) 625, 88 Sct 1507.

27. The case of a boy between the ages of sixteen and twenty-one who has committed an act which, if committed by an adult, would be a felony, may be transferred to the common pleas court. If the said boy is found guilty of the felony charged, it is then the duty of the court to commit the boy to the Ohio state reformatory: 1938 OAG No.3439.

28. If the juvenile court decides not to transfer the case but determines that the case should be disposed of by the juvenile court, the judge may commit the delinquent boy to any of the places and institutions, penal or otherwise, mentioned in GC § 1639-30 (RC § 2151.35): 1938 OAG No.3439.

DECISIONS UNDER FORMER GC § 1681

29. Where a felony charge against a minor is transferred from the juvenile court to the common pleas court under GC § 1681 (see now RC § 2151.26), the grand jury is empowered to return any indictment proper under the facts: *State v. Klingenger*, 113 OS 418, 149 NE 395.

30. This section is discretionary and not mandatory, and a delinquent child, charged with a felony, may be committed as provided in GC § 1652 (see now RC § 2151.35) or recognized to the court of common pleas, subject to the requirements of the general criminal laws of the state, at the discretion of the juvenile judge: *Leonard v. Licker*, 3 App 377, 23 CC(NS) 442, 26 CD 427 [citing *Prescott v. State*, 19 OS 184].

31. General Code § 1652 (see now RC § 2151.35) is not in conflict with this section. General Code § 1652 (see now RC § 2151.35) provides a different place for the confinement of delinquent children over sixteen years of age from the place of confinement to which other delinquent children may be committed,

namely, to the Ohio state reformatory; while this section provides that delinquent children of any age charged with a felony may be indicted and subjected to the provisions of the general criminal statutes: *Leonard v. Licker*, 3 App 377, 23 CC(NS) 442, 26 CD 427 [citing *Prescott v. State*, 19 OS 184].

32. The fact that, under the juvenile court act (GC § 1639 et seq), the commission of a felony by a minor constitutes him a delinquent and authorizes such court to take charge of him as such delinquent, does not relieve him of the consequences of his crime, or abridge the right of the grand jury to indict him for such crime, or the right of the common pleas court to try him for such crime, where the juvenile court does not acquire jurisdiction of him for such delinquency before the common pleas court acquires jurisdiction of him for such felony: *Gerak v. State*, 22 App 357, 5 OLA 761, 153 NE 902.

33. Refusal by a court of domestic relations to hear the case of an infant charged with felony, leaves it in common pleas, and is the equivalent of transferring the case to the common pleas court under GC § 1681 (see now RC § 2151.26): *State ex rel Brown v. Hoffman*, 23 App 348, 155 NE 499.

34. This section, which authorizes the judge of the juvenile court to bind over to the court of common pleas a delinquent child which is charged with a felony, is discretionary and not mandatory; and the judge of the juvenile court may commit a child which is charged with a felony to the custody of a probation officer, to a suitable home or to a proper industrial school in his discretion: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199 [citing *Leonard v. Licker*, 23 CC(NS) 442].

35. A juvenile offender under the age of eighteen who is charged with a felony and who fails to interpose such objection at his preliminary examination before the justice of the peace, does not waive such objection, since neither the justice of the peace nor the court of common pleas had jurisdiction over him unless he was first brought before the juvenile court and bound over in the discretion of the juvenile court to the court of common pleas under this section. Such defense may therefore be interposed for the first time in the court of common pleas after indictment by a plea in abatement: *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

36. This section is discretionary and not mandatory. The division of domestic relations may either try the juvenile for delinquency or bind him over to the court of common pleas for "indictment" etc: *State v. Wessel*, 28 OLR 104 (CP).

§ 2151.27 Complaint.

Any person having knowledge of a child who appears to be a juvenile traffic offender or to be delinquent, unruly, abused, neglected, or dependent may, with respect to such child, file a sworn complaint in the juvenile court of the county in which such child has a residence or legal settlement, or in which such traffic offense, delinquency, unruliness, abuse, neglect, or dependency occurred. Such sworn complaint may be upon information and belief, and in addition to the allegation that the child is delinquent, unruly, abused, neglected, dependent, or a juvenile traffic offender, the complaint must allege the particular facts upon which the allegation of delinquency,

unruliness, abuse, neglect, dependency, or juvenile traffic offender is based.

Whenever a child, before arriving at the age of eighteen years, allegedly commits an act for which he may be adjudged delinquent, unruly, or a juvenile traffic offender, and the specific complaint thereon is not filed or a hearing held until after said child arrives at the age of eighteen years, the court has jurisdiction to hear and dispose of such complaint, as if the complaint were filed and hearing held before such child arrived at the age of eighteen years.

If the complainant in an abuse, neglect, or dependency case is requesting permanent custody of the child or children, the complaint shall contain a prayer specifically requesting such custody.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 85. Eff 11-28-75.

Analogous in part to former RC § 2151.27, repealed 133 v H 320.

Cross-References to Related Sections

See RC §§ 2151.31.4, 2151.33 which refer to this section.

Comparative Legislation

Procedure in children's cases:

- Cal.—Welf & Inst Code, § 650
- Ill.—Rev Stat, ch 37, § 704-1
- Ind.—Burns' Stat, § 33-12-2-13
- Ky.—KRS, § 208.070
- Mich.—MCLA, § 712A.11
- N.Y.—Jud—Family Court, § 731
- Pa.—Purdon's Stat, Tit. 11, § 50-314
- Fla.—FSA, § 39.04

Text Discussion

2 Anderson Fam. L. §§ 2.2, 6.3, 6.6-6.10, 11.32.

Research Aids

Complaint:

- O-Jur2d: Juvenile Courts §§ 36, 36.1
- Am-Jur2d: Juvenile Courts etc §§ 40-42

Guardian ad litem—when appointed:

- O-Jur2d: Juvenile Courts § 36.5

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULRev 53 (1973).

Ohio's mandatory reporting statute for cases of child abuse. Mario C. Ciano. 18 WestResLRev 1405.

Ohio Rules

This section is affected by Juv. Rule 10(A), (B), (C).

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See also case note 18 under RC § 2151.23.

1. The certification of a cause from the probate court to the juvenile court under the provisions of GC § 10512-21 (RC § 3107.12), does not constitute a complaint against the parents that the child which was the subject of the adoption proceedings is a dependent, delinquent or neglected child, and a judgment by the juvenile court finding that such child is a dependent child, made without the filing of a complaint against the parents, is void ab initio for lack of jurisdiction: *State ex rel Clark v. Allaman*, 154 OS 296, 43 OO 190, 95 NE(2d) 753.

1.1 A complaint under Juv.R. 10 and RC § 2151.27 alleging that a child is dependent must state the essential facts which bring the proceeding within the jurisdiction of the court: *In re Hunt*, 46 OS(2d) 378, 75 OO(2d) 450, 348 NE(2d) 727 (1976).

2. A complaint filed under this section which alleges that a child under twenty months of age is dependent is sufficiently definite: *In re Anteau*, 67 App 117, 21 OO 129, 36 NE(2d) 47.

3. Under a complaint filed in the common pleas court, division of domestic relations, under this section, that a child of separated parents is dependent, a judgment of the court that the child is dependent and awarding its custody to its father "until further order of the court," is a final order from which appeal to the court of appeals may be taken: *In re Anteau*, 67 App 117, 21 OO 129, 36 NE(2d) 47.

4. Where an affidavit is filed in support of a motion for a new trial, alleging that the child was a neglected child within the meaning of the provisions of this section, on which charges a hearing was had, the juvenile court has jurisdiction in such matter and may grant a motion for new trial: *State ex rel Sparto v. Williams*, 86 App 377, 41 OO 474, 86 NE(2d) 501 [affirmed, 153 OS 64].

5. Where a petition for the adoption of an illegitimate child was filed in the probate court and the child's mother gave her consent in writing to such adoption, but the petitioners withdrew their petition before any action thereon was taken, the court, upon issuing an order that the petition be withdrawn and the cause dismissed, is without authority to certify the cause to the juvenile court for disposition under GC § 10512-21; in such case, there was no proper basis for certification from the probate court to the juvenile court, and, no complaint having been filed charging the child to be a dependent child or any other form of complaint originating in the juvenile court, that court was without jurisdiction to determine that the child was a dependent child or to make an order depriving the mother of custody and committing the child to the custody of a detention home: *State ex rel Clark v. Allaman*, 87 App 101, 42 OO 330, 90 NE(2d) 394.

6. Under this section, the juvenile court of the county in which acts constituting neglect or dependency of a minor child occur, has jurisdiction over complaints concerning such child, and it is immaterial whether the parent or minor child was a non-resident of the county in which the complaint is filed: *In re Belk*, 97 App 114, 55 OO 330, 123 NE(2d) 757.

7. In a proceeding in the juvenile court, instituted by the filing of a complaint under the provisions of RC § 2151.27, a finding by the court that a child is "neglected" in that it "lacked proper parental care because of the faults and habits of his parents" (RC § 2151.03(B)), and "dependent," in that its "condition and environment . . . is such as to warrant the court . . . in assuming his guardianship" (RC § 2151.04(C)), must be based on evidence with respect to whether the child was receiving proper parental

care in a proper environment in its home at the time of the hearing: *In re Minton*, 112 App 361, 16 OO(2d) 283, 76 NE(2d) 252.

8. A proceeding, instituted in the juvenile court under the provisions of RC § 2151.27, the so-called "neglected child" statute, may not be used by the complainant either to force an adoption or as a substitute for an adoption proceeding: *In re Minton*, 112 App 361, 16 OO(2d) 283, 76 NE(2d) 252.

9. Where a neglected-child proceeding is instituted in the juvenile court, pursuant to this section by a parent of such child, and a divorce action is later instituted by such parent, the juvenile court has exclusive original jurisdiction to determine whether the child is neglected, the power to determine his custody and the authority to place the child with a relative: *In re Small*, 114 App 248, 19 OO(2d) 128, 181 NE(2d) 503.

10. Revised Code § 3109.04, relating to the custody of children of separated or divorced parents, is not applicable to a neglected-child proceeding under this section: *In re Small*, 114 App 248, 19 OO(2d) 128, 181 NE(2d) 503.

11. An allegation in a motion filed in juvenile court seeking to have that court "determine and award the future care and custody" of a child, that "neither parent is a suitable person to have the care and custody of said child," does not constitute a charge that such child is "neglected" (RC § 2151.03) or "dependent" (RC § 2151.04) and is not sufficiently definite to constitute the "complaint" necessitated by RC § 2151.27: *Union County Child Welfare Board v. Parker*, 7 OApp(2d) 79, 36 OO(2d) 162, 218 NE(2d) 757.

12. Proceedings, wherein the juvenile court determines, in response to a motion, that a child is a neglected and dependent child and orders such child placed in the temporary custody of the county welfare board, are void ab initio for want of a complaint filed as prescribed by this section. Such proceedings cannot be the foundation for a determination of dependency or neglect necessary to support an order awarding custody of such child: *Union County Child Welfare Board v. Parker*, 7 OApp(2d) 79, 36 OO(2d) 162, 218 NE(2d) 757.

13. An application for a writ of habeas corpus will be denied, where a complaint is duly filed in the county of legal residence, pursuant to this section, charging a child with being a dependent or neglected child, notwithstanding the court of common pleas of another county in this state, as a result of a divorce action there heard, gave custody of the child to the mother, who subsequently moved with the child to the county where the affidavit of dependency and neglect was filed: *James v. Child Welfare Board*, 9 OApp(2d) 299, 38 OO(2d) 347, 224 NE(2d) 358.

14. An Ohio juvenile court, in a dependency proceeding pursuant to RC § 2151.27 et seq., has no jurisdiction to interfere with a mother's legal custody of her children, in the absence of proof, and a finding, of unfitness of such parent, merely for the purpose of releasing such children to the officers of the court of a foreign state. The Ohio juvenile court need not give full faith and credit to a Michigan decree where that decree was obtained by the husband in an ex parte custody determination, subsequent to a divorce decree, in which the Michigan court had no personal jurisdiction over the non-resident wife: *In re Messner*, 19 OApp(2d) 33, 48 OO(2d) 31, 249 NE(2d) 532.

15. A minor seventeen years of age, who is being detained in a county detention home as the result of

the filing of a delinquency affidavit under GC § 1639-23 (RC § 2151.27) et seq., is being lawfully detained; and since he is not charged with an "offense" he is not entitled to release on bail under the provisions of Art. I, § 9 of the Ohio constitution: *State ex rel Peaks v. Allaman*, 51 OO 321, 115 NE(2d) 849 (App).

16. Jurisdiction and procedure in complaints involving a child are defined and controlled by RC § 2151.27 et seq.: *State ex rel Burchett v. Juvenile Court*, 28 OO(2d) 116, 194 NE(2d) 912 (App).

17. Under the provisions of this section jurisdiction of the juvenile court rests on either the residence of the child in the county where the complaint has been filed, or a showing that the acts constituting neglect or dependency of the minor child have occurred in that county: *State ex rel Burchett v. Juvenile Court*, 28 OO(2d) 116, 194 NE(2d) 912 (App).

18. The certification of the record of the court of common pleas to the juvenile court in which it is shown that the children of one of the parties to a divorce action is being neglected amounts to the filing of a complaint under this section: *Hartshorne v. Hartshorne*, 89 OLA 243, 185 NE(2d) 329 (App).

19. In a dependency proceeding, GC §§ 1639-4, 1639-21, 1639-35 (RC §§ 2151.04, 2151.16, 2151.38) and this section, there must be legal service upon a minor parent and there must be a guardian ad litem to represent her as prerequisites to any order of dependency against her child in order to satisfy the requirements of due process: *In re Hobson*, 62 NE(2d) 510 (App).

20. In a proceeding to establish the dependency of a child, GC § 1639-23 makes the complaint sufficiently definite by the simple use of the word "dependent": *In re Duncan*, 62 OLA 173, 107 NE(2d) 256 (App).

21. Under the authority derived from RC §§ 2151.23, 2151.27 and 2151.35, the juvenile court has the authority to hear and determine the case of a neglected child notwithstanding the fact that the child is at the time within the continuing jurisdiction of the common pleas court by virtue of a divorce decree: *In re Gail*, 12 OMisc 251, 41 OO(2d) 341, 231 NE(2d) 253 (JC).

22. The fact that the juvenile reached the age of eighteen on the day after the complaint was filed in juvenile court did not alone deprive that court of jurisdiction: *In re Davis*, 22 OO(2d) 108, 179 NE(2d) 198 (JC).

23. The juvenile court having once waived jurisdiction to handle a case under the juvenile code must order further proceedings under the regular procedural provisions of the criminal law: *In re Davis*, 22 OO(2d) 108, 179 NE(2d) 198 (JC).

24. A minor may be brought to the attention of the juvenile court on a petition that merely alleges that he is a delinquent child: *In re L——*, 25 OO(2d) 369, 194 NE(2d) 797 (JC).

25. Where a petition is filed in which specific allegations are stated and in which it is alleged that the minor did assault a police officer about the face and body by striking him with fists, it is necessary to establish by a preponderance of the evidence that the allegations of the petition are true: *In re L——*, 25 OO(2d) 369, 194 NE(2d) 797 (JC).

26. There is no language in RC § 3107.12 which indicates that a certification of a case by the probate court to the juvenile court is to be considered a complaint: *In re Robert O.*, 28 OO(2d) 165, 199 NE(2d) 765 (JC).

27. The fact that the mother initially gave up her child for the purpose of adoption does not constitute such rejection of the child as to warrant a finding that the child is a neglected child: *In re Robert O.*, 28 OO(2d)

165, 199 NE(2d) 765 (JC).

28. Under this section, service on the parents is not needed to give jurisdiction to the juvenile court if the neglect or delinquency of the minor children took place in the county assuming jurisdiction: *In re Goshorn*, 82 OLA 599, 167 NE(2d) 146 (JC).

DECISIONS UNDER FORMER GC § 1647

29. A court of common pleas, having made an order concerning the disposition of a minor child of parents involved in divorce proceedings, has continuing jurisdiction of such child, precluding a juvenile court from taking independent jurisdiction thereof. If the best interests of the child demand a change of custody, the proper procedure is by application to the common pleas court to modify its former order: *Cleveland Prot. Orphan Asylum v. Soule*, 3 App 67, 24 CC(NS) 151, 26 CD 135, 60 Bull 449 (Ed), 60 Bull 473 (Ed) [citing *In re Crist*, 89 OS 33; *Children's Home v. Fetter*, 90 OS 110].

30. In a prosecution for contributing to the delinquency of a minor, the affidavit, in order to charge a crime, must allege that the minor is under eighteen years of age, and is a delinquent within the meaning of the statute, and that the defendant is guilty of contributing to such delinquency: *Willison v. State*, 3 App 244, 21 CC(NS) 526, 25 CD 558.

31. Service of citation upon the parent of a child in a proceeding under GC § 1647 (see now RC § 2151.27) is not a condition precedent to jurisdiction over the child: *Bleier v. Crouse*, 13 App 69, 31 OCA 453.

32. It is true that the statute, GC § 1647, provides that it shall be sufficient in an affidavit to set out that a child is a dependent or delinquent child. But where the affiant elects to set out the particular wherein it is claimed that the child is dependent, and it is entirely insufficient to constitute dependency, [the court does not acquire] jurisdiction: *Smith v. Privette*, 13 OLA 291 (App).

33. Under authority of this section, it is sufficient if the complainant defines the child's condition by the words of the statute without setting out the details: *In re Hayes*, 28 OLA 154, 23 NE(2d) 956.

34. Whenever a child is alleged to be dependent, a juvenile court is authorized to receive evidence on all matters pertaining to that question, even though all facts of dependency are not alleged in complaint: *In re Decker*, 28 NP(NS) 433.

[§ 2151.27.1] § 2151.271 Transfer to juvenile court of another county.

If the child resides in a county of the state and the proceeding is commenced in a juvenile court of another county, that court, on its own motion or a motion of a party, may transfer the proceeding to the county of the child's residence upon the filing of the complaint or after the adjudicatory, or dispositional hearing, for such further proceeding as required. The court of the child's residence shall then proceed as if the original complaint had been filed in that court. Transfer may also be made if the residence of the child changes. The proceeding shall be so transferred if other proceedings involving the child are pending in the juvenile court of the county of his residence.

Whenever a case is transferred to the county of the child's residence and it appears to the

court of that county that the interests of justice and the convenience of the parties requires that the adjudicatory hearing be had in the county wherein the complaint was filed, the court may return the proceeding to the county wherein the complaint was filed for the purpose of such adjudicatory hearing. The court may thereafter proceed as to the transfer to the county of the child's legal residence as provided in this section.

Certified copies of all legal and social records pertaining to the case shall accompany the transfer.

HISTORY: 133 v H 320. EA 11-19-69.

Text Discussion

2 *Anderson Fam. L.* § 6.10.

Research Aids

Transfer of proceeding:

O-Jur2d: *Juvenile Courts* § 36

Ohio Rules

This section is affected by Juv. Rule 11.

§ 2151.28 Summons.

(A) After the complaint has been filed, the court shall fix a time for hearing, which, if the child is in detention, shall not be later than ten days after the filing of the complaint. It shall direct the issuance of a summons directed to the child except as provided by this section, the parents, guardian, custodian, or other person with whom the child may be and such other persons as appear to the court to be proper or necessary parties to the proceedings, requiring them to appear before the court at the time fixed to answer the allegations of the complaint. A child alleged to be abused, neglected, or dependent shall not be summoned unless the court so directs. A summons issued for a child who is under fourteen years of age and who is alleged to be a delinquent or unruly child or a juvenile traffic offender shall be served on his parent, guardian, or custodian in his behalf.

If the person who has physical custody of the child, or with whom the child resides, is other than the parent or guardian, then the parents and guardian shall also be summoned. A copy of the complaint shall accompany the summons.

If the complaint contains a prayer for permanent custody in a neglect or dependency case, the summons served on the parents shall contain an explanation that the granting of such custody permanently divests the parents of their parental rights and privileges.

(B) The court may endorse upon the summons an order directing the parents, or guardian of the child, or other person with whom the child may be to appear personally at the hearing and directing the person having the physical custody or control of the child to bring the child to the hearing.

(C) The summons shall contain a statement advising that any party is entitled to counsel in the proceedings and that the court will appoint counsel or designate a county public defender or joint county public defender to provide legal representation if the party is indigent.

(D) If it appears from affidavit filed or from sworn testimony before the court that the conduct, condition, or surroundings of the child are endangering his health or welfare or those of others, or that he may abscond or be removed from the jurisdiction of the court or will not be brought to the court, notwithstanding the service of the summons, the court may endorse upon the summons an order that a law enforcement officer shall serve the summons and shall take the child into immediate custody and bring him forthwith to the court.

(E) A party, other than the child, may waive service of summons by written stipulation.

(F) Before any temporary commitment is made permanent, the court shall fix a time for hearing and shall cause notice by summons to be served upon the parent or guardian of the child, or published, as provided in section 2151.29 of the Revised Code. Such summons shall contain an **explanation that the granting of permanent custody permanently divests the parents of their parental rights and privileges.**

(G) Any person whose presence is considered necessary and who is not summoned may be subpoenaed to appear and testify at the hearing. Any one summoned or subpoenaed to appear who fails to do so may be punished, as in other cases in the court of common pleas, for contempt of court. Persons subpoenaed shall be paid the same witness fees as are allowed in the court of common pleas.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 85 (Eff 11-28-75); 136 v H 164. Eff 1-13-76.

Analogous in part to former RC § 2151.28, repealed, 133 v H 320.

Cross-References to Related Sections

See RC § 2151.29 which refers to this section.

Text Discussion

2 Anderson Fam. L. § § 5.3, 6.17-6.19, 6.23, 8.26, 11.32.

Research Aids

Notice and service of process:

O-Jur2d: Juvenile Courts § § 35, 37, 37.5, 38, 39

Am-Jur2d: Juvenile Courts § 43

ALR

Constitutionality, construction, and application of statutory provision against use in evidence in any other case of records or evidence in juvenile court proceedings. 147 ALR 443.

Power of juvenile court to require children to testify. 151 ALR 1229.

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULRev 53 (1973).

The Juvenile Court; a court of law. Hon. Walter G.

Whitlatch. 18 WestResLRev 1239.

Ohio's mandatory reporting statute for cases of child abuse. Mario C. Ciano. 18 WestResLRev 1405.

Ohio Rules

This section is affected by Juv.R. 3, 15, 29.

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See also case note 30 under RC § 2151.27.

1. By virtue of the provisions of this section, the parents of a minor child or children are entitled to notice, actual or constructive, in a proceeding instituted in the juvenile court upon a complaint of dependency of such children. Unless such notice is given to the parents, the jurisdiction of the court does not attach, and a judgment of commitment rendered in such proceeding is void: In re Corey, 145 OS 413, 31 OO 35, 61 NE(2d) 892.

2. The mother of an illegitimate child is entitled to notice of a guardianship proceeding concerning the child, and where the sheriff's return of a citation for the mother shows that no service was made upon her and the record of the juvenile court fails to show a voluntary appearance by her or that service was made upon her by publication, the juvenile court is without jurisdiction over the child and its judgment of permanent commitment rendered in such proceeding is void ab initio, even though the entry of commitment recites "that the citation heretofore issued has been duly served, and all persons interested are now before the court": In re McLean, 65 App 106, 18 OO 327, 29 NE(2d) 425.

2.1 Revised Code §§ 2151.28 and 2151.31, a part of the juvenile court act, do not require a hearing as a condition precedent to the taking of a child into custody, pursuant to order of a juvenile court, during pendency of an action in such court: In re Jones, 114 App 319, 19 OO(2d) 286, 182 NE(2d) 631.

3. A father is a party to proceedings in a juvenile court in which his children are found to be neglected and in which temporary custody is given to the mother; and he is also a party to a subsequent proceeding in the same court modifying such temporary custody order and is entitled to appear in an appeal from such order and move to dismiss such appeal: In re Rule, 1 OApp(2d) 57, 30 OO(2d) 76, 203 NE(2d) 501.

4. Where a hearing is held under the provisions of this section, the juvenile court may deal with the child as provided therein even to the point of making an order for permanent custody, notwithstanding that the child is a ward of another court of this state by virtue of custody order arising out of a divorce action: James v. Child Welfare Board, 9 OApp(2d) 299, 38 OO(2d) 347, 224 NE(2d) 358.

5. Where only the father and mother were cited to appear, the court acquired jurisdiction only of the

parents and not of the children: *Pesta v. Pesta*, 45 OLA 631, 68 NE(2d) 234 (App).

6. When [a parent] was made defendant in the divorce action in the domestic relations court and was duly served with summons in that action, he was bound with knowledge that the divorce court had jurisdiction to make disposition of the child of the parties to that action. . . . [a]nd by his failure to appear in that action he is estopped from . . . claiming that the court was without jurisdiction to make the order here complained of: *In re McCoy*, 72 OLA 519, 135 NE(2d) 638 (App).

7. Regular legal notice by service of process on the parent is an indispensable prerequisite to jurisdiction of the juvenile court to make commitment of a minor child charged with being delinquent: *In re Flickinger*, 20 OO 224 (CP).

8. The parents of a minor child, in court by citation or notice, are parties to a proceeding before the juvenile court to determine whether such child is a neglected child and where the child is determined to be a neglected child and made a ward of the court and committed to the temporary custody of the county child welfare board, any resistance by the parents to the execution of such order, either active or passive, constitutes a contempt for which such parents may be punished by the court: *State v. Hershberger*, 77 OLA 487, 150 NE(2d) 671 (JC).

9. In a proceeding to determine whether a child is a neglected child, the parents, in court by citation or notice, are parties even though such proceeding is designated as an ex parte proceeding and they are parties to any order made therein: *State v. Hershberger*, 77 OLA 487, 150 NE(2d) 671 (JC).

10. The notice provision of the code of the juvenile court must be complied with before the court acquires jurisdiction of any child before it, and since parents are necessary parties to any proceedings concerning a child in the juvenile court they must either be served with the required citations or notices, or must enter their appearance in some other manner: *Mobley v. Allaman*, 89 OLA 473, 184 NE(2d) 707 (PC).

11. A court acquires jurisdiction over the person of a defendant either by service of process upon him, whereby he is brought into court against his will, or by his voluntary appearance and submission; an appearance for any purpose, except to object to the jurisdiction over the person, constitutes a submission to the jurisdiction of the court; appearance in court or participation in the trial subjects the defendant to the court's jurisdiction: *Mobley v. Allaman*, 89 OLA 473, 184 NE(2d) 707 (PC).

11.1 The sheriff is required to serve summons, notices, and subpoenas which are directed to him by the juvenile court: 1970 OAG No. 70-130.

11.2 In the event the juvenile court requests the summons, notices, or subpoenas to be served personally or whether the same is to be delivered by registered or certified mail, the sheriff's office is legally required to serve the same in accordance with the directions of the juvenile court: 1970 OAG No. 70-130.

11.3 If the person to be served summons, notices, and subpoenas of the juvenile court is out of the state and his address is known, service of summons may be made by the sheriff by delivering a copy to him personally or mailing a copy to him by registered or certified mail: 1970 OAG No. 70-130.

11.4 Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

12. All fact-finding hearings in juvenile court must measure up to the essentials of due process, including adequate and timely notice so that the child and his parents have opportunity to respond. In hearings which may result in commitment, the child is entitled to counsel

and must be informed of his legal rights, including privilege against self-incrimination, prior to a confession: *In re Gault*, 387 US 1, 40 OO(2d) 378, 18 LE(2d) 527, 87 SCt 1428.

DECISIONS UNDER FORMER GC § 1648

13. On grounds of public policy, an administrative or executive officer, whether he be constable, policeman, game warden, sheriff, or any other authorized officer of the state, whose duty it is under the law to serve the process of a court having jurisdiction of an offense sought to be charged in a complaint by affidavit, information or indictment, but which complaint is insufficient in law, is exempt from any liability arising from an imprisonment by virtue of such process, which is prima facie regular: *Brinkman v. Drolesbaugh*, 97 OS 171, 119 NE 451, LRA 1918F, 1132.

14. The words "other person having custody of such child," as used in GC § 1648 (see now RC § 2151.28), mean a person having the custody created by operation of law or awarded to such person by judicial order: *Rarey v. Schmidt*, 115 OS 518, 154 NE 914.

15. An order of a juvenile court declaring a minor to be dependent and awarding its custody to a stranger, obtained without service upon the parent, the guardian or a person having the legal custody of such child, confers upon such stranger no power to consent to its adoption: *Rarey v. Schmidt*, 115 OS 518, 154 NE 914.

16. Under GC § 1648 (see now RC § 2151.28), the mother of an illegitimate child must be notified of proceedings as to dependency; if notice is not given, jurisdiction does not attach, and the judgment is void. The prerequisites to notice by publication are jurisdictional: *Lewis v. Reed*, 117 OS 152, 157 NE 897.

18. In case of arrest of a minor, upon a warrant issued by a juvenile court, arising out of a complaint charging such minor with delinquency, the juvenile court has jurisdiction of the proceedings even though a citation has not been issued to the parents, guardian or other person having custody and control of such child, or with whom it may be: *State ex rel Heth v. Moloney*, 126 OS 526, 186 NE 362.

19. Under this section the mother of a child is entitled to notice, actual or constructive, of proceedings upon a complaint of dependency instituted in the juvenile court with reference to such child; and when a mother appears at and participates in a hearing in which the dependency of the child is considered, she waives all prior notice of proceedings upon such complaint of dependency to which she was entitled under the statute: *Ex parte Province*, 127 OS 333, 188 NE 550.

20. A parent, who has not been cited, under GC § 1648 (see now RC § 2151.28), must seek remedy in the first instance in the juvenile court, of which the child is a ward: *Bleier v. Crouse*, 13 App 69, 31 OCA 453.

21. Service of citation upon the parent of a child in a proceeding under GC § 1648 (see now RC § 2151.28), is not a condition precedent to jurisdiction over the child: *Bleier v. Crouse*, 13 App 69, 31 OCA 453.

22. Where mother and reputed father of dependent child were beyond the state, and custody was in an orphan asylum, publication of citation (GC § 1648 [see now RC § 2151.28]) was held sufficient, without an affidavit that service could not be made: *In re Veselich*, 22 App 528, 154 NE 55.

23. Where warrant was issued for infant daughter and subpoena was issued for mother, and mother appeared at hearing, the mother, under GC § 1648 (see now RC § 2151.28), received due notice in depend-

ency proceeding against daughter: In re Cunningham, 27 App 306, 160 NE 733.

24. Where an affidavit charging delinquency is filed in juvenile court against a minor, and service is duly had on said minor while he or she is yet under age, the fact that said minor becomes of age does not take away jurisdiction of said court to proceed against said minor as a juvenile delinquent person: 1920 OAG vol.1, p.296.

25. Construction of GC §§ 1643 and 1648 (see now RC §§ 2151.38 and 2151.28) concerning the authority of the juvenile court for recommitment or adoption of children under age; citation to parents or guardian is not necessary where a judge changes a temporary order to a permanent one: 1925 OAG p.283.

26. While this section provides for an affidavit, and not for an indictment, it is not invalid under Art. I, § 10 of the constitution of Ohio which provides that the accused can be held to answer for an infamous crime only upon presentation by the grand jury; since delinquency is not made a crime by GC § 1644 (see now RC § 2151.02): In re Januszewski, 196 Fed 123, 10 OLR 151.

[§ 2151.28.1] § 2151.281 Guardian ad litem.

The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent, unruly, or dependent child when:

(A) The child has no parent, guardian, or legal custodian;

(B) The court finds that there is a conflict of interest between the child and his parent, guardian, or legal custodian.

The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged abused or neglected child.

In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child where the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of such parent.

The court shall require such guardian ad litem to faithfully discharge his duties, and upon his failure to do so shall discharge him and appoint another. The court may fix compensation for the service of the guardian ad litem which shall be paid from the treasury of the county.

A parent who is eighteen years of age or older and not mentally incompetent shall be deemed sui juris for the purpose of any proceeding relative to his child alleged or adjudicated to be an abused, neglected, or dependent child.

In any case wherein a parent of a child alleged or adjudicated to be an abused, neglected, or dependent child is under eighteen years of age, the parents of said parent shall be summoned to appear at any hearing respecting the alleged or adjudicated to be an abused, neglected, or dependent child.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 85 (Eff 11-28-75).

Text Discussion

2 Anderson Fam. L. § 4.12.

Research Aids

Guardian ad litem:

O-Jur2d: Juvenile Courts § 36.5.

Ohio Rules

This section is affected by Juv.R. 2, 3, 4.

§ 2151.29 Service of summons.

Service of summons, notices, and subpoenas, prescribed by section 2151.28 of the Revised Code, shall be made by delivering a copy to the person summoned, notified, or subpoenaed, or by leaving a copy at his usual place of residence. If the juvenile judge is satisfied that such service is impracticable, he may order service by registered or certified mail. If the person to be served is without the state but he can be found or his address is known, or his whereabouts or address can with reasonable diligence be ascertained, service of the summons may be made by delivering a copy to him personally or mailing a copy to him by registered or certified mail.

Whenever it appears by affidavit that after reasonable effort the person to be served with summons cannot be found or his post-office address ascertained, whether he is within or without a state, the clerk shall publish such summons once in a newspaper of general circulation throughout the county. The summons shall state the substance and the time and place of the hearing, which shall be held at least one week later than the date of the publication. A copy of the summons and the complaint shall be sent by registered or certified mail to the last known address of the person summoned unless it is shown by affidavit that a reasonable effort has been made, without success, to obtain such address.

A copy of the advertisement, summons, and complaint, accompanied by the certificate of the clerk that such publication has been made and that such summons and complaint have been mailed as required by this section, is sufficient evidence of publication and mailing. When a period of one week from the time of publication has elapsed, the juvenile court shall have full jurisdiction to deal with such child as provided by sections 2151.01 to 2151.99, inclusive, of the Revised Code.

HISTORY: 133 v H 320. Eff 11-19-69.

Analogous in part to former RC § 2151.29, repealed, 133 v H 320.

Cross-References to Related Sections

See RC §§ 2151.28, 2151.30 which refer to this section.

Text Discussion

2 Anderson Fam. L. § 6.22.

Research Aids

Service:

O-Jur2d: Juvenile Courts §§ 37, 37.5, 38
Am-Jur2d: Juvenile Courts § 43

Ohio Rules

This section is affected by Juv.R. 16(A); see also Civ.R. 4(A), (C), (D), 4.1-4.6.

CASE NOTES AND OAG

See also case notes 11.1-11.3 under RC § 2151.28.

1. Where a minor child has neither legal guardian nor a custodian created by operation of law or by judicial order, judgment, or decree, other than a parent, and the residence of such parent is known, service, actual or constructive, must be had upon such parent before a juvenile court has jurisdiction to declare such child a dependent child: *Rarey v. Schmidt*, 115 OS 518, 154 NE 914.

2. An order of a juvenile court declaring a minor child to be a dependent child and awarding its custody to a stranger, obtained without service upon the parent, the guardian, or a person having the custody of such child by operation of law or awarded by a judicial order, judgment, or decree, confers upon such stranger no power to consent to the adoption of such child by any one: *Rarey v. Schmidt*, 115 OS 518, 154 NE 914.

3. Under GC § 1648, the mother of an illegitimate child is entitled to notice, actual or constructive, of proceedings upon a complaint of dependency instituted in the juvenile court in reference to such child. Until notice of such proceedings has been given to the mother, the jurisdiction of the juvenile court does not attach and a judgment of permanent commitment rendered in such dependency proceeding is void: *Lewis v. Reed*, 117 OS 152, 157 NE 897.

4. A juvenile court is without jurisdiction to make permanent a temporary commitment of a dependent or delinquent child unless notice of the time and place of the hearing upon such matter is served on the parent or guardian of such child either by delivering a copy to the person to be notified, by leaving a copy at his usual place of residence, by service by registered mail, or by publication, as provided and directed by this section: *In re Frinzl*, 152 OS 164, 39 OO 456, 87 NE(2d) 583.

5. In order to be valid, such notice must be served sufficiently in advance of the hearing to give the person to be notified a reasonable time to obtain counsel and prepare for participation in such hearing: *In re Frinzl*, 152 OS 164, 39 OO 456, 87 NE(2d) 583.

6. Where the only notice given to the mother of an adjudged dependent child, of a hearing to change such child's temporary commitment to a permanent one, was served on the mother within an hour before such hearing and she had no opportunity between the time of being served with the notice and the time of the hearing, to either prepare for such hearing or to engage counsel to represent her, such notice is insufficient in law and an order for permanent custody made at such hearing is void for want of jurisdiction of the court in making it, and an attack made upon it by an application for a writ of habeas corpus is direct and not collateral and is proper even though the judgment appears to be regular and valid upon its face [Paragraph four of the syllabus in *Lewis v. Reed*, 117 OS 152, approved and followed]: *In re Frinzl*, 152 OS 164, 39 OO 456, 87 NE(2d) 583.

7. Knowledge by a mother that her daughter was being held and that a complaint probably would be made is not sufficient notice, because this section specifically requires that service of citations, notices and subpoenas shall be made personally by delivery of the attested copies thereof to the persons cited: *In re Flickinger*, 20 OO 224 (CP).

§ 2151.30 Issuance of warrant. (GC § 1639-26)

In any case when it is made to appear to the juvenile judge that the service of a citation under section 2151.29 of the Revised Code will be ineffectual or the welfare of the child requires that he be brought forthwith into the custody of the juvenile court, a warrant may be issued against the parent, custodian, or guardian, or against the child himself.

HISTORY: GC § 1639-26; 117 v 520 (528). **EFF** 10-1-53.

Text Discussion

2 *Anderson Fam. L.* §§ 6.20-6.22.

Research Aids

Issuance of warrant:

O-Jur2d: Juvenile Courts § 35

Ohio Rules

This section is affected by Juv.R. 13(A), 15(D), (E), 16(B).

§ 2151.31 Apprehension, custody, and detention.

A child may be taken into custody:

(A) Pursuant to an order of the court under this chapter;

(B) Pursuant to the laws of arrest;

(C) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, as defined in section 2151.03 of the Revised Code, or is in immediate danger from his surroundings, and that his removal is necessary;

(D) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian.

Taking a child into custody shall not be deemed an arrest except for the purpose of determining its validity under the constitution of this state or of the United States.

A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the complaint unless his detention or care is required to protect the person and property of others or those of the child, or because the child may abscond or be removed from the jurisdiction of the court, or because he has no parents, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required, or because an order for his detention or shelter care has been made by the court pursuant to this chapter.

HISTORY: 133 v H 320. **EFF** 11-19-69.

Analogue in part to former RC § 2151.31, repealed 133 v H 320.

Cross-References to Related Sections

See RC §§ 2151.31.1, 2151.31.4 which refer to this section.

Text Discussion

2 Anderson Fam. L. § § 5.1-5.16.

Research Aids

Detention and shelter care:

O-Jur2d: Juvenile Courts § 40.6

Am-Jur2d: Juvenile Courts etc. § 35

Ohio Rules

This section is affected by Juv. Rules 6; 7(A).

CASE NOTES AND OAG

1. In an action for damages for false imprisonment, the plaintiff has the burden to prove that the detention or restraint caused by the defendant was an unreasonable detention or restraint and was not accidental or incidental to the welfare of the plaintiff: *Garland v. Dustman*, 19 OApp(2d) 292, 48 OO(2d) 408, 251 NE(2d) 153.

2. Under the provisions of RC §§ 2151.14 and 2151.31, it is the manifest duty of enforcement officers to co-operate with and assist the juvenile authorities in the performance of their duties when such officers are specifically requested to do so by the juvenile authorities; and such officers may avoid liability in an action for false imprisonment by showing that they were justified in the detention or restraint of the juvenile made under the specific direction and order of the juvenile authorities: *Garland v. Dustman*, 19 OApp(2d) 292, 48 OO(2d) 408, 251 NE(2d) 153.

3. A juvenile judge and the quasi-judicial officers of a juvenile court are immune from liability for causing the detention of juveniles when they are acting within the scope of their jurisdiction, and public policy will not justify or sanction liability in damages for false imprisonment against enforcement officers acting in good faith under the direct orders of such juvenile authorities: *Garland v. Dustman*, 19 OApp(2d) 292, 48 OO(2d) 408, 251 NE(2d) 153.

4. This section is not unconstitutional by virtue of the fact that release on bail is not mandatory, and where a child was not charged with an offense, his detention hereunder was lawful since the juvenile court act is neither criminal nor penal, but an administrative police regulation. *State ex rel Peaks v. Allaman*, 51 OO 321, 115 NE(2d) 849 (App).

5. A police officer may take a child into protective custody without process where he has reasonable grounds to believe said child to be a delinquent, neglected or dependent child, and it is not necessary that the child be committing a misdemeanor in the officer's presence or that probable cause exist for the officer to believe that the child has been involved in the commission of a felony: *In re L—*, 25 OO(2d) 369, 194 NE(2d) 797 (JC).

[§ 2151.31.1] § 2151.311 Procedure upon apprehension.

(A) A person taking a child into custody shall, with all reasonable speed, either:

(1) Release the child to his parents, guardian, or other custodian upon their written promise to bring the child before the court when requested by the court, unless his detention or shelter care appears to be warranted or required as provided in section 2151.31 of the Revised Code;

(2) Bring the child to the court or deliver him to a place of detention or shelter care designated by the court and promptly give notice thereof, together with a statement of the reason for taking the child into custody, to a parent, guardian, or other custodian and to the court. Any temporary detention or inquiry of the child necessary to comply with division (A) (1) of this section shall conform to the procedures and conditions prescribed by this chapter and rules of court.

(B) If a parent, guardian, or other custodian fails, when requested, to bring the child before the court as provided by this section, the court may issue its warrant directing that the child be taken into custody and brought before the court.

HISTORY: 133 v H 320 (Eff 11-19-69); 133 v H 931 (Eff 8-27-70); 134 v S 445. Eff 6-29-72.

Cross-References to Related Sections

See RC § 2151.31.4 which refers to this section.

Text Discussion

2 Anderson Fam. L. § § 5.10, 5.12.

Research Aids

Procedure upon apprehension:

O-Jur2d: Juvenile Courts § § 40, 40.5, 40.7

Release on bail:

Am-Jur2d: Juvenile Courts etc. § 36

Law Reviews

Due process in Ohio for the delinquent and unruly child. *Max Kravitz*. 2 CapitalULRev 53 (1973).

Ohio Rules

This section is affected by Juv. Rule 7(B), (C), (D).

CASE NOTES AND OAG

1. Confessions were admissible in evidence, even though the accused were not taken immediately before the juvenile court as directed by this section: *State v. Lowder*, 79 App 237, 34 OO 568, 72 NE(2d) 785.

2. The matter of unlawful search and seizure under the 4th Amendment of the Constitution of the United States applies to juveniles; and the burden of proving unlawful search and seizure is upon the one who filed the motion to suppress evidence: *In re Morris*, 29 OMisc 71, 58 OO(2d) 126, 278 NE(2d) 701 (JC 1971).

[§ 2151.31.2] § 2151.312 Place of detention.

(A) A child alleged to be delinquent, unruly, or a juvenile traffic offender may be detained only in the following places:

(1) A certified foster home or a home approved by the court;

(2) A facility operated by a certified child welfare agency;

(3) A detention home or center for delinquent children which is under the direction or supervision of the court or other public authority or of a private agency and approved by the court;

(4) Any other suitable place designated by the court.

A child may be detained in jail or other facility

for detention of adults only if the facility in division (A) (3) of this section is not available and the detention is in a room separate and removed from those for adults. The court may order that a child over the age of fifteen years be detained in a jail in a room separate and removed from adults if public safety and protection reasonably require such detention.

The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately when a child, who is or appears to be under the age of eighteen years, is received at the facility, and shall deliver him to the court upon request, or transfer him to a detention facility designated by the court.

If a case is transferred to another court for criminal prosecution, the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime.

(B) A child alleged to be neglected, abused, or dependent shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent unless upon order of the court.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 85 (Eff 11-28-75).

Text Discussion

2 Anderson Fam. L. §§ 5.10, 5.11, 5.25-5.28.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

Am-Jur2d: Juvenile Courts etc. § 35

Ohio Rules

This section is affected by Juv. Rule 7(I).

CASE NOTES AND OAG

1. The commitment of a fifteen year old to a state institution pursuant to RC § 2151.26 for the purpose of examination is not an act for which a writ of prohibition will issue: State ex rel Harris v. Common Pleas Court, 25 OApp(2d) 78, 54 OO(2d) 115, 266 NE(2d) 589.

2. If the county adult detention facility is designed with a space which is enclosed on all sides, that is distinct, set apart and disconnected so that no child over the age of fifteen placed in that space will come in contact or communication with any adult convicted of or arrested for a crime and the public interest and safety require the detention of such child when a delinquent detention facility is not available, the use of such adult facility is authorized by the Revised Code: 1970 OAG No. 70-015.

[§ 2151.31.3] § 2151.313 Fingerprints and photographs.

No child shall be fingerprinted or photographed in the investigation of a crime without the consent of the judge, except as provided in this section. Fingerprints of a child may be taken by law enforcement officers investigating the

commission of an act which would be a felony if committed by an adult when there is probable cause to believe that the child may have been involved in the felonious act being investigated.

Unless otherwise ordered by the court, originals and all copies of such fingerprints or photographs shall be delivered to the juvenile court after use for their original purpose for such further use and disposition as the court directs.

Fingerprints and photographs of a child shall be removed from the file and destroyed if a complaint is not filed or is dismissed after having been filed.

HISTORY: 133 v H 320 (Eff 11-19-69); 135 v S 1. Eff 1-1-74.

Cross-References to Related Sections

Fingerprint, files, RC § 109.57

Fingerprinting by police, RC § 109.60.

Penalty, RC § 2151.99(B).

Text Discussion

2 Anderson Fam. L. §§ 9.36-9.38, 9.42, 9.43.

Research Aids

Fingerprinting of child:

O-Jur2d: Juvenile Courts § 33; Criminal Law § 45

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

Ohio Rules

This section is affected by Juv.R. 7.

CASE NOTES AND OAG

1. The nature of the card upon which fingerprints or photograph is placed has nothing to do with their authenticity. The purpose of this section is not to determine their admissibility into evidence but rather to conform to the theory that juvenile proceedings are not criminal in nature: State v. Carder, 9 OS(2d) 1, 38 OO(2d) 1, 222 NE(2d) 620.

2. There is not statutory authority, in cases where juveniles are fingerprinted with the consent of the juvenile court under this section, which would permit or require local police officers to forward the fingerprint impressions so made to the state bureau of criminal identification for inclusion in the bureau's permanent files; nor is the bureau authorized, under GC § 1841-15 (RC § 5149.03), to procure and file for record the fingerprints of juveniles who are in any place of confinement under a commitment by a juvenile court on a charge of delinquency. 1952 OAG No. 1771.

[§ 2151.31.4] § 2151.314 De-tention hearing.

When a child is brought before the court or delivered to a place of detention or shelter care designated by the court, the intake or other authorized officer of the court shall immediately make an investigation and shall release the child unless it appears that his detention or shelter care is warranted or required under section 2151.31 of the Revised Code.

If he is not so released, a complaint under section 2151.27 of the Revised Code shall be filed

and an informal detention hearing held promptly, not later than seventy-two hours after he is placed in detention, to determine whether detention or shelter care is required. Reasonable oral or written notice of the time, place, and purpose of the detention hearing shall be given to the child and, if they can be found, to his parents, guardian, or other custodian. Prior to the hearing, the court shall inform the parties of their right to counsel and to appointed counsel or to the services of the county public defender or joint county public defender, if they are indigent, and of the child's right to remain silent with respect to any allegation of delinquency. Unless it appears from the hearing that the child's detention or shelter care is required under the provisions of section 2151.31 of the Revised Code, the court shall order his release as provided by section 2151.311 [2151.31.1] of the Revised Code. If a parent, guardian, or custodian has not been so notified and did not appear or waive appearance at the hearing, upon filing of his affidavit stating these facts, the court shall rehear the matter without unnecessary delay.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 164. Eff 1-13-76.

Research Aids

Detention hearing:

O-Jur2d: Juvenile Courts § 40.9

Am-Jur2d: Juvenile Courts etc. § 44 et seq.

Ohio Rules

This section is affected by Juv.R. 4(A), 7(E), (F), (G).

CASE NOTES AND OAG

See case notes 2, 7, 8, 9 under RC § 2151.25; 2.1 under RC § 2151.28.

§ 2151.32 Selection of custodian. (GC § 1639-33)

In placing a child under any guardianship or custody other than that of its parent, the juvenile court shall, when practicable, select a person or an institution or agency governed by persons of like religious faith as that of the parents of such child, or in case of a difference in the religious faith of the parents, then of the religious faith of the child, or if the religious faith of the child is not ascertained, then of either of the parents.

HISTORY: GC § 1639-33; 117 v 520 (531). Eff 10-1-53. Analogous to former GC § 1679.

Research Aids

Selection of custodian—religion:

O-Jur2d: Juvenile Courts § 51

Law Reviews

The law of adoption in Ohio. Beverly E. Sylvester. 2 CapitalULRev 23 (1973).

§ 2151.33 Temporary care; emergency medical treatment; reimbursement. (GC § 1639-28)

Pending hearing of a complaint filed under

section 2151.27 of the Revised Code and service of citations, the juvenile court may make such temporary disposition of any child as it deems best. Upon the certificate of one or more reputable practicing physicians, the court may summarily provide for emergency medical and surgical treatment which appears to be immediately necessary for any child concerning whom a complaint or an application for care has been filed, pending the service of a citation upon its parents, guardian, or custodian. The court may order the parents, guardian, or custodian, if found able to do so, to reimburse the court for the expense involved in providing such emergency medical and surgical treatment, and any such person who disobeys such order may be adjudged in contempt of court and punished accordingly.

When such emergency medical and surgical treatment is furnished a child who is found at the hearing to be a nonresident of the county, and if the expense of such medical and surgical treatment cannot be recovered from the parents, legal guardian, or custodian of such child, the board of county commissioners of the county in which such child has a legal settlement shall reimburse the court for the reasonable cost of such emergency medical or surgical treatment out of its general fund.

HISTORY: GC § 1639-28; 117 v 520 (529); 119 v 731; 121 v 557 (563). Eff 10-1-53. Analogous to former GC § 1648.

Cross-References to Related Sections

Annual review of every child by custodial agent, RC § 5103.15.1.

Text Discussion

2 Anderson Fam. L. § 11.21.

Research Aids

Emergency medical treatment and reimbursement:

O-Jur2d: Juvenile Courts § 42

Temporary care:

O-Jur2d: Juvenile Courts § 40

Law Reviews

Blood transfusions and elective surgery: a custodial function of an Ohio juvenile court. M.J. Zaremski. 23 ClevStLRev 231.

Ohio Rules

This section is affected by Juv. Rules 7(J); 13; 32(A)(1).

CASE NOTES AND OAG

1. This section is not unconstitutional: In re Clark, 21 OO(2d) 86, 185 NE(2d) 128 (CP).

2. Where a child's life is concerned, the juvenile court has not only the right but the duty to act in the child's behalf first, and give the parents their day in court later: In re Clark, 21 OO(2d) 86, 185 NE(2d) 128 (CP).

3. A juvenile court may summarily give the medical staff of a hospital authority to administer blood transfusions to a child suffering serious burns, whose blood condition is deteriorating, although the child's parents refused to give permission because of religious beliefs: In re Clark, 21 OO(2d) 86, 185 NE(2d) 128 (CP).

4. When a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way: *In re Clark*, 21 OO(2d) 86, 185 NE(2d) 128 (CP).

5. When a complaint or application for care concerning a child has been filed with the juvenile court, such court may, pending service of a citation on the child's parents, guardian or custodian, order the provision of emergency medical or surgical treatment upon the certificate of one or more reputable practicing physicians, as provided in this section: 1951 OAG No.898.

6. Where a child is being cared for by a county welfare department or board of child welfare, by agreement with the parents or guardian of such child, only such parents or guardian may properly consent, upon competent medical advice, to medical or surgical treatment of such child: 1951 OAG No.898.

7. Where a physician or surgeon seeks to avoid potential liability in tort for the administration, without the patient's consent, of medical or surgical treatment to a minor child receiving care from a child welfare board, the question, in particular cases, of what person, organization or authority is competent to give such consent on behalf of such child, so as effectively to protect him from incurring such liability, is ultimately one for decision by the physician or surgeon concerned, upon advice of private counsel: 1951 OAG No.898.

[DISTRICT DETENTION HOMES]

§ **2151.34** Treatment of children in custody; detention home.

No child under eighteen years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where the child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime. A child may be confined in a place of juvenile detention for a period not to exceed ninety days, during which time a social history may be prepared to include court record, family history, personal history, school and attendance records, and such other pertinent studies and material as will be of assistance to the juvenile court in its disposition of the charges against such juvenile offenders.

Upon the advice and recommendation of the judge, the board of county commissioners shall provide, by purchase, lease, construction, or otherwise, a place to be known as a detention home, which shall be within a convenient distance of the juvenile court, and not used for the confinement of adult persons charged with criminal offenses, where delinquent, unruly, dependent, neglected, abused children, or juvenile traffic offenders may be detained until final disposition. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties shall form themselves into a joint board, and proceed to organize a district for the establishment and support of a detention home for the use of the juvenile courts of such counties, where delin-

quent, unruly, dependent, neglected, abused children, or juvenile traffic offenders may be detained until final disposition, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon.

The county or district detention home shall be maintained as provided in sections 2151.01 to 2151.54 of the Revised Code. In any county in which there is no detention home, or which is not served by a district detention home, the board of county commissioners shall provide funds for the boarding of such children temporarily in private homes. Children who are alleged to be or have been adjudged delinquent, unruly, dependent, neglected, abused, or juvenile traffic offenders, may, after complaint is filed, be detained in such detention home or certified foster homes until final disposition of their case. The court may arrange for the boarding of such children in certified foster homes or in uncertified foster homes for a period not exceeding sixty days, subject to the supervision of the court, or may arrange with any county department of welfare which has assumed the administration of child welfare, county children services board, or certified organization to receive for temporary care children within the jurisdiction of the court. A district detention home approved for such purpose by the youth commission under section 5139.281 [5139.28.1] of the Revised Code may receive children committed to its temporary custody under section 2151.355 [2151.35.5] of the Revised Code and provide the care, treatment, and training required.

In case a detention home is established as an agency of the court, or a district detention home is established by the courts of several counties as hereinbefore provided, it shall be furnished and carried on, as far as possible, as a family home in charge of a superintendent or matron in a non-punitive neutral atmosphere. The judge, or the directing board of a district detention home, may appoint a superintendent, a matron, and other necessary employees for such home and fix their salaries. During the school year, when possible, a comparable educational program with competent and trained staff shall be provided for those children of school age. A sufficient number of trained recreational personnel shall be included among the staff to assure wholesome and profitable leisure-time activities. Medical and mental health services shall be made available to insure the courts all possible treatment facilities shall be given to those children placed under their care. In the case of a county detention home, such salaries shall be paid in the same manner as is provided by section 2151.13 of the Revised Code for other employees of the court, and the necessary expenses incurred in maintaining such detention home shall be paid by the county. In the case of a district detention

home, such salaries and the necessary expenses incurred in maintaining such detention home shall be paid as provided in sections 2151.341 [2151.34.1] to 2151.3415 [2151.34.15] of the Revised Code.

In case the court arranges for the board of children temporarily detained in such foster homes, or arranges for such board through any private certified organization, a reasonable sum to be fixed by the court for the board of such children shall be paid by the county. In order to have such foster homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein.

HISTORY: GC §1639-22; 117 v 520; 121 v 557; 128 v 1211 (EF 11-2-59); 133 v S 49 (EF 8-13-69); 133 v H 320 (EF 11-19-69); 133 v H 931 (EF 8-27-70); 136 v H 85 (EF 11-28-75); 136 v H 1196. EF 8-9-76.

Analogous to former GC §§ 1653, 1657, 1670.

Cross-References to Related Sections

Additional tax levy, RC § 5705.19.

Bond issue for construction, RC § 133.15.1.

Contract for care of child, RC § 5103.15.

Financial assistance for operating detention homes, RC § 5139.28.1.

Financial assistance from youth commission, RC §§ 5139.27.1, 5139.29.

Minor shall not be confined in jail with adult prisoners, RC § 341.11.

See RC §§ 2151.34.3, 2151.34.4, 2151.34.8 to 2151.34.14, 2151.35.5, 2151.35.7, 2151.78, 2151.79 which refer to this section.

Text Discussion

2 Anderson Fam. L. § § 5.25-5.28.

Research Aids

Place of detention for children:

O-Jur2d: Juvenile Courts § 41

Am-Jur2d: Juvenile Courts etc. § 35

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

Ohio Rules

This section is affected by Juv. Rule 7(I).

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1. This section, which requires that, "upon the advice and recommendation of the judge, the board of county commissioners shall provide, by purchase, lease, construction, or otherwise, a place to be known as a detention home," is mandatory, and a writ of mandamus will issue to compel the board to exer-

cise its discretion in making provision for such home: State ex rel Ray v. South, 178 OS 241, 27 OO(2d) 133, 198 NE(2d) 919.

2. Impossibility of performance is a viable defense to a complaint for mandamus seeking to compel county commissioners to provide a juvenile detention facility: State ex rel. Johns v. County Commrs., 29 OS(2d) 6, 58 OO(2d) 65, 278 NE(2d) 19.

3. Where a county has no separate juvenile detention home as provided in this section, and the only facility for the detention of juveniles, as ordered and authorized by the juvenile judge, is a juvenile ward which is separated and secluded from the adult sections but is located in the county jail; and where, pursuant to verbal directions by the chief probation officer of the juvenile court, an eight-year-old boy, in the company of his father who was arrested by deputy sheriffs at 1:30 a.m., is placed by the deputy sheriffs, together with his father, in the juvenile ward in the county jail until the mother of the boy could come to take the boy home; and where the boy and his father are in the juvenile ward in the county jail for approximately one-and-one half hours when the mother arrived and took the boy home; the sheriff of the county is not liable in damages in an action for false imprisonment, brought by the mother on behalf of the boy, for the detention of the boy placed in the juvenile ward by his deputy sheriffs under the specific directions of the chief probation officer of the juvenile court: Garland v. Dustman, 19 OApp(2d) 292, 48 OO(2d) 408, 251 NE(2d) 153.

4. This section provides that no child under eighteen shall be placed in or committed to any prison, jail, or lockup; and such section provides further that it is the mandatory duty of the county commissioners of each county, upon the advice and recommendation of the juvenile judge, to provide a separate juvenile detention home for the detention of juveniles under the jurisdiction of the juvenile courts: Garland v. Dustman, 19 OApp(2d) 292, 48 OO(2d) 408, 251 NE(2d) 153.

5. A final order of disposition of a child found to be delinquent, as prescribed by RC § 2151.35.5, may not include, as punishment or otherwise, confinement (or detention) in a juvenile detention home: In re Bolden, 37 OApp(2d) 7, 66 OO(2d) 26, 306 NE(2d) 166 (1973).

6. This section, providing that no child under eighteen years of age shall be placed in any prison, jail or lock-up is mandatory and the county jail being a prison, within the meaning and inhibition of such section, the imprisonment of a child under eighteen years of age in such county jail is contrary to law: In re Karnes, 67 OLA 449, 121 NE(2d) 156 (App).

10. It is necessary that the trial of the accused, under the juvenile court laws, who has been committed pending the final disposition of the case, be commenced within four days of such commitment, unless otherwise requested by the defendant: 1918 OAG vol.1, p.160.

11. A juvenile under fourteen years of age may not, pending final disposition of his case, be confined in a cell in the upper part of the county jail even though such cell is separate from the county jail proper: 1918 OAG vol.2, p.1592.

12. Board of education has authority to forbid attendance of inmates of a county detention home at the public schools of the district: 1921 OAG vol.2, p.942.

13. Unless a dependent child is committed to an institution designated by GC § 1639-34 (RC § 2151.36), or a family home, and in conformity with the juvenile court code, no payment for the care and board of such child is authorized, as there is no commitment under

the law: 1937 OAG No.983.

14. If the judge of the juvenile court advises and recommends the establishment of a detention home, it is mandatory upon the county commissioners to purchase or lease such detention home within a convenient distance of the court, and the court is authorized to commit a delinquent child to such detention home in the same manner as it is in the case of commitment to any other suitable public institution: 1938 OAG Nos.2803, 2804.

15. County commissioners are not empowered by this section to acquire a detention home upon a request by the judge of the court exercising the power and jurisdiction conferred by GC §1639-1 (RC §2151.01) et seq: 1949 OAG No.1231.

16. A judge of the court exercising such powers and jurisdiction is limited to advising and recommending the need of a detention home and the extent of the facilities required to fulfill that need: 1949 OAG No.1231.

17. In case a juvenile detention home is established, it is under the supervision of the juvenile judge who also has the sole authority to appoint necessary employees for such home. The county, through the board of county commissioners, has a duty to provide sufficient funds for the operation of the home: 1961 OAG No.2034.

18. Where, under this section a juvenile judge of a county, on January 6, 1959, advised and recommended that a detention home be provided at a certain location and the board of county commissioners has taken no action in this regard for two years, the advice and recommendation for the establishment of a detention home are still in effect. The board, while not being required to follow the specific recommendations as to location, has a mandatory duty to provide a detention home within a convenient distance of the juvenile court: 1961 OAG No.2034.

19. Pursuant to this section a juvenile detention home is a place not used for the confinement of adult persons. Such a home should be separate and apart from buildings in which adult persons are confined. Accordingly, such a juvenile detention home may not properly be established in a county jail, even though one complete floor of the jail would be used for such purpose and the intention would be to keep the one floor separate and apart from the rest of the jail: 1962 OAG No.2814.

20. Under this section, the governing authority of the juvenile detention home shall when possible provide "a comparable educational program" for those children of school age in the home; and the expense thereof shall be treated in the same manner as any other expense of operation of a juvenile detention home: 1963 OAG No.261.

21. When it is not possible for the governing authority of a juvenile detention home to provide "a comparable educational program," an educational program shall be provided by the school district in which the home is located by force of RC §3313.55; and the expense thereof shall be assumed by the county: 1963 OAG No.261.

22. A detention home provided by authority of this section is for the detention of "delinquent, dependent, neglected children, or juvenile traffic offenders . . . until final disposition": 1963 OAG No.553.

23. If a district detention home is established pursuant to this section, the board of county commissioners of each participating county shall provide for its proportionate share of the costs of establishing, maintaining, and supporting the detention home: 1966 OAG No.66-173.

24. Until the juvenile judge or juvenile judges advise and recommend the establishment of a county or a district detention home, pursuant to this section, there is no legal authority to levy a tax for that purpose. There is no statutory authority for a tax levy in the alternative. Revised Code §§5705.19, 5705.25: 1966 OAG No.66-173.

25. There is no statutory authority to submit a proposed district levy to the voters of such district for the purpose of building a district detention home pursuant to RC §2151.34 et seq, either before or after the formation of a district board of trustees: 1966 OAG No.66-173.

26. If the county adult detention facility is designed with a space which is enclosed on all sides, that is distinct, set apart and disconnected so that no child over the age of fifteen placed in that space will come in contact or communication with any adult convicted of or arrested for a crime and the public interest and safety require the detention of such child when a delinquent detention facility is not available, the use of such adult facility is authorized by the Revised Code: 1970 OAG No. 70-015.

27. A judge of a juvenile court may not commit a child who has been found to be a delinquent child, or a juvenile traffic offender, to the county jail upon the failure, refusal, or inability of such child to pay a fine and court costs: 1970 OAG No. 70-143.

[§ 2151.34.1] § 2151.341 [Application for financial assistance; tax assessment for operation of district detention home.]

The board of trustees of a district detention home may make application to the youth commission under section 5139.281 [5139.28.1] of the Revised Code for financial assistance in defraying the cost of operating and maintaining the home. Such application shall be made on forms prescribed and furnished by the youth commission. The joint boards of county commissioners of district detention homes shall make annual assessments of taxes sufficient to support and defray all necessary expenses of such home not paid from funds made available under section 5139.281 [5139.28.1] of the Revised Code.

HISTORY: 128 v 1211 (EF 11-2-59); 136 v H 1196. EF 8-9-76.

Cross-References to Related Sections

Inspection of facility applying for or receiving financial aid, RC §5139.31.

See RC §2151.34 which refers to §2151.34.1 et seq.

Text Discussion

2 Anderson Fam. L. §§5.18-5.24, 11.21.

Research Aids

Place of detention for children:

O-Jur2d: Juvenile Courts §41

[§ 2151.34.2] § 2151.342 District detention home may receive donations and bequests.

When any person donates or bequeaths his real or personal estate or any part thereof, to the use and benefit of a district detention home, the board of trustees of the home may accept and

use such donation or bequest as they deem for the best interests of the institution, and consistent with the conditions of such bequest.

HISTORY: 128 v 1211 (1213), § 1. Eff 11-2-59.

[§ 2151.34.3] § 2151.343 District detention home trustees.

Immediately upon the organization of the joint board of county commissioners as provided by section 2151.34 of the Revised Code, or so soon thereafter as practicable, such joint board of county commissioners shall appoint a board of not less than five trustees, which shall hold office and perform its duties until the first annual meeting after the choice of an established site and buildings, or after the selection and purchase of a building site, at which time such joint board of county commissioners shall appoint a board of not less than five trustees, one of whom shall hold office for a term of one year, one for the term of two years, one for the term of three years, half of the remaining number for the term of four years, and the remainder for the term of five years. Annually thereafter, the joint board of county commissioners shall appoint one or more trustees, each of whom shall hold office for the term of five years, to succeed the trustee or trustees whose term of office shall expire. A trustee may be appointed to succeed himself upon such board of trustees, and all appointments to such board of trustees shall be made from persons who are recommended and approved by the juvenile court judge or judges of the county of which such person is resident. The annual meeting of the board of trustees shall be held on the first Tuesday in May each year.

HISTORY: 128 v 1211 (1213), § 1. Eff 11-2-59.

Cross-References to Related Sections

See RC §§ 2151.34.4, 2151.34.7, 2151.34.9 to 2151.34.11, 2151.34.13 which refer to this section.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

CASE NOTES AND OAG

1. There is nothing to preclude a juvenile court judge from being appointed a member of a board of trustees of a district detention home, if it is physically possible for one person to discharge the duties of both positions: 1966 OAG No. 66-112.

[§ 2151.34.4] § 2151.344 Meetings.

A majority of the board of trustees appointed under section 2151.343 [2151.34.3] of the Revised Code constitutes a quorum. Board meetings shall be held at least quarterly. The juvenile court judge of each of the counties of the district organized pursuant to section 2151.34 of the Revised Code shall attend such meetings, or shall designate a member of his staff to do so. The

members of the board shall receive no compensation for their services, except their actual traveling expenses, which, when properly certified, shall be allowed and paid by the treasurer.

HISTORY: 128 v 1211 (1213), § 1. Eff 11-2-59.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.5] § 2151.345 Superintendent of district detention home; duties.

The board of trustees of a district detention home shall appoint the superintendent thereof. Before entering upon his duties such superintendent shall give bond to the board, in such sum as it fixes, with sufficient surety, conditioned upon the full and faithful accounting of the funds and properties coming into his hands.

The superintendent shall appoint all employees, who, except for the superintendent, shall be in the classified civil service.

The superintendent under the supervision and subject to the rules and regulations of the board, shall control, manage, operate, and have general charge of the home, and shall have the custody of its property, files, and records.

The children to be admitted for care in such home, the period during which they shall be cared for in such home, and the removal and transfer of children from such home shall be determined by the juvenile courts of the respective counties.

HISTORY: 128 v 1211 (1214), § 1. Eff 11-2-59.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.6] § 2151.346 District detention homes operated same manner as county detention homes.

District detention homes shall be established, operated, maintained, and managed in the same manner so far as applicable as county detention homes.

HISTORY: 128 v 1211 (1214), § 1. Eff 11-2-59.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.7] § 2151.347 Selection of site.

When the board of trustees appointed under section 2151.343 [2151.34.3] of the Revised Code does not choose an established institution in one of the counties of this district, it may select a suitable site for the erection of a district detention home. Such site must be easily accessible, and when, in the judgment of the board, it is

equally conducive to health, economy in purchasing or in building, and to the general interest of the home and inmates, such site shall be as near as practicable to the geographical center of the district. When only two counties form such district the site shall be as near as practicable to the dividing line between such counties.

HISTORY: 128 v 1211 (1214), § 1. Eff 11-2-59.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.8] § 2151.348 Each county shall be represented on board of trustees.

Each county in the district, organized under section 2151.34 of the Revised Code, shall be entitled to one trustee, and in districts composed of but two counties, each county shall be entitled to not less than two trustees. In districts composed of more than four counties, the number of trustees shall be sufficiently increased so that there shall always be an uneven number of trustees constituting such board. The county in which a district detention home is located shall have not less than two trustees, who, in the interim period between the regular meetings of the board of trustees, shall act as an executive committee in the discharge of all business pertaining to the home.

HISTORY: 128 v 1211 (1214), § 1. Eff 11-2-59.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.9] § 2151.349 Removal of trustees.

The joint board of county commissioners organized under section 2151.34 of the Revised Code may remove any trustee appointed under section 2151.343 [2151.34.3] of the Revised Code, but no such removal shall be made on account of the religious or political opinion of such trustee. The trustee appointed to fill any vacancy shall hold his office for the unexpired term of his predecessor.

HISTORY: 128 v 1211 (1215), § 1. Eff 11-2-59.

Cross-References to Related Sections

See RC § 2151.34.13 which refers to this section.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.10] § 2151.3410 Interim powers of board of trustees.

In the interim, between the selection and purchase of a site, and the erection and occupancy of the district detention home, the joint board of

county commissioners provided by section 2151.34 of the Revised Code may delegate to the board of trustees appointed under section 2151.343 [2151.34.3] of the Revised Code, such powers and duties as, in its judgment, will be of general interest or aid to the institution. Such joint board of county commissioners may appropriate a trustees' fund, to be expended by the board of trustees in payment of such contracts, purchases, or other expenses necessary to the wants or requirements of the home, which are not otherwise provided for. The board of trustees shall make a complete settlement with the joint board of county commissioners once each six months, or quarterly if required, and shall make a full report of the condition of the home and inmates, to the board of county commissioners and to the juvenile court of each of the counties.

HISTORY: 128 v 1211 (1215), § 1 (Eff 11-2-59); 129 v 582 (738), § 1. Eff 1-10-61.

Style deviations in this section were corrected by the amendment in HB 1 (129 v 582). No change in the law was intended; see RC § 1.25.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.11] § 2151.3411 Joint board of county commissioners; powers and duties.

The choice of an established site and buildings, or the purchase of a site, stock, implements, and general farm equipment, should there be a farm, the erection of buildings, and the completion and furnishing of the district detention home for occupancy, shall be in the hands of the joint board of county commissioners organized under section 2151.34 of the Revised Code. Such joint board of county commissioners may delegate all or a portion of these duties to the board of trustees provided for under section 2151.343 [2151.34.3] of the Revised Code, under such restrictions and regulations as the joint board of county commissioners imposes.

HISTORY: 128 v 1211 (1215), § 1. Eff 11-2-59.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.12] § 2151.3412 Appraisal of district detention home's site and buildings; funding of expenses.

When an established site and buildings are used for a district detention home the joint board of county commissioners organized under section 2151.34 of the Revised Code shall cause the value of such site and buildings to be properly appraised. This appraisal value, or in case of the

purchase of a site, the purchase price and the cost of all betterments and additions thereto, shall be paid by the counties comprising the district, in proportion to the taxable property of each county, as shown by its tax duplicate. The current expenses of maintaining the home not paid from funds made available under section 5139.281 [5139.28.1] of the Revised Code, and the cost of ordinary repairs thereto shall be paid by each such county in proportion to the number of children from such county who are maintained in the home during the year, or by a levy submitted by the joint board of county commissioners under division (A) of section 5705.19 of the Revised Code and approved by the electors of the district.

HISTORY: 128 v 1211 (Eff 11-2-59); 134 v H 258 (Eff 1-27-72); 136 v H 1196. Eff 8-9-76.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

CASE NOTES AND OAG

1. The pro rata share to be contributed by each county should be based on the total of its general duplicate of real and public utility property, plus its general duplicate of personal property, plus its duplicate of classified intangible property: 1966 OAG No. 66-112.

2. If a district detention home is established pursuant to RC § 2151.34, the board of county commissioners of each participating county shall provide for its proportionate share of the costs of establishing, maintaining, and supporting the detention home: 1966 OAG No. 66-173.

[§ 2151.34.13] § 2151.3413 Withdrawal by county from detention home district; continuity of district tax levy.

The board of county commissioners of any county within a detention home district may, upon the recommendation of the juvenile court of such county, withdraw from such district and dispose of its interest in such home by selling or leasing its right, title, and interest in the site, buildings, furniture, and equipment to any counties in the district, at such price and upon such terms as are agreed upon among the boards of county commissioners of the counties concerned. Section 307.10 of the Revised Code does not apply to this section. The net proceeds of any such sale or lease shall be paid into the treasury of the withdrawing county.

Any county withdrawing from such district or from a combined district organized under sections 2151.34 and 2151.65 of the Revised Code shall continue to have levied against its tax duplicate any tax levied by the district during the period in which the county was a member of the district for current operating expenses, permanent improvements, or the retirement of bonded indebtedness. Such levy shall continue to be a levy against such duplicate of the county until such time that it expires or is renewed.

Members of the board of trustees of a district detention home who are residents of a county withdrawing from such district are deemed to have resigned their positions upon the completion of the withdrawal procedure provided by this section. Vacancies then created shall be filled according to sections 2151.343 [2151.34.3] and 2151.349 [2151.34.9] of the Revised Code.

HISTORY: 128 v 1211 (Eff 11-2-59); 134 v H 258. Eff 1-27-72.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

CASE NOTES AND OAG

1. The only basis upon which a county may withdraw from such arrangement is provided for in this section: 1966 OAG No. 66-112.

2. When the joint board has been duly formed and has thereafter proceeded with the duties imposed on it by the statute, a county cannot withdraw on the basis of a subsequent determination that it does not have the finances to proceed: 1966 OAG No. 66-112.

3. Subsequent to the forming of a joint board of county commissioners and the organization of a district for the establishment and support of a detention home, such relationship cannot be terminated at the will of one of the counties: 1966 OAG No. 66-112.

[§ 2151.34.14] § 2151.3414 Designation of fiscal officer of detention home district; adjustment of accounts.

The county auditor of the county having the greatest population, or, with the unanimous concurrence of the county auditors of the counties composing a district, the auditor of the county wherein the detention home is located, shall be the fiscal officer of a detention home district or a combined district organized under sections 2151.34 and 2151.65 of the Revised Code. The county auditors of the several counties composing a detention home district shall meet at the district detention home, not less than once in six months, to review accounts and to transact such other duties in connection with the institution as pertain to the business of their office.

HISTORY: 128 v 1211 (Eff 11-2-59); 134 v H 258 (Eff 1-27-72); 135 v H 1033. Eff 10-2-74.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

[§ 2151.34.15] § 2151.3415 Board of county commissioners; expenses.

Members of the board of county commissioners who meet by appointment to consider the organization of a district detention home shall, upon presentation of properly certified accounts, be paid their necessary expenses upon a warrant drawn by the county auditor of their county.

HISTORY: 128 v 1211 (1216), § 1. Eff 11-2-59.

[§ 2151.34.16] § 2151.3416 [Financial assistance for home.]

The board of county commissioners of each county which participates in the establishment of a district detention home may apply to the youth commission for financial assistance to defray the county's share of the cost of acquisition or construction of such home, as provided in section 5139.271 [5139.27.1] of the Revised Code. Application shall be made in accordance with rules and regulations adopted by the commission. No county shall be reimbursed for expenses incurred in the acquisition or construction of a district detention home which serves a district having fewer than one hundred thousand residents, as determined by the most recent decennial census.

HISTORY: 133 v H 1135. EF 9-16-70.

Cross-References to Related Sections

Financial assistance from youth commission, RC § 5139.27.1.

Inspection by youth commission, RC § 5139.31.

Research Aids

Place of detention:

O-Jur2d: Juvenile Courts § 41

§ 2151.35 Hearing procedure; findings; record.

The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case.

All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving abused, neglected, or dependent children. The court shall hear and determine all cases of children without a jury.

If the court finds from clear and convincing evidence that the child is a delinquent, unruly, abused, neglected, or dependent child, or a juvenile traffic offender, the court shall proceed immediately, or at a postponed hearing, to hear the evidence as to the proper disposition to be made under sections 2151.352 [2151.35.2] to 2151.355 [2151.35.5], of the Revised Code. If the court does not so find, it shall order that the complaint be dismissed and that the child be discharged from any detention or restriction theretofore ordered.

A record of all testimony and other oral proceedings in juvenile court shall be made upon request as provided in section 2301.20 of the Revised Code.

HISTORY: 133 v H 320 (EF 11-19-69); 136 v H 85. EF 11-28-75.

Analogous in part to former RC § 2151.35 [GC § 1639-30; 117 v 520; 119 v 731; 121 v 557; 125 v 324; 127 v 547; 130 v

621; 130 v 623; 132 v S 278; 133 v S 49 (eff 8-13-69)] repealed in 133 v H 320, § 2.

See also analogous provisions now contained in RC §§ 2151.35.2, 2151.35.3, 2151.35.5, 2151.35.6

Cross-References to Related Sections

Determination by juvenile judge that truant child is dependent or delinquent, RC § 3321.22.

Foster care facilities, RC § 5139.36.

Youth commission to submit findings and recommendations to committing court, RC § 5139.05.

Comparative Legislation

Informal hearing:

Cal.—Welf & Inst Code, § 680

Ill.—Rev Stat, ch 37, § 705-1

Ind.—Burns' Stat, § 31-5-7-15

Ky.—KRS, § 280.060

Mich.—MCLA, § 712A.12

N.Y.—Jud—Family Court, § 741

Pa.—Purdon's Stat, Tit. 11, § 50-316

Fla.—FSA, § 39.09

Text Discussion

2 Anderson Fam. L. §§ 8.3-8.5, 8.12, 9.45.

Research Aids

Findings:

O-Jur2d: Juvenile Courts § 49

Am-Jur2d: Juvenile Courts § 55

ALR

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity. 59 ALR3d 659.

Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 ALR 2d 506.

Constitutionality, construction, and application of statutory provision against use in evidence in any other case of records or evidence in juvenile court proceedings. 147 ALR 443.

Power of juvenile court to require children to testify. 151 ALR 1229.

Use of judgment in prior juvenile court proceeding to impeach credibility of witness. 63 ALR3d 1112.

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

Juvenile delinquent and unruly proceedings in Ohio: unconstitutional adjudications. Note. 24 ClevSLRev 602 (1975).

The Gault decision—its effect on the office of the prosecution attorney. Hon. Walter G. Whitlatch. 41 OBar (No.2) 41.

The right of an indigent juvenile in Ohio to a transcript at state expense. Comment. 5 AkronLRev 117.

Practice and procedure in the juvenile court. Walter G. Whitlatch. 21 ClevBJ (No. 7) 107.

Constitutional guarantees in the juvenile court. Hon. Benjamin S. Schwartz. 39 OBar (No.47) 1385.

The Juvenile Court, a court of law. Hon. Walter G. Whitlatch. 18 WestResLRev 1239.

Juvenile court; "neglected child" of the judiciary. Hon. Albert A. Woldman. 37 ClevBJ (No. 11) 257.

Welfare and social progress in the prevention and treatment of juvenile delinquency. Hon. William F. Burns. 5 ClevMarLRev 35.

Evidence problems in juvenile delinquency proceedings. Ronald J. Harpst. 11 ClevMarLRev 486.

Juvenile proceedings—juvenile not entitled to indictment or jury trial under Ohio constitution. (Case note.) 32 CinLRev 123.

Ohio Rules

This section is affected by Juv.R. 3, 27, 29, 34, 37; see also Crim.R. 57(A).

CASE NOTES AND OAG

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See also case note 14 under RC § 2151.27.

1. This section has been construed and applied: In re Ramsey, 164 OS 567, 58 OO 431, 132 NE(2d) 469.

2. The provisions of this section relating to the hearing and commitment of a delinquent child without an indictment or a jury trial are not violative of Const., Art. I, § 5 or § 10: In re Darnell, 173 OS 335, 19 OO(2d) 269, 182 NE(2d) 321.

3. Proceedings in the juvenile court are civil in nature and not criminal. This section implies protection for the minor and not punishment: Cope v. Campbell, 175 OS 475, 26 OO(2d) 88, 196 NE(2d) 457.

4. Any adjudication of delinquency must be supported by clear and convincing evidence: In re Agler, 19 OS(2d) 70, 48 OO(2d) 85, 249 NE(2d) 808.

5. Delinquency proceedings in juvenile court do not require indictment or trial by jury under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States or under Sections 5 and 10 of Article I of the Constitution of Ohio: In re Agler, 19 OS(2d) 70, 48 OO(2d) 85, 249 NE(2d) 808.

6. Proceedings in a juvenile court are civil in nature, the customary rules of evidence governing civil actions must be followed, and hearsay evidence is not admissible; and a mere preponderance of the evidence is sufficient to warrant a determination that a minor is a delinquent, even though such determination involves a finding that a criminal statute has been violated by such minor: State v. Shardell, 107 App 338, 8 OO(2d) 262, 153 NE(2d) 510.

7. Proceedings instituted in a juvenile court are not criminal in nature nor are they conducted with the object of convicting a minor of a crime and punishing him therefor; they are informal hearings through the medium of the juvenile court to determine whether the child needs intervention of the state as guardian and protector of his person: State v. Shardell, 107 App 338, 8 OO(2d) 262, 153 NE(2d) 510.

9. The authority granted the court by this section to "conduct its hearings in an informal manner" does not abrogate the right of a minor defendant to a separate trial: In re Allen, 10 OApp(2d) 120, 39 OO(2d) 200, 226 NE(2d) 135.

10. The provisions of the juvenile code of Ohio relating to delinquency of juveniles are not designed as punishment for crime, but to place minors of the description and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care, discipline, education and training, until they are rehabilitated or arrive at the age of majority: In re Whittington, 13 OApp(2d) 11, 42 OO(2d) 39, 233

NE(2d) 333 [overruled, In re Whittington, 17 OApp(2d) 164, 46 OO(2d) 237, 245 NE(2d) 364.]

11. Federal constitutional guarantees accompanying ordinary criminal proceedings are applicable to state juvenile court proceedings where possible commitment to a state institution is involved: In re Whittington, 391 US 341, 45 OO(2d) 31, 20 LEd(2d) 625, 88 SCt 1507. [In re Whittington, 13 OApp(2d) 11, 42 OO(2d) 39, 233 NE(2d) 333, cited n 10, supra, overruled in 17 OApp(2d) 164, 46 OO(2d) 237, 245 NE(2d) 364.]

12. Where a juvenile has received the following essentials of due process and fair treatment, (1) written notice of the specific charge or factual allegations, given to the juvenile and his parents or guardian sufficiently in advance of the hearing to permit preparation; (2) notification to the juvenile and his parents of the juvenile's right to be represented by counsel retained by them, or, if they are unable to afford counsel, that counsel will be appointed to represent the juvenile; (3) application of the constitutional privileges against self-incrimination; and (4), absent a valid confession, a determination of delinquency and an order of commitment based only on sworn testimony subjected to the opportunity for cross-examination in accordance with constitutional requirements, such juvenile has not been deprived of due process under either the Constitution of the United States or the Constitution of the state of Ohio: In re Baker, 18 OApp(2d) 276, 47 OO(2d) 411, 248 NE(2d) 620.

13. RC § 3109.04, which permits the court to allow the choice of a child of fourteen years of age or more to determine with which parent he will live, is applicable to a proceeding for change of custody under the juvenile court act: In re Smelser, 22 OMisc 41, 51 OO(2d) 31, 257 NE(2d) 769 (JC).

14. The fact that the juvenile reached the age of eighteen on the day after the complaint was filed in juvenile court did not alone deprive that court of jurisdiction: In re Davis, 22 OO(2d) 108, 179 NE(2d) 198 (JC).

15. Proceedings instituted in a juvenile court are not criminal in nature nor are they conducted with the objective of convicting a minor of a crime and punishing him therefor; they are informal hearings through a medium of the juvenile court to determine whether the child needs intervention of the state as guardian and protector of his person: In re L——, 25 OO(2d) 369, 194 NE(2d) 797 (JC).

16. In the absence of a valid confession, a juvenile can be committed only upon sworn testimony subject to cross-examination: In re Gault, 387 US 1, 40 OO(2d) 378, 18 LEd(2d) 527, 87 SCt 1428.

DECISIONS CONSTRUING FORMER GC § 1652

17. This section, which authorizes the judge to determine the question of delinquency without a jury, is not rendered invalid by Art. I, § 5 of the constitution of Ohio, which provides that the right of trial by jury shall be inviolate; nor is it rendered invalid by the fourteenth amendment to the constitution of the United States, which provides that no one shall be deprived of life, liberty, or property, without due process of law: In re Januszewski, 196 Fed 123, 10 OLR 151.

18. Inasmuch as the privileges and immunities of a citizen of the United States do not include the right to trial by jury in a state court, even for a state offense, or the right to be exempt from trial for an infamous crime, except upon presentment by a grand jury, it follows that a jury trial is not essential in all cases of due process of law; and the commitment of the petitioner to the boys' industrial school for incorrigibility by the juvenile court of Cuyahoga county was not rendered invalid by reason of the fact that it was without the intervention of a jury, notwithstanding the charge in the affidavit upon which

he was arrested was that he was a delinquent in that he maliciously and purposely shot M with intent to kill: In re Januszewski, 196 Fed 123, 10 OLR 151.

DECISIONS CONSTRUING FORMER GC § 1650

19. A court calendar is not required to be kept in the probate court: Stark v. Stark, 17 CC(NS) 398, 24 CD 135 [affirmed, without opinion, 88 OS 586; citing Millard v. Commissioners, 13 CC 581, 7 CD 115].

[§ 2151.35.1] § 2151.351 Repealed, 136 v H 164, § 2 [132 v S 383; 133 v H 320; 136 v H 85]. Eff 1-13-76.

CASE NOTES AND OAG

DECISIONS CONSTRUING FORMER RC § 2151.35.1

1. In order to sustain commitment of a juvenile offender to a state institution in a delinquency proceeding, where such commitment will deprive the child of his liberty, the alleged delinquent must have been afforded representation by counsel, appointed at state expense in case of indigency: In re Agler, 19 OS(2d) 70, 48 OO(2d) 85, 249 NE(2d) 808.

2. When the court deems it necessary to appoint counsel for a juvenile, pursuant to RC § 2151.35.1, such counsel's services shall be paid for by the county as is stated therein: 1969 OAG No.69-110.

[§ 2151.35.2] § 2151.352 Right to counsel.

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodians, or guardian of such child, upon

written request prior to any hearing involving such child.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 164. Eff 1-13-76.

Cross-References to Related Sections

See RC § 2151.35 which refers to § 2151.35.2 et seq.

Text Discussion

2 Anderson Fam. L. §§ 4.1-4.12, 13.14.

Research Aids

Right to counsel:

O-Jur2d: Juvenile Courts §§ 45, 45.5

Am-Jur2d: Juvenile Courts §§ 38, 39

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 Capital ULRev 53 (1973).

The juvenile and his constitutional right to a jury trial. William A. Huddleson. 1 No.Ky.St. L.F. 164 (1973).

Ohio Rules

This section is affected by Juv. Rules 3; 4(A); 7(J); 29(B).

CASE NOTES AND OAG

See also case notes construing former RC § 2151.35.1.

1. If the parents of a juvenile who is the subject of a delinquency hearing in juvenile court are to testify at that hearing, the exclusion by the judge of the parents from the courtroom under an order for separation of witnesses until they have testified is not prejudicial, where the juvenile is represented by counsel during the hearing: State v. Ostrowski, 30 OS(2d) 34, 59 OO(2d) 62, 282 NE(2d) 359.

2. Approval by the court of the permanent surrender of a child is purely an administrative matter, and not in the nature of an adversary proceeding; the court has no duty to advise the mother of her right to counsel or to appoint a lawyer for her in the event of indigency: In re Anne K., 31 OMisc 218, 60 OO(2d) 134, 282 NE(2d) 370 (JC 1972).

DECISIONS CONSTRUING FORMER RC § 2151.35

3. Section 10, Article I of the Ohio Constitution, and the Fifth and Sixth Amendments to the United States Constitution, being applicable only to the rights of accused persons charged with criminal offenses, do not apply to, or require the appointment of counsel in, a delinquent-child proceeding in the juvenile court: Cope v. Campbell, 175 OS 475, 26 OO(2d) 88, 196 NE(2d) 457.

4. A minor charged with delinquency in a juvenile court proceeding has the right to be represented by an attorney at law in such proceeding: State v. Shardell, 107 App 338, 8 OO(2d) 262, 153 NE(2d) 510.

5. In the juvenile court in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child: 1967 OAG No. 67-068.

6. Juvenile courts have inherent power to appoint counsel for indigents: 1967 OAG No. 67-068.

7. There is no provision under the statutes which permits the juvenile court to authorize compensation to attorneys appointed to represent indigents: 1967 OAG No. 67-068.

[§ 2151.35.3] § 2151.353 Disposition of neglected or dependent child.

If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(A) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(B) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, the Ohio youth commission for the purpose of diagnostic study and report as provided by division (B) of section 5139.05 of the Revised Code, either parent or a relative residing within or outside the state or a probation officer for placement in a certified foster home;

(C) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires;

(D) Commit the child permanently to the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them.

No order for permanent custody shall be made at the hearing wherein the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 85. Eff 11-28-75.

Cross-References to Related Sections

All children in permanent custody to be listed with public welfare department, RC § 5103.15.2.

Purpose of temporary commitment to youth commission, RC § 5139.05.

See RC §§ 2151.35.4, 2151.35.5 which refer to this section.

Text Discussion

2 Anderson Fam. L. § 13.5.

Research Aids

Disposition of neglected or dependent child:

O-Jur2d: Juvenile Courts § 49

Am-Jur2d: Juvenile Courts etc. § 29 et seq.

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

The law of adoption in Ohio. Beverly E. Sylvester. 2 CapitalULRev 23 (1973).

Ohio Rules

This section is affected by Juv.R. 10(D), 15(B)(5), 29(F), 32(A)(3), 34(C), (D), (E) and 35.

CASE NOTES AND OAG

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See also case notes 25 under RC § 2151.23; 7 under RC § 2151.27; 8 and 9 under RC § 2151.28.

1. Under RC § 2151.35.3, the filing of a complaint containing a prayer requesting permanent custody of minor children, sufficiently apprising the parents of the grounds upon which the order is to be based, and the service of summons upon the parents, explaining that the granting of such an order permanently divests them of their parental rights, are prerequisite to a valid adjudication that a child is neglected or dependent for the purpose of obtaining an order for permanent custody divesting parental rights: In re Fassinger, 42 OS(2d) 505, 71 OO(2d) 503, 330 NE (2d) 431 (1975).

2. The mere allegation in a motion filed by the county welfare department that "it would appear to be in the best interests of said minors that they be placed permanently for adoption" does not state grounds under which a Juvenile Court may lawfully take permanent custody of children from their natural parents. In a hearing conducted pursuant to RC § 2151.35, in which the welfare department seeks to take permanent custody of children from their natural parents, the welfare department has the burden to plead and prove by clear and convincing evidence that the children are presently neglected or dependent. An adjudication of dependency made in a temporary custody hearing does not constitute legal grounds for granting permanent custody of minor children to the welfare department where over 22 months have elapsed between the temporary and permanent custody hearings, and where custody had been returned to the natural parents in the interim period between the temporary and permanent custody hearings. The granting of permanent custody under such circumstances requires a contemporaneous finding of dependency: In re Fassinger, 43 OApp(2d) 89, 72 OO(2d) 292, 334 NE(2d) 5 (1974).

3. Permanent custody of a dependent child will be granted to the county welfare department if it is for the best interest of a child, despite the well-intentioned concern of the maternal grandparents who wished to adopt the child: In re Baby Girl, 32 OMisc 217, 61 OO(2d) 439, 290 NE(2d) 925.

4. Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment

to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

DECISIONS CONSTRUING FORMER RC § 2151.35

5. The authority granted a juvenile court in this section to make certain specified dispositions and commitments of children in matters before it can be exercised by such only if the child before it is found to be a juvenile traffic offender or is delinquent, neglected or dependent: *In re Darst*, 117 App 374, 24 OO(2d) 144, 192 NE(2d) 287.

6. Where the juvenile court finds that children are both neglected and dependent, the welfare of the children requires that they be permanently committed to the county welfare department: *In re Douglas*, 11 OO(2d) 340, 164 NE(2d) 475 (JC).

7. An order modifying a previously-entered temporary custody order which was made in disposition of a finding that a child is neglected constitutes a final appealable order pursuant to the provisions of RC § 2501.02: *In re Rule*, 1 OApp(2d) 57, 30 OO(2d) 76, 203 NE(2d) 501.

8. Under the authority derived from RC §§ 2151.23, 2151.27 and 2151.35, the juvenile court has the authority to hear and determine the case of a neglected child notwithstanding the fact that the child is at the time within the continuing jurisdiction of the common pleas court by virtue of a divorce decree: *In re Gail*, 41 OO(2d) 341, 12 OMisc 251, 231 NE(2d) 253.

9. The juvenile court, pursuant to this section, may commit children directly to a district children's home: 1950 OAG No. 2529.

10. Under RC § 2151.35, a juvenile court may upon finding that a child is neglected, dependent, or delinquent, commit the child to any person or institution meeting the requirements of RC §§ 5103.02 and 5103.03, even though a county child welfare board exists and could provide care and support for the child: 1962 OAG No. 3489.

11. The placement or detention of delinquent, dependent, neglected children, or juvenile traffic offenders, under this section, is upon final disposition of the juvenile court and does not include placement in a detention home provided under RC § 2151.34: 1963 OAG No. 553.

DECISIONS CONSTRUING FORMER GC § 1652

15. [U]nder the provisions of GC § 1652, the court is authorized to make temporary provision for a child subject to be returned to the judge for further proceedings whenever such action might appear necessary: *Children's Home v. Fetter*, 90 OS 110, 106 NE 761.

16. The discretion of the juvenile court in relation to the care, custody and control of a delinquent or neglected child is a judicial discretion that must be exercised in good faith, and in the interest of the child, upon evidence introduced in the usual and ordinary course of the administration of justice: *State ex rel Tailford v. Bristline*, 96 OS 581, 119 NE 138.

17. A proceeding to have a child adjudged dependent is not a chancery case and is not appealable: *State ex rel Fortini v. Hoffman*, 12 App 341, 32 OCA 193.

18. An action in habeas corpus in the court of common pleas cannot be maintained to secure the custody of a child committed by the juvenile court as a dependent: *Bleier v. Crouse*, 13 App 69, 31 OCA 453.

19. No person or parent can give their consent to a finding of "dependency" for a child, but the requirements of GC § 1639-4 (RC § 2151.04), which define a dependent child, must be found to exist: *In re Hobson*, 42 OLA 216, 62 NE(2d) 510 (App).

20. Where a court declares a child to be a ward of the court and awards custody to a stranger without first finding that the child is a dependent, such action of the court is null and void and the child should be restored to

the person from whom it was taken: *In re Hayes*, 28 OLA 154.

21. The power of the court to determine questions of the custody of children is inherently equitable in its nature and it is cognizable in the court of chancery. Accordingly, a case involving the custody of children falls within the class of "chancery cases" within the meaning of Art. IV, § 6 of the constitution of Ohio and the provisions of GC § 8035 (RC § 3109.07), for an appeal in such cases is not rendered invalid by Art. IV, § 6. The fact that the legislature has codified the rules of equity (GC §§ 8032 to 8035 [RC §§ 3109.03 to 3109.07]) does not prevent such cases from being included in the class of "chancery cases": *Varsey v. Varsey*, 25 CC(NS) 229, 26 CD 385 [following *Rogers v. Rogers*, 51 OS 1; *Bower v. Bower*, 90 OS 172].

23. In case of the separation of parents, the custody of an epileptic son, who is twenty years of age and an inmate of an epileptic hospital, will be granted to the father, the evidence showing that he is a suitable and proper person to look after the interest of such child: *Patterson v. Patterson*, 12 NP(NS) 601, 57 Bull 273 (Ed).

24. If husband and wife have separated, the custody of the children is to be granted so as to secure the best interests of such children: *Patterson v. Patterson*, 12 NP(NS) 601, 57 Bull 273 (Ed).

25. A discussion of temporary and permanent care and custody of dependent girls committed by juvenile courts to the board of state charities: 1920 OAG vol. 2, p. 1009.

26. A juvenile court does not have jurisdiction to make commitments of children unless service, either actual or constructive, is first had on the father or person having custody of such child, such custody created by operation of law, judicial order, judgment or decree: 1929 OAG p. 420.

27. Where a temporary commitment is made of a dependent child to the division of charities, such child should be kept in readiness for the return to the parent or guardian upon order of the court: 1932 OAG No. 4883.

28. A juvenile court has no authority to make a permanent order of separation of a child from its parents, or in the case of an illegitimate child, from its mother, and follow the same with a temporary commitment to the division of charities: 1932 OAG No. 4883.

[§ 2151.35.4] § 2151.354 Disposition of unruly child.

If the child is adjudged unruly the court may:

(A) Make any of the dispositions authorized under section 2151.353 [2151.35.3] of the Revised Code;

(B) Place the child on probation under such conditions as the court prescribes;

(C) Suspend or revoke the operator's or chauffeur's license issued to such child; suspend or revoke the registration of all motor vehicles registered in the name of such child.

If after making such disposition the court finds, upon further hearing, that the child is not amenable to treatment or rehabilitation under such disposition, the court may make a disposition otherwise authorized under section 2151.355 [2151.35.5] of the Revised Code.

HISTORY: 133 v H 320. EF 11-19-69.

Text Discussion

2 Anderson Fam. L. §§ 13.4, 14.1-14.13.

Research Aids

Disposition of unruly child:

O-Jur2d: Juvenile Courts § 49**Am-Jur2d:** Juvenile Courts etc. § 29 et seq.**Law Reviews****A proposal for the more effective treatment of the unruly child in Ohio.** G. David Schiering. 39 CinL Rev 275.

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

Juvenile delinquent and unruly proceedings in Ohio: unconstitutional adjudications. Note. 24 ClevStLRev 602 (1975).

Ohio Rules

This section is affected by Juv.R. 29(F), 34(B), (C), (D), (E), 35(B).

CASE NOTES AND OAG

See also case notes 5, 11, 16, 26, 28 under RC § 2151.35.3.

1. Any construction of RC § 2151.35.4 that would allow commitment of an "unruly" child to the legal custody of the Ohio youth commission would be a violation of due process of law, and therefore an improper construction. Both the existing juvenile code and the juvenile rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

DECISIONS CONSTRUING FORMER GC § 1652

2. Under this section a court may make an order permitting an incorrigible child to make his home with his father on certain days of the week, and with his mother on the remaining days of the week, subject to certain conditions and provided that final judgment of commitment to any other person, place or institution should be suspended as long as such child should comply with such conditions, in the opinion of the judge, without losing jurisdiction of such case; and the court may thereafter remove such child from the custody of its parents and commit it to a county children's home: Children's Home v. Fetter, 90 OS 110, 106 NE 761.

[§ 2151.35.5] § 2151.355 Disposition of delinquent child.

If the child is found to be a delinquent child, the court may make any of the following orders of disposition:

(A) Any order which is authorized by section 2151.353 [2151.35.3] of the Revised Code;

(B) Place the child on probation under such conditions as the court prescribes;

(C) Commit the child to the temporary custody of any school, camp, institution or other facility for delinquent children operated for the care of such children by the county, by a district organized under section 2151.34 or 2151.65 of the Revised Code, or by a private agency or organization, within or without the state, which is authorized and qualified to provide the care, treatment, or placement required;

(D) Commit the child to the legal custody of the Ohio youth commission;

(E) Commit a male child sixteen years of age or over who has committed an act which if committed by an adult would be a felony to a maximum security institution operated by the Ohio youth commission for the training and rehabilitation of such delinquent children;

(F) Impose a fine not to exceed fifty dollars and costs;

(G) Suspend or revoke the operator's or chauffeur's license issued to such child, or suspend or revoke the registration of all motor vehicles registered in the name of such child;

(H) Make such disposition as authorized by section 2947.25 of the Revised Code, if the child would come within the purview of such section if he were an adult;

(I) Make such further disposition as the court finds proper.

HISTORY: 133 v H 320 (Eff 11-19-69); 133 v H 931 (Eff 3-27-70); 134 v H 494 (Eff 7-12-72); 135 v S 324 (Eff 12-19-73); 135 v H 1067 (Eff 4-8-74); 136 v H 1196. Eff 8-9-76.

Cross-References to Related Sections

Financial assistance for operating detention homes, RC § 5139.28.1.

Temporary or permanent commitment of child to youth commission, RC § 5139.05.

See RC §§ 2151.34, 2151.35.4, 2151.35.6, which refer to this section.

Text Discussion

2 Anderson Fam. L. §§ 13.4, 14.1-14.13.

Research Aids

Commitment to reformatory:

O-Jur2d: Criminal Practice and Procedure § 645**Am-Jur2d:** Juvenile Courts etc §§ 32, 33

Disposition of delinquent child:

O-Jur2d: Juvenile Courts § 49**Am-Jur2d:** Juvenile Courts § 29 et seq.

Youth commission:

O-Jur2d: Houses of Correction § 16**Law Reviews**

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

Ohio Rules

This section is affected by Juv.R. 22(D)(3), (F), 29(F), 30, 34(C), (E), 35(B), 37, 45.

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See case notes under RC §§ 2151.35.3 and 2151.35.

See also case notes 9, 11, 15, 26, 35, under RC § 2151.26; 62 under RC § 2151.23; 5.1 under RC § 2151.27.

1. Where a child, as defined in RC § 2151.01.1 (B)(1), who has been adjudicated a delinquent beyond a reasonable doubt, leaves the jurisdiction of the juvenile court so that such court can not dispose of his case, the juvenile court has authority under RC § 2151.35.5(I) to treat such person as an adult and to impose upon such person the penalty prescribed in the statute he violated and which constituted the basis for the adjudication of delinquency: *In re Cox*, 36 OApp(2d) 65, 65 OO(2d) 51, 301 NE(2d) 907 (1973).

2. The authority of the juvenile court under RC § 2151.35.5(I) is limited to dispositions provided by other statutes: *In re Cox*, 36 OApp(2d) 65, 65 OO(2d) 51, 301 NE(2d) 907 (1973).

3. A final order of disposition of a child found to be delinquent, as prescribed by RC § 2151.35.5, may not include, as punishment or otherwise, confinement (or detention) in a juvenile detention home: *In re Bolden*, 37 OApp(2d) 7, 66 OO(2d) 26, 306 NE(2d) 166 (1973).

4. Where it is apparent on appeal that a youth who was adjudicated delinquent knew of his right of appeal and of his right to expungement and the statutory time for expungement had not been met, a claim of error on the part of the lower court in not advising the youth of these rights will be regarded as frivolous and not prejudicial: *In re Haas*, 45 OApp(2d) 187, 74 OO(2d) 231 (1975).

DECISIONS CONSTRUING FORMER RC § 2151.35

5. The commitment of a juvenile to the Ohio state reformatory by a juvenile court under the provisions of former RC § 2151.35(E), is prejudicially erroneous where the evidence fails to establish that the acts committed by the juvenile were such that they would constitute a felony if committed by an adult: *In re Baker*, 20 OS(2d) 142, 49 OO(2d) 473, 254 NE(2d) 363.

6. Paragraph (E) of RC § 2151.35 which authorizes the juvenile court to commit a male child over sixteen years of age, who has committed an act which if committed by an adult would be a felony, to the Ohio state reformatory (the same institution to which adults convicted of a felony are committed), without providing to such juvenile equal rights of due process of law, is an unconstitutional denial of rights secured by the Fourteenth Amendment to the United States Constitution: *State v. Fisher*, 17 OApp(2d) 183, 46 OO(2d) 247, 245 NE(2d) 358.

7. Paragraph (E) of RC § 2151.35 is separable from the other parts of RC § 2151.35, and the unconstitutionality of paragraph (E) does not affect the remainder of RC § 2151.35: *State v. Fisher*, 17 OApp(2d) 183, 46 OO(2d) 247, 245 NE(2d) 358.

8. If the custody of such juveniles is, in fact, not for training and rehabilitation or is a commingling with adult convicts, such defalcation is an administrative matter and should not invalidate nor affect an otherwise valid commitment or power to commit: *In re Tsessmilles*, 24 OApp(2d) 153, 53 OO(2d) 363, 265 NE(2d) 308.

9. The custody of such juveniles must be completely separate and apart from and free of any contact with adult convicts: *In re Tsessmilles*, 24 OApp(2d) 153, 53

OO(2d) 363, 265 NE(2d) 308.

10. Juveniles adjudicated as delinquent for the commission of an act which if committed by an adult would be a felony may be committed by the court to the custody of the department of mental hygiene and correction for the purpose of training and rehabilitation only: *In re Tsessmilles*, 24 OApp(2d) 153, 53 OO(2d) 363, 265 NE(2d) 308.

11. A judge of a juvenile court may not commit a child who has been found to be a delinquent child, or a juvenile traffic offender, to the county jail upon the failure, refusal, or inability of such child to pay a fine and court costs: 1970 OAG No. 70-143.

12. A male juvenile delinquent over sixteen years of age who, under this section and RC § 5143.04, has been committed to the Ohio state reformatory until he arrives at the age of twenty-one years, unless sooner released for satisfactory behavior and progress in training, may be released by the superintendent of such institution upon the granting of a parole by the pardon and parole commission: 1961 OAG No. 2704.

13. Under RC § 2965.17, such a paroled prisoner may be granted a certificate of final release by the pardon and parole commission if he has faithfully performed all the conditions and obligations of his parole and has obeyed all of the rules and regulations adopted by the pardon and parole commission; but such final release may not be issued before one year after the release from the reformatory unless the said prisoner has attained the age of twenty-one years: 1961 OAG No. 2704.

14. A person who is committed to the Ohio state reformatory as a juvenile delinquent pursuant to this section and RC § 5143.04 is not serving a "sentence" within the meaning of the aggregate sentence provision of RC § 2965.35: 1962 OAG No. 2871.

DECISIONS CONSTRUING FORMER GC § 1652

15. Where a delinquent child has become a ward of the juvenile court and it has been committed to an institution, under the provisions of the General Code relating to the juvenile court, a proceeding in habeas corpus by a parent against the institution or its officers for the custody of the child will not lie: *Children's Home v. Fetter*, 90 OS 110, 106 NE 761.

16. The provisions of the General Code relating to delinquent children are reformatory in their nature and not penal. Accordingly, the provisions of this section that, "where it appears upon the hearing that such delinquent child is sixteen years of age, or over, and has committed felony," he may be committed to the Ohio state reformatory, are not unconstitutional: *Leonard v. Licker*, 3 App 377, 23 CC(NS) 442, 26 CD 427 [citing *Prescott v. State*, 19 OS 184].

17. This section is not in conflict with GC § 1681 (see now RC § 2151.26). This section provides a different place for the confinement of delinquent children over sixteen years of age from the places of confinement to which other delinquent children may be committed, namely, to the Ohio state reformatory; while GC § 1681 (see now RC § 2151.26) provides that delinquent children of any age charged with a felony may be indicted and subjected to the provisions of the general criminal statutes: *Leonard v. Licker*, 3 App 377, 23 CC(NS) 442, 26 CD 427 [citing *Prescott v. State*, 19 OS 184].

18. General Code § 1681 (see now RC § 2151.26) is discretionary and not mandatory, and a delinquent child charged with a felony may be committed as provided in this section or recognized to the court of common pleas, subject to the requirements of the general criminal laws of the state, at the discretion of the juvenile judge: *Leonard v. Licker*, 3 App 377, 23 CC(NS) 442, 26 CD 427 [citing *Prescott v. State*, 19 OS 184]; *State v. Joiner*, 20 NP(NS) 313, 28 OD 199.

19. Irregularities or errors in a judgment of

commitment cannot be reviewed by habeas corpus: In re Crouse, 14 App 274.

20. The Ohio state reformatory is a prison for persons who are convicted of felonies and committed thereto by a sentence of the court following such conviction; while for delinquent children, who have been committed thereto after having committed an act which constitutes a felony, it is only a school or place of reformation: Leonard v. Licker, 3 App 377, 23 CC(NS) 442, 26 CD 427 [citing Prescott v. State, 19 OS 184].

21. Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal or penal in its nature, but is an administrative police regulation of a corrective character; and while the commission of a crime may set the machinery of the juvenile court in motion, the accused was not tried in that court for his crime, but for incorrigibility: In re Januszewski, 196 Fed 123, 10 OLR 151.

22. Repugnancy of a state statute to the constitution of the state does not afford ground for the granting of a writ of habeas corpus by a federal court upon application of one convicted thereunder, unless the petitioner is in custody by virtue of such statute and the statute is in conflict with the constitution of the United States: In re Januszewski, 196 Fed 123, 10 OLR 151.

23. The juvenile court act, which provides for the care of delinquent children, does not declare delinquency a crime; and such statutes are corrective and not criminal: In re Januszewski, 196 Fed 123, 10 OLR 151.

24. A juvenile court may commit a delinquent male child, who is delinquent because of having committed a felony, and who at the time of the hearing is sixteen years of age or over, to the Ohio reformatory, even though such child was not yet sixteen years of age at the time of committing such felony: 1916 OAG vol. 1, p. 249.

25. As to the effect when a minor under eighteen years of age, who is placed on probation by the juvenile court, violates said probation after reaching the age of eighteen years, and as to the jurisdiction of the juvenile and common pleas court in such a case, see: 1917 OAG vol. 2, p. 1914.

26. When a boy over sixteen years of age is committed to the Ohio state reformatory, the costs are paid by the county treasurer upon the certificate of the juvenile judge, as provided in GC § 1682 (see now RC § 2151.54): 1918 OAG vol. 1, p. 324.

27. A female minor child under the age of ten years cannot legally be committed to girls' industrial school by the juvenile court: 1919 OAG vol. 1, p. 673.

28. The juvenile court may not take jurisdiction of a minor child where the jurisdiction of the common pleas court has attached in a divorce proceeding, unless the minor child is charged with being delinquent: 1924 OAG p. 639.

29. A girl over eighteen years of age may be admitted to the girls' industrial school when the juvenile court, prior to her eighteenth birthday, has duly committed her thereto, provided said order has not been rescinded, or suspended, requiring further commitment after her eighteenth birthday: 1925 OAG p. 63.

30. A court exercising jurisdiction as a "juvenile court" does not have authority to try and sentence a female charged with a felony, and therefore cannot lawfully sentence a female to the Ohio reformatory for women: 1931 OAG No. 2840.

31. A juvenile court having found that a male child over sixteen years of age was delinquent, such child, having been made a ward of the juvenile court, remains such until he is of age, even though he has been committed by the court to the reformatory: 1935 OAG No. 4865.

32. The board of parole has no jurisdiction to release on parole or otherwise a male delinquent who has been committed to the reformatory by a juvenile court. Such child can be released by the committing juvenile court

any time before reaching the age of twenty-one years: 1935 OAG No. 4865.

33. Inmates of the Ohio state reformatory, committed thereto by the juvenile court under the provisions of par. 5 of this section, must be released upon attaining the age of twenty-one years as provided in GC § 2131-1 (RC § 5143.04): 1942 OAG No. 5087.

34. Fines imposed by a juvenile court upon a juvenile delinquent under authority of this section are not fines imposed for offenses or misdemeanors prosecuted in the name of the state, as referred to in GC § 3056-2 (RC § 3375.52), and therefore are not payable to the trustees of the law library association, but are to be paid, pursuant to GC § 13454-4 (RC § 2949.11), into the treasury of the county: 1943 OAG No. 6406.

35. The release and parole of prisoners confined in penal or reformatory institutions, including juveniles committed to the Ohio state reformatory by a juvenile court under the provisions of par. 5, this section, will continue to be governed by the provisions of GC § 2209 (RC § 2965.01) et seq, notwithstanding the transfer of such persons to the Marion training school: 1950 OAG No. 2051.

[§ 2151.35.6] § 2151.356 Disposition of juvenile traffic offender.

If the child is found to be a juvenile traffic offender the court may make any of the following orders of disposition:

(A) Impose a fine not to exceed fifty dollars and costs;

(B) Suspend the child's operator's or chauffeur's license or the registration of all motor vehicles registered in the name of such child for such period as the court prescribes;

(C) Revoke the child's operator's or chauffeur's license or the registration of all motor vehicles registered in the name of such child;

(D) Place the child on probation;

(E) Require the child to make restitution for all damages caused by his traffic violation or any part thereof.

If after making such disposition the court finds upon further hearing that the child has failed to comply with the orders of the court and his operation of a motor vehicle constitutes him a danger to himself and to others, the court may make any disposition authorized by section 2151.355 [2151.35.5] of the Revised Code.

HISTORY: 133 v H 320 (EF 11-19-69); 133 v H 931. EF 8-27-70.

Text Discussion

2 Anderson Fam. L. §§ 13.6, 14.1-14.13.

Research Aids

Disposition of juvenile traffic offender:

O-Jur2d: Juvenile Courts § 49

Am-Jur2d: Juvenile Courts § 29 et seq.

Ohio Rules

This section is affected by Juv.R. 29(E)(4), (F), 34(C), 35(B), 37, 45.

CASE NOTES AND OAG

See also case notes under RC §§ 2151.35, 2151.35.3, 2151.35.5; case note 10 under RC § 2151.35.8.

1. A complaint alleging a child to be a juvenile traffic offender is neither a criminal nor a civil proceeding: In re C., 43 OMisc 98, 72 OO(2d) 421, 334 NE(2d) 545 (JC 1975).

[§ 2151.35.7] § 2151.357 [Cost.]

The court shall at the time of making any order which removes a child from his own home determine which school district shall bear the cost of educating such child. Such determination shall be made a part of the order which provides for the child's placement or commitment.

Whenever a child is placed in a detention home established under section 2154.34 of the Revised Code, or a public school within this state, not including a school operated by the state, his school district as determined by the court shall pay the cost of educating said child based on the per capita cost of the educational facility within such detention home or public school. Whenever a child is placed by the court in a private institution, school, residential treatment center, or other private facility, the state shall pay to the court a subsidy to help defray the expense of educating such child in an amount equal to the product of the daily per capita educational cost of such facility and the number of days the child resides thereat, provided that such subsidy shall not exceed five hundred dollars per year. The subsidy shall be paid quarterly to the court.

HISTORY: 133 v H 320 (E# 11-19-69); 133 v S 518. E# 7-16-70.

Research Aids

Cost of educating child:

O-Jur2d: Juvenile Courts § 49

Ohio Rules

This section is affected by Juv.R. 34(C), (D), 35.

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See also case note 10 under RC § 2151.35.3.

1. A foster home is not an educational facility within the meaning of RC § 2151.35.7, and the section has no application to a foster home: 1970 OAG No.70-166.

2. A child of kindergarten age is included within the meaning of the word "child" as it is used in RC § 2151.35.7: 1972 OAG No. 72-099.

3. If the juvenile court, pursuant to RC § 2151.35.7, removes a child of kindergarten age from the home of its parents and places it under the custody of a welfare agency, and that agency then places the child in a

kindergarten program in a school district other than that of the child's parents, RC § 5153.16(D), places the responsibility for payment of the tuition on the welfare agency: 1972 OAG No. 72-099.

4. If a welfare agency has placed a child in a kindergarten program outside the district of the residence of the child's parents, the parents will be responsible for the tuition if they are able to pay. If they are not able to pay, the welfare agency will be responsible for the tuition, even if the board of education of the parents' residence has made no provision for a kindergarten program: 1972 OAG No. 72-099.

5. A board of education which does not have a kindergarten program as part of its curriculum is neither obligated nor permitted to assume the cost of tuition for a child under six years of age who resides within its district and attends a kindergarten program in another school district: 1972 OAG No. 72-099.

DECISIONS CONSTRUING FORMER RC § 2151.35

6. Subsequent proceedings by the juvenile court declaring a child neglected will not end the obligation of the district of his school residence to continue paying his tuition: In re Laricchiuta, 16 OApp(2d) 164, 45 OO(2d) 456, 243 NE(2d) 111.

7. A child becomes a "school resident" in a school district as soon as he begins to reside therein as the child or ward of a resident. No specific period of residence is required by RC § 3313.64 to entitle him to free schooling in such district: In re Laricchiuta, 16 OApp(2d) 164, 45 OO(2d) 456, 243 NE(2d) 111.

8. A mother's continuing receipt of aid to dependent children from one county after moving to another does not prevent her children from becoming school residents of a district in the county to which she moved with them: In re Laricchiuta, 16 OApp(2d) 164, 45 OO(2d) 456, 243 NE(2d) 111.

9. The school board of the district in which a child has a school residence at the time of his placement in another district must pay his tuition, whether such placement was by order of court or by the child welfare board in whose care the parent had voluntarily left him: In re Laricchiuta, 16 OApp(2d) 164, 45 OO(2d) 456, 243 NE(2d) 111.

10. Similar earlier proceedings by the Juvenile Court of another county do not prevent a child from thereafter becoming a school resident in a county to which he moves with his family: In re Laricchiuta, 16 OApp(2d) 164, 45 OO(2d) 456, 243 NE(2d) 111.

11. Where under RC § 2151.35(B) a juvenile court commits a child to a specialized school in another state, the court, under RC § 2151.36, must itself pay expenses occasioned by the commitment and authorized by the court at the time of commitment, which expenses are paid out of funds appropriated to the court by the board of county commissioners under RC § 2151.10; and pursuant to RC § 2151.36 the court may order the parents, guardian, or person charged with the child's support to reimburse the court for such payments: 1962 OAG No. 2938.

12. Under this section the juvenile court "shall, at time of placing the child, determine which school district must bear the cost of educating the child while he is residing at such place as the court directs": 1963 OAG No. 553.

13. When a county child welfare board assumes control of a school age child and such child is placed by the board in the county children's home or in a foster home, the child's district of school residence prior to the board's assumption of control must pay tuition to another school district in which the child subsequently attends school: 1966 OAG No. 66-077.

[§ 2151.35.8] § 2151.358 Expunge- ment of record.

Any person who has been adjudicated a delin-

quent or unruly child, may apply to the court for an expungement of his record, or the court may initiate expungement proceedings. Such application shall be filed no sooner than two years after the termination of any order made by the court, or two years after his unconditional discharge from the Ohio youth commission or other institution or facility to which he may have been committed.

Notice of the hearing on such application shall be given to the prosecuting attorney.

If the court finds that the rehabilitation of the person has been attained to a satisfactory degree, the court may order the records sealed and the proceedings in such case shall be deemed never to have occurred. All index references shall be deleted and the person and the court may properly reply that no record exists with respect to such person upon any inquiry in the matter. Inspection of the records included in the order may thereafter be permitted by the court only upon application by the person who is the subject of the records and only to such persons as are named in his application.

The judgment rendered by the court under this chapter shall not impose any of the civil disabilities ordinarily imposed by conviction of a crime in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court except as provided by this chapter. The disposition of a child under the judgment rendered or any evidence given in court is not admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation. Such disposition or evidence shall not operate to disqualify a child in any future civil service examination, appointment, or application.

HISTORY: 133 v H 320. EF 11-19-69.

Text Discussion

2 Anderson Fam. L. §§ 8.14, 9.67.

Research Aids

Expungement of record:

O-Jur2d: Juvenile Courts § 54, 55

Am-Jur2d: Juvenile Courts § 59

Use of juvenile court records as evidence in subsequent criminal proceeding:

O-Jur2d: Criminal Practice and Procedure §§ 255, 292; Appellate Review § 957; Homicide §§ 134, 149

Am-Jur2d: Juvenile Courts etc. § 56

Law Reviews

Due process in Ohio for the delinquent and unruly child. Max Kravitz. 2 CapitalULRev 53 (1973).

Ohio Rules

This section is affected by Juv.R. 29, 34(E), 37(B).

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1. Although the general assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactments may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense: *State v. Cox*, 42 OS(2d) 200, 71 OO(2d) 186, 327 NE(2d) 639 (1975).

2. Where it is apparent on appeal that a youth who was adjudicated delinquent, knew of his right to expungement and that the statutory time for expungement had not been met, a claim of error on the part of the lower court in not advising the youth of this right will be regarded as frivolous and not prejudicial: *In re Haas*, 45 OApp(2d) 187, 74 OO(2d) 231 (1975).

DECISIONS CONSTRUING FORMER RC § 2151.35

3. Although Ohio law generally protects a minor from the exposure of his acts in another judicial forum, paragraph (G) of RC § 2151.35 does not prohibit the cross-examination, in a criminal trial, of a defendant, or defendant's witnesses, concerning a prior juvenile record, where the defendant's evidence attempts to establish his good character: *State v. Hale*, 21 OApp(2d) 207, 50 OO(2d) 340, 256 NE(2d) 239.

4. Where the defense introduces character evidence to the effect that the defendant had never been in any kind of trouble, and where the trial court disallows cross-examination of defendant's witnesses on the subject of prior juvenile court involvement, the introduction of a juvenile record to rebut such evidence is not prejudicial error: *State v. Hale*, 21 OApp(2d) 207, 50 OO(2d) 340, 256 NE(2d) 239.

5. Under Ohio law, juvenile convictions were inadmissible as evidence in a subsequent criminal prosecution, and such convictions could not be used to enhance punishment. [RC § 2151.35] The use by the prosecution of any prior convictions for whatever purpose is prejudicial and cannot be construed as harmless error. This error is of constitutional dimension and use of such a conviction, at a trial for a subsequent offense, for any purpose leading to a conviction for that subsequent offense is violative of the Fourteenth Amendment: *Workman v. Cardwell*, 60 OO(2d) 187, 338 FSupp 893 (1972).

6. When a defendant in a criminal case is permitted to introduce evidence of his life history, he waives the protection of this section, and may be cross-examined with reference to the disposition of any charge preferred against him as a juvenile: *State v. Marinski*, 139 OS 559, 23 OO 50, 41 NE(2d) 387.

7. The fact that the confessions were used in the juvenile court, did not render them inadmissible in the common pleas court, under this section, because there was but one case or proceeding: *State v. Lowder*, 79 App 237, 34 OO 568, 72 NE(2d) 785.

8. It is prejudicial error to permit examination of a witness in a negligence action as to convictions and imprisonments with respect to law violations committed in another state, where charges for the offenses involved were heard and disposed of by a juvenile court of such state and, under the laws of such state, denominating a child a criminal because of the adjudication of a juvenile court and denominating such an adjudication a conviction are expressly forbidden: *Mason v. Klaserner*,

114 App 171, 19 OO(2d) 24, 180 NE(2d) 870.

9. Under this section a minor, tried and found guilty by a juvenile court on a charge of auto theft, is neither charged with a crime nor convicted of a felony, and the judgment rendered therein is not admissible as evidence against him in any other case or proceeding in any other court: *Beatty v. Riegel*, 115 App 448, 21 OO(2d) 71, 185 NE(2d) 555.

10. In an action by an insurance company to declare an automobile liability policy void, the admission into evidence of juvenile court records was not prejudicial error where the insured's own testimony disclosed his arrest for driving while under the influence of intoxicating liquor, the suspension of his driver's license, and the payment of a fine: *Allstate Ins. Co. v. Cook*, 26 OO(2d) 192, 324 F(2d) 752.

11. This section, providing that evidence received in the juvenile court is not admissible as evidence against the child in any other case or proceeding or any other court, is not applicable to a proceeding against the alleged insurance carrier of the child on a supplemental petition to enforce the insurer's liability: *Bingham v. Hartman*, 88 OLA 126, 181 NE(2d) 721 (App).

DECISIONS CONSTRUING FORMER GC § 1669

12. It is prejudicial error to permit cross-examination of a defendant in a criminal case as to the commission of offenses prior to the one for which he is being tried, when such inquiry is predicated upon juvenile court proceedings against him as a juvenile delinquent, examination of this character being within the prohibitions of GC § 1669 [see former RC § 2151.35 (now RC § 2151.35.8)]: *Malone v. State*, 130 OS 443, 5 OO 59, 200 NE 473.

[§ 2151.35.9] § 2151.359 Control of conduct of parent, guardian, or custodian.

In any proceeding wherein a child has been adjudged delinquent, unruly, abused, neglected, or dependent, on the application of a party, or the court's own motion, the court may make an order restraining or otherwise controlling the conduct of any parent, guardian, or other custodian in the relationship of such individual to the child if the court finds that such an order is necessary to:

(A) Control any conduct or relationship that will be detrimental or harmful to the child;

(B) Where such conduct or relationship will tend to defeat the execution of the order of disposition made or to be made.

Due notice of the application or motion and the grounds therefor, and an opportunity to be heard shall be given to the person against whom such order is directed.

HISTORY: 133 v H 320 (Eff 11-19-69); 136 v H 85. Eff 11-28-75.

Research Aids

Controlling conduct of parents:

O-Jur2d: Juvenile Courts § 49.5

Am-Jur2d: Juvenile Courts § 30

Ohio Rules

This section is affected by Juv.R. 34(D), 35(A).

§ 2151.36 Support of child.

When a child has been committed as provided

by sections 2151.01 to 2151.54, of the Revised Code, the juvenile court may make an examination regarding the income of the parents, guardian, or person charged with such child's support, and may then order that such parent, guardian, or person pay for the care, maintenance, and education of such child and for expenses involved in providing orthopedic, medical or surgical treatment, or special care of such child. The court may enter judgment for the money due and enforce such judgment by execution as in the court of common pleas.

Any expenses incurred for the care, support, maintenance, education, medical or surgical treatment, special care of a child, which has a legal settlement in another county, shall be at the expense of the county of legal settlement, if the consent of the juvenile judge of the county of legal settlement, is first obtained. When such consent is obtained, the board of county commissioners of the county in which such child has a legal settlement shall reimburse the committing court for such expense out of its general fund. If the department of public welfare deems it to be in the best interest of any delinquent, dependent, unruly, abused, or neglected child which has a legal settlement in a foreign state or country, that such child be returned to the state or country of legal settlement, such child may be committed to the department for such return.

Any expense ordered by the court for the care, maintenance, and education of dependent, neglected, abused, unruly, or delinquent children, or for orthopedic, medical or surgical treatment, or special care of such children under sections 2151.01 to 2151.54 of the Revised Code, except such part thereof as may be paid by the state or federal government, shall be paid from the county treasury upon specifically itemized vouchers, certified to by the judge. The court shall not be responsible for any expense resulting from the commitment of children to any home, county department of welfare which has assumed the administration of child welfare, county children services board, certified organization, or other institution, association, or agency, unless such expense has been authorized by the court at the time of commitment.

HISTORY: GC § 1639-34; 117 v 520; 119 v 731; 121 v 557; 133 v S 49 (Eff 8-13-69); 133 v H 320 (Eff 11-19-69); 136 v H 85. Eff 11-28-75.

Analogous to former GC § 1653.

Cross-References to Related Sections

Determination by juvenile judge that truant child is dependent or delinquent, RC § 3321.22.

Division of social administration, child-placing, credit of moneys to, RC § 5103.11.

Research Aids

Expenses for maintenance, education, support etc:

O-Jur2d: Juvenile Courts §§ 56, 57

Removal of children to foreign state or country:

O-Jur2d: Poor Relief and Public Welfare § 78**ALR**

Liability of parent for support of child institutionalized by juvenile court. 59 ALR3d 636.

Ohio Rules

This section is affected by Juv.R. 34(C).

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1. By the enactment of this section and GC § 1639-57 (RC § 2151.10) the legislature has granted to the juvenile court authority commensurate with its enlarged responsibility for the welfare of neglected, dependent or delinquent children. The court may obligate the county for the payment of expenses necessary to the proper discharge of its responsibility but it is not contemplated that such action will be taken where the welfare of such children is subserved adequately by their commitment to private or municipal institutions that voluntarily assume the expenses resulting therefrom: *Cleveland v. Gorman*, 87 App 36, 42 OO 278, 89 NE(2d) 605.

2. The county in which a juvenile court assumes jurisdiction of a child and declares such child to be dependent, will be responsible for the support of such child: 1935 OAG No. 4172.

3. Unless a dependent child is committed to an institution designated by this section, or a family home, and in conformity with the juvenile court code, no payment for the care and board of such child is authorized, as there is no commitment under the law: 1937 OAG No.983.

4. Moneys paid into the county welfare board for the support of dependent children, which moneys are collected from the parents of such children, should be paid into the county treasury to the credit of the general fund, such payment amounting to a reimbursement of the county fund for public funds expended for the care of dependent children: 1938 OAG No.1843.

5. The department of public welfare must accept "when able to do so" a child committed by a juvenile court under the authority of this section for transportation to said child's legal settlement, but a lack of available funds to carry on such activity would render the department of public welfare unable "to do so," and therefore, under such circumstances, such department is not required to accept a child so committed: 1938 OAG No.2391.

6. A juvenile court is empowered under proper circumstances, as determined by the court, to commit a child to a foster home and to make such terms respecting such commitment as may be proper and suitable under the circumstances: 1941 OAG No.3353.

7. Where the mother has verbally released her right to custody and has transferred her child to a foster parent in another county, a later transfer to the mother immediately establishes in the child the legal settlement of its mother: 1941 OAG No.4033.

8. Where commitment proceedings are instituted under jurisdiction of the probate court the determination of residence of the child is to be decided by reference to the commissioner of mental diseases

under GC § 1890-33 (RC § 5123.29): 1941 OAG No. 4033.

9. While the duty rests upon the board of education of a school district in which a juvenile detention home is located to employ and provide such teachers and such incidental facilities as are necessary to furnish instruction to children confined in such home, such board of education may recover from the county commissioners the cost and expense involved in so doing: 1946 OAG No.1200.

10. Where a crippled child has been committed to the division of social administration for care under GC § 1352-8 (RC § 5103.12), and such child has, or subsequently acquires, legal settlement in another county, the committing court should, in the ordinary case, certify such case under GC § 1639-34 (RC § 2151.36), to the juvenile court of such other county for further proceedings. Following such certification, and until the juvenile court of such other county otherwise orders, the division of social administration may continue to extend care to such child under the original order of commitment, and the cost of such care must be borne by the county of legal settlement: 1952 OAG No. 1839.

11. Where a crippled child has been committed to the division of social administration under GC § 1352-8 (RC § 5103.12), by the juvenile court of a county in which such child does not have legal settlement, the division of social administration is authorized, under such section, to meet the expense of such care from funds allocated from the federal children's bureau to the state of Ohio for the care of crippled children. In such case, in the event that such child has, or subsequently acquires, legal settlement in a county other than the county from which commitment was ordered, the county of legal settlement can be charged with the expense thus incurred only after the consent of the juvenile court of the county of legal settlement has been obtained, as provided in GC § 1639-34 (RC § 2151.36): 1952 OAG No. 1839.

12. The term "legal settlement" as used in this section has reference to that term as defined in RC § 5113.05: 1956 OAG No.6542.

13. A committing juvenile court may, under this section, at the time of commitment, obligate the county for such expenses as are authorized and approved by the judge of the juvenile court for the care of a delinquent child committed to the department of mental hygiene and correction for placement in a private family home or institution operating under such rules and regulations as are adopted by the department: 1956 OAG No.7007.

14. Where, under division (B) of RC § 2151.35, a juvenile court commits a child to a specialized school in another state, the court, under RC § 2151.36, must itself pay expenses occasioned by the commitment and authorized by the court at the time of commitment, which expenses are paid out of funds appropriated to the court by the board of county commissioners under RC § 2151.10; and pursuant to RC § 2151.36, the court may order the parents, guardian, or person charged with the child's support to reimburse the court for such payments: 1962 OAG No. 2938.

15. A child welfare board may not legally request support payments from parents whose children have been taken from them permanently by the courts: 1966 OAG No. 66-148.

DECISIONS UNDER FORMER GC § 1653

16. The county's share of expense of maintaining children committed by the juvenile court to the Ohio board of state charities for placing in homes is to be paid from the general county fund: 1915 OAG vol. 3, p.2159.

17. General Code § 1653 (see now RC § 2151.36), while authorizing commitments by juvenile courts of dependent and neglected children to the care of an individual of good moral character, makes no provision in such cases for payment by the county commissioners of the board of such committed children: 1922 OAG vol.1, p.149.

18. A court of the county in which the mother was originally committed to the girls' industrial school, such county being the legal residence of the mother, has jurisdiction to commit her illegitimate child born in another county, under GC § 1653 (see now RC § 2151.36): 1933 OAG No.1397.

19. A juvenile court has jurisdiction to declare any child a dependent which is found within the county under facts and circumstances constituting dependency. The legal residence of the child or its parents, or those standing in loco parentis does not determine the jurisdiction of the court. (1929 OAG Vol.II, p 1151 followed): 1933 OAG No.1397.

20. Care and support of minors after temporary commitment to a children's home by a juvenile court is terminated, discussed: 1934 OAG No.2388.

21. If commitments are made to a county children's home in another county, the county commissioners of the county from which they are committed are required to pay for their care if such dependent children have a legal settlement in the county from which they are committed: 1934 OAG No.2759.

22. Even though a county child welfare board has been established in a particular county, the judge of the juvenile court of such county, if there is no county children's home in the county, may commit dependent children to a county children's home in another county if such home is willing to receive the children: 1934 OAG No.2759.

23. When a child is committed to the children's home by a juvenile court permanently, and such child at the age of nineteen years, while in the care and custody of the trustees of the children's home, marries, the marriage does not release the child from the guardianship of the trustees: 1934 OAG No.3160.

§ 2151.37 Institution receiving children required to make report. (GC § 1639-36)

At any time the juvenile judge may require from an association receiving or desiring to receive children, such reports, information, and statements as he deems necessary. He may at any time require from an association or institution reports, information, or statements concerning any child committed to it by such judge under sections 2151.01 to 2151.54, inclusive, of the Revised Code.

HISTORY: GC § 1639-36; 117 v 520 (532). Eff 10-1-53. Analogous to former GC § 1675.

Research Aids

Report may be required of institution receiving children:

O-Jur2d: Juvenile Courts § 12

Ohio Rules

This section is affected by Juv.R. 7(D), (E), 35(A).

§ 2151.38 [Custody of child.]

When a child is committed to the legal custody of the youth commission, or to the per-

manent custody of a county department of welfare which has assumed the administration of child welfare, county children services board, or certified organization, the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of commitment, except that if the department or any county department, board, or certified organization having such permanent custody makes application to the court for the termination of such custody, the court upon such application, after notice and hearing and for good cause shown, may terminate such custody at any time prior to the child becoming of age. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for such period as designated by the court in its order, or until terminated or modified by the court, or until a child attains the age of twenty-one years.

HISTORY: GC § 1639-35; 117 v 520; 131 v 557; 130 v 625 (Eff 10-7-63); 133 v S 49 (Eff 8-13-69); 133 v H 320. Eff 11-19-69.

Comparative Legislation

When jurisdiction ceases:

Cal.—Welf & Inst Code, § 607

Ill.—Rev Stat, ch 37, § 705-11

Ind.—Burns' Stat, § 31-5-7-17

Ky.—KRS, § 208.200

Mich.—MCLA, § 712A.19a

N.Y.—Jud—Family Court, § 756

Pa.—Purdon's Stat, Tit. 11, § 50-312

Text Discussion

2 Anderson Fam. L. § 13.19.

Research Aids

Termination of jurisdiction:

O-Jur2d: Juvenile Courts § 25; Houses of Correction §§ 5, 8, 12

Ohio Rules

This section is affected by Juv.R. 19.

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1. Where an adjudicated delinquent child becomes twenty-one years of age during the pendency of appeals from his adjudication, all jurisdiction of the juvenile court terminates by operation of RC § 2151.38 so that the court has no authority even to vacate its previous order of commitment, which was suspended by an appellate court: In re J.F., 46 OO(2d) 49, 17 OMisc 40, 242 NE(2d) 604 (JC).

2. This section, providing that the jurisdiction of the juvenile court with respect to a child shall cease when such child is committed to the permanent care of an institution is constitutional: State v. Clevenger, 19

OApp(2d) 306, 48 OO(2d) 416, 251 NE(2d) 159.

3. It is apparent from this section that the juvenile court's jurisdiction of a child continues until the child is twenty-one years of age: *Calogeras v. Calogeras*, 10 OO(2d) 441, 163 NE(2d) 713 (JC).

4. Under the express provisions of former GC § 1643 (see now RC § 2151.38), the jurisdiction of the juvenile court ceases when a dependent child is committed to the permanent care and guardianship of an institution or association certified by the state board of charities, with permission and power to place such child in a foster home with the probability of adoption: *Conti v. Shriner*, 30 OLA 193.

5. The juvenile court's jurisdiction is terminated where a child is committed permanently to the county child welfare board and such fact requires a dismissal of an application for modification and change of custody by the child's mother: *In re Howell*, 74 OLA 217, 140 NE(2d) 347 (JC).

6. When a juvenile court acquires jurisdiction over a dependent child the jurisdiction continues until the child becomes twenty-one years of age, regardless of the residence of the parents; the county in which such court is situated is responsible for its support: 1937 OAG No.891.

7. The jurisdiction of the juvenile court over a "dependent" child can be terminated by proper entry in accordance with this section. When there has been such a termination, the common pleas court has, in a divorce action, complete jurisdiction over the matters of custody, care and support of said children; the common pleas court may, however, under the circumstances described in GC § 1639-16 (RC § 2151-23), transfer said jurisdiction to the juvenile court: 1938 OAG No.3356.

8. When a delinquent or dependent minor is committed to the permanent care and guardianship of the department of public welfare, it is the duty of the department to care for such child until he attains the age of twenty-one years, even though he enlists in the army or navy with the consent of the department, or marries with like consent: 1940 OAG No. 2959.

9. The department of mental hygiene and correction has the exclusive guardianship of delinquent children committed to it by a juvenile court, and such guardianship may not be transferred to the division of social administration, department of public welfare, merely with the consent of the committing court, but such guardianship continues until the commitment order expires or is terminated upon application to the committing court under this section: 1956 OAG No.7007.

10. Children who are inmates of a county children's home, who at the time of placement in the home were not school residents of the district in which such home is located, should be admitted to the schools in the district where the home is located, at the expense of their respective school districts in which they were school residents at the time of placement, notwithstanding the status of the children as to temporary or permanent custody by the county welfare board: 1959 OAG No. 92.

11. Under this section and RC §§ 5141.01 and 5141.02, where a juvenile court commits a child to the boys' industrial school, the jurisdiction of the court over the child ceases; and the fact that the court may have attempted to put a condition upon the release of the child, such as making restitution for damages, does not affect the exclusive power of the school and the department of mental hygiene and correction to release the child for satisfactory behavior and progress in training; and the department may so release the child regardless of whether or not

such condition has been fulfilled: 1962 OAG No. 3461.

12. Children committed by a juvenile court to a county department of welfare pursuant to RC Chapter 2151, either permanently or temporarily, remain the responsibility of the department until they reach the age of twenty-one, unless the court, upon a proper application, terminates the order of commission at an earlier date: 1975 OAG No. 75-035.

DECISION UNDER FORMER GC §§ 1643, 1672

15. Under this section the jurisdiction over an incorrigible child continues until he attains the age of twenty-one: *Children's Home v. Fetter*, 90 OS 110, 106 NE 761.

16. Under this section a court may make an order permitting an incorrigible child to make his home with his father on certain days of the week, and with his mother on the remaining days of the week, subject to certain conditions and provided that final judgment of commitment to any other person, place, or institution, should be suspended so long as such child should comply with such conditions, in the opinion of the judge, without losing jurisdiction of such case; and the court may thereafter remove such child from the custody of its parents and commit it to a county children's home: *Children's Home v. Fetter*, 90 OS 110, 106 NE 761.

17. Where a delinquent or neglected child has become the ward of the juvenile court and has been committed to an institution, under the provisions of the General Code relating to juvenile courts, the jurisdiction of the juvenile court over such child is a continuing jurisdiction, and it has authority to vacate its original order or modify the same, or make such further and additional orders in relation thereto as to it may seem just and proper: *State ex rel Taiford v. Bristline*, 96 OS 581, 119 NE 138.

18. Under this section, when a child under the age of eighteen years comes into custody of juvenile court by virtue of a warrant and arrest, such child continues for all necessary purposes of discipline and protection a ward of the court until he or she attains the age of twenty-one years, and this is true even though such court has not adjudicated such complaint prior to time that minor becomes eighteen years of age: *State ex rel Heth v. Moloney*, 126 OS 526, 186 NE 362.

19. Where mother received due notice in original dependency proceedings against infant daughter, the court, under GC § 1643 (see now RC § 2151.38), acquired continuing jurisdiction of infant, which authorized the court to change the temporary commitment to permanent, without notice to mother (GC § 1672 [see now RC § 2151.38]): *In re Cunningham*, 27 App 306, 160 NE 733.

20. The jurisdiction of the juvenile court having attached when a child is under eighteen years of age, the child continues to be the ward of the court until attaining the age of twenty-one years: *Slawski v. Slawski*, 49 App 100, 1 OO 201, 195 NE 258.

21. The juvenile court under former GC § 1643 (see now RC § 2151.38) has continuing jurisdiction of dependent child after having once acquired jurisdiction by service of the citation and notice upon the parent of such child, and adjudication of dependency, and a new citation to the parent or guardian is not necessary at the time a juvenile judge wishes to change a temporary order to a permanent one: *Conti v. Shriner*, 30 OLA 193.

22. Juvenile court judge is without authority to commit youth over eighteen years of age to boys' industrial school, notwithstanding status of delinquency attached to youth prior to arriving at age of

eighteen: 1915 OAG vol.1, p.621.

23. When a child under eighteen comes into the custody of a juvenile court, it continues under the custody of such court until it is twenty-one years old or is adopted under GC § 1672 (see now RC § 2151.-38): 1919 OAG vol.1, p.591.

24. A discussion of temporary and permanent care and custody of dependent girls committed by juvenile courts to the board of state charities: 1920 OAG vol. 2, p.1009.

25. Dependent children temporarily committed by the juvenile court to the board of state charities, may in turn be placed in the home of a mother or parent by said board. The expense of providing necessities for such children must be paid by the treasurer of the county from which they come: 1922 OAG vol.1, p.125.

26. Construction of GC §§ 1643 and 1648 (see now RC §§ 2151.38 and 2151.28) concerning the authority of the juvenile court for recommitment or adoption of children under age. A citation to parents or guardian is not necessary where a judge changes a temporary order to a permanent one: 1925 OAG p.283.

27. The trustees of a county children's home may make agreement on forms prescribed and published by the division of charities to transfer the guardianship of an indigent ward permanently committed to such institution to any public, semi-public, or private association or institution of this state established for the purpose of caring for or placing children: 1932 OAG No.4882.

28. When either a boy or girl is temporarily committed to the children's home by the juvenile court, their marriage at the age of nineteen, while in the custody of the trustees of the children's home, does not affect the jurisdiction of the juvenile court over them and their status is not affected in any way whatsoever as wards of the court: 1934 OAG No. 3160.

§ 2151.39 [Placement of children from other states.]

No person, association or agency, public, or private, of another state, incorporated or otherwise, shall place a child in a family home or with an agency or institution within the boundaries of this state, either for temporary or permanent care or custody or for adoption, unless such person or association has furnished the department of public welfare with a medical and social history of the child, pertinent information about the family, agency, association, or institution in this state with whom the sending party desires to place the child, and any other information or financial guaranty required by the department to determine whether the proposed placement will meet the needs of the child. The department may require the party desiring the placement to agree to promptly receive and remove from the state a child brought into the state whose placement has not proven satisfactorily responsive to the needs of the child at any time until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the department. All placements proposed to be made in this state by a party located in a state which is a party to the interstate compact on the placement of children shall be

made according to the provisions of sections 5103.20 to 5103.28 of the Revised Code.

HISTORY: GC § 1639-37; 117 v 520; 126 v 1165 (EF 10-17-55); 136 v H 247. EF 1-1-76.

Analogous to former GC § 1677.

Cross-References to Related Sections

Advertising for adoption placement, division of social administration to enforce prohibition upon, RC § 5103.17.

Research Aids

Placement of children from other states:

O-Jur2d: Adoption of Children § 10; Poor Relief and Public Welfare § 78

Law Reviews

The law of adoption in Ohio. Beverly E. Sylvester. 2 CapitalULRev 23 (1973).

CASE NOTES AND OAG

1. A true construction of this section requires a bond to be executed in case the mother of a child leaves the state of her legal residence and comes into Ohio and gives birth to a child within the territorial limits of the state of Ohio: In re Stringer, 26 OO 4, 11 OSupp 60 (PC).

2. The juvenile court can exercise jurisdiction over a child even though its legal settlement is not in the county; it is sufficient that the child has a residence within the country: In re Stringer, 26 OO 4, 11 OSupp 60 (PC).

3. When a juvenile court declares a child to be a ward of the court, the court assumed full parental rights over the child, and as a consequence the provisions of this section are not applicable; and a decree for adoption may be granted by the probate court without the execution of a bond: In re Stringer, 26 OO 4, 11 OSupp 60 (PC).

4. Procedure for adoption of a child placed by New York society for caring and placing of children with an Ohio family desiring to adopt said child: 1922 OAG vol.1, p.517.

5. The provisions of this section are not applicable to the acceptance of a juvenile delinquent by the Ohio compact administrator pursuant to RC § 2151.56 et seq: 1959 OAG No. 758.

§ 2151.40 Cooperation with court.

Every county, township, or municipal official or department, including the prosecuting attorney, shall render all assistance and co-operation within his jurisdictional power which may further the objects of sections 2151.01 to 2151.54 of the Revised Code. All institutions or agencies to which the juvenile court sends any child shall give to the court or to any officer appointed by it such information concerning such child as said court or officer requires. The court may seek the co-operation of all societies or organizations having for their object the protection or aid of children.

On the request of the judge, when the child is represented by an attorney, or when a trial is requested the prosecuting attorney shall assist the court in presenting the evidence at any hearing or proceeding concerning an alleged or adjudicated

cated delinquent, unruly, abused, neglected, or dependent child or juvenile traffic offender.

HISTORY: GC § 1639-55; 117 v 520; 133 v H 320 (Eff 11-19-69); 136 v H 85. Eff 11-28-75.

Research Aids

Cooperation required:

O-Jur2d: Juvenile Courts § 34

Reports of child abuse or neglect:

O-Jur2d: Juvenile Courts § 9.5

Ohio Rules

This section is affected by Juv. R. 9(A), 29(E)(1).

§ 2151.41 [Abusing or contributing to delinquency of a child prohibited.]

No person shall abuse a child or aid, abet, induce, cause, encourage, or contribute to the dependency, neglect, unruliness, or delinquency of a child or a ward of the juvenile court, or act in a way tending to cause delinquency or unruliness in such child. No person shall aid, abet, induce, cause, or encourage a child or a ward of the court, committed to the custody of any person, department, public or private institution, to leave the custody of such person, department, public or private institution, without legal consent. Each day of such contribution to such dependency, neglect, unruliness, or delinquency is a separate offense.

HISTORY: GC § 1639-45; 117 v 520; 133 v H 320. Eff 11-19-69.

Analogous to former GC § 1654.

Cross-References to Related Sections

Penalty, RC § 2151.99(A).

See RC § 2151.42.1 which refers to this section.

Text Discussion

2 Anderson Fam. L. §§ 17.12, 17.13.

Research Aids

Abusing or contributing to delinquency of child:

O-Jur2d: Juvenile Courts § 60 et seq.

Am-Jur2d: Juvenile Courts § 63 et seq.

Evidence—exception to husband—wife privilege:

O-Jur2d: Witnesses § 228

Sufficiency of evidence:

O-Jur2d: Juvenile Courts § 73

Am-Jur2d: Juvenile Courts §§ 67, 68

ALR

Acts in connection with marriage of infant below marriageable age as contributing to delinquency. 68 ALR2d 745.

Criminal liability for contributing to delinquency of married minor by immoral acts. 84 ALR2d 1254.

Criminal liability for contributing to delinquency of minor as affected by the fact that minor has not become a delinquent. 18 ALR3d 824.

Law Reviews

Ohio's mandatory reporting statute for cases of child abuse. Mario C. Ciano. 18 WestResLRev 1405.

Charges against adult offenders in the juvenile court. Judge Don J. Young, Jr. 32 OBar (No. 11) 224.

Constitutional law—freedom of speech—parental

advice on birth prevention. (Case note.) 17 WestResLRev 614.

Ohio Rules

This section is affected by Juv. R. 6, 13; see also Crim. R. 1(C).

CASE NOTES AND OAC

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1. A person who sells intoxicating liquor to a child under eighteen years of age, thereby causing the intoxication of such child, "induces" its "delinquency" within the meaning of this section, even though such seller honestly believes at the time of such sale that the child is of proper age: *State v. Kominis*, 73 App 204, 28 OO 308, 55 NE(2d) 344.

2. The offense of contributing to the delinquency of a minor female, under this section, is a misdemeanor: *State v. Beddow*, 15 OO 270 (App).

3. The owner of an establishment where intoxicating liquors are sold, who leaves her fifteen year old son in such establishment to "watch" a volunteer bartender while the owner is absent on an errand, is guilty of acting in a way tending to cause delinquency of a minor under the provisions of this section if such minor sells intoxicating liquor to other minors during the owner's absence: *State v. Butler*, 25 OO 567, 11 OSupp 18 (JC).

4. In order to obtain a conviction under this section the state must prove that there has been an adjudication of delinquency, and that the defendant committed some unlawful act which contributed thereto: *State v. Friedman*, 35 OO 39 (CP).

5. The violation of the provisions of this section, constitutes a misdemeanor, punishable as provided for in such section: *State v. Ausberry*, 83 App 514, 38 OO 549, 82 NE(2d) 751.

6. In the prosecution of a mother, predicated on GC § 1639-45 (RC § 2151.41) for contributing toward the neglect of her child by abandoning it, the husband of the accused is competent to testify for the prosecution: *State v. Ward*, 92 App 179, 49 OO 312, 109 NE(2d) 488.

7. No motion or demurrer being tendered and no bill of particulars being requested, a complaint charging that defendant "did act in a way tending to cause the delinquency" of a minor boy in that defendant

"took indecent liberties with the boy" is, as a matter of law, sufficient to charge an offense under GC § 1639-45 (RC § 2151.41): *State v. Clark*, 92 App 382, 49 OO 437, 110 NE(2d) 433.

8. Insofar as GC § 1639-45 (RC § 2151.41), condemns aiding, abetting, causing, encouraging, or contributing towards the delinquency of a child, it contemplates an existing delinquency and in such instance it is required that the complaint allege and the proof establish that the minor is or was a delinquent, and that such delinquency was in some measure caused or contributed to by the accused: *State v. Clark*, 92 App 382, 49 OO 437, 110 NE(2d) 433.

9. The portion of GC § 1639-45 (RC § 2151.41), having to do with acts which in a way tend to cause delinquency presents a different concept. It does not follow that the minor must, as a result of such acts, become a delinquent. If the acts within themselves possess the nature and character as to probably lead the minor into the status of a delinquent, such acts may be considered as tending to cause delinquency: *State v. Clark*, 92 App 382, 49 OO 437, 110 NE(2d) 433.

10. An affidavit which charges that the accused "did encourage and contribute toward the neglect or dependency of * * * in that he * * * encouraged and contributed to the lack of proper parental care due to the faults and habits of the mother * * * and the neglect by the said mother of the care necessary for its health, morals and well-being; and encouraged and contributed toward conditions and environment such as to warrant the state, in the interests of said child in assuming its guardianship," charges an offense under this section: *State v. Griffin*, 93 App 299, 51 OO 47, 106 NE(2d) 668.

11. In such case, it is not a prerequisite that the child be adjudicated as a neglected, dependent or delinquent child in a separate proceeding before a charge of contributing toward such neglect, dependency or delinquency of such child can be maintained: *State v. Griffin*, 93 App 299, 51 OO 47, 106 NE(2d) 668.

12. In a prosecution for contributing to the neglect or dependency of a minor child, the admission in evidence of the record of a separate proceeding in the same court, involving the same acts of misconduct and adjudicating the child to be a neglected and dependent child, is not erroneous: *State v. Griffin*, 93 App 299, 51 OO 47, 106 NE(2d) 668.

13. In such case, the record of a separate proceeding adjudicating the child to be a neglected and dependent child, and the testimony of the child's mother that she and the defendant engaged in acts of illicit sexual relations in the presence of the child, is sufficient competent evidence to prove the child to be a neglected or dependent child within the meaning of this section: *State v. Griffin*, 93 App 299, 51 OO 47, 106 NE(2d) 668.

13.1 In a proceeding under GC § 1639-45 (RC § 2151.41) it is not essential to expressly allege in the affidavit that the child was a "neglected" or "dependent" child: *State v. Griffin*, 93 App 299, 106 NE(2d) 668.

14. An affidavit drawn pursuant to this section charging a person with contributing toward the delinquency of a minor child, "in that he did act as a receiver of stolen property from the said minor," which neither charges that such child is a delinquent nor sets forth facts showing such child to be a delinquent within the purview of GC § 1639-2 (RC § 2151.02), and which does not set forth facts showing that the accused in any way contributed to the delinquency of such child, does not charge an offense: *State v. Kiessling*, 93 App 524, 51 OO 225, 114 NE(2d) 154.

15. An affidavit charging defendant, a married man, with improper associations with a sixteen year old female in the late hours of the night and that such child thereupon deported herself so as to injure or endanger her morals or health is sufficient to support a verdict of guilty under the provisions of this section: *State v. Mahoney*, 54 OLA 218, 87 NE(2d) 496 (App).

15.1 It is not a prerequisite that the minor be found to be delinquent in a separate action before a charge of contributing toward the delinquency of such minor can be maintained, but the affidavit setting forth the charge that defendant contributed toward the delinquency of the minor, must set forth facts showing the minor to be a delinquent minor within the purview of this section: *State v. Mahoney*, 54 OLA 218, 87 NE(2d) 496 (App).

16. A finding by the court that the defendant was guilty under this section of contributing to the delinquency of a minor girl of sixteen years is sustained by evidence that the girl, who ran away from home, was employed by the defendant to serve customers with wine, beer, gin, and other intoxicants, and after working a day and a half quit the employment and was permitted by the defendant to frequent the place as a customer, and aided in her associations with the loose characters, male and female, who made the place their rendezvous: *State v. Johns*, 32 OLA 315.

17. A prosecution in municipal court under this section commenced after November 19, 1969 for an offense alleged to have been committed by an adult defendant after that date is null and void, as the 1969 amendment to RC § 2151.23 vests exclusive original jurisdiction over such cases in the juvenile court: *State v. Sanchez*, 22 OApp(2d) 145, 51 OO(2d) 292, 259 NE(2d) 139.

18. Intent is not an element of the offense of acting in a way tending to cause the delinquency of a minor: *State v. Poney*, 48 OO(2d) 208, 19 OMisc 51, 249 NE(2d) 567 (JC).

18.1 Proof of the offense of acting in a manner tending to contribute to the delinquency of a minor is established by evidence of acts of such a nature as could reasonably be certain to lead to the delinquency of a certain child: *State v. Poney*, 48 OO(2d) 208, 19 OMisc 51, 249 NE(2d) 567 (JC).

19. Revised Code 3345.21 requiring a university to maintain "law and order" on campus and RC § 2151.41 making it a crime to contribute to the delinquency of a child, place no responsibility on the part of a university to regulate the private lives of its students: *Hegel v. Langsam*, 29 OMisc 147, 55 OO(2d) 476, 273 NE(2d) 351 (CP 1971).

19.1 An affidavit drawn pursuant to GC § 1639-45 (RC §§ 2151.41, 2151.99), charging an accused with contributing toward the delinquency of a minor by furnishing, aiding or participating in the sale of beer to such minor, but which does not set forth facts showing such minor to be a delinquent within the purview of this section, does not charge an offense against the laws of Ohio: *State v. Zaras*, 81 App 152, 36 OO 460, 78 NE(2d) 74.

19.2 An affidavit charging that defendant, "the father of an illegitimate child under the age of eighteen years, did unlawfully fail and neglect to care for, support, and educate said child," does not state a cause of action against defendant under this section, since a person prosecuted thereunder must be one who is "charged by law" to be the father of an illegitimate child under eighteen years of age: *State v. Parker*, 50 OLA 285, 78 NE(2d) 427 (App).

20. General Code §§ 13452-1 to 13452-11, 13451-8a, and 13451-8b (RC §§ 2951.02 to 2951.12, 2947-12 and 2947.13) have no application to persons convicted of violation of this section or GC § 1639-46 (RC § 2151.42), such suspensions of the execution of

sentences being governed by GC §§ 1639-49 and 1639-50 (RC §§ 2151.49, 2151.50): 1942 OAG No. 4922.

21. Under the provisions of GC § 1639-49 (RC § 2151.49), read in the light of GC § 1639-50 (RC § 2151.50), a juvenile court is authorized and empowered to suspend the execution of sentences, imposed for violation of this section or GC § 1639-46 (RC § 2151.42), where imprisonment is imposed as part of the punishment, "before or during commitment, upon such condition as he imposes," at least for such period as the juvenile court does not, by reason of age or otherwise, lose jurisdiction over the dependent, neglected, or delinquent child involved: 1942 OAG No. 4922.

22. A conviction for the offense of contributing to the delinquency of a minor will not be disturbed on appeal, where competent evidence was introduced at the trial showing that the defendant, a married man, twenty-nine years of age and with a family, persistently associated with a sixteen-year old girl in such a way as to disrupt her life and morals: *State ex rel Meng v. Todaro*, 161 OS 348, 53 OO 252, 119 NE(2d) 281.

22.1 A finding or adjudication in a separate proceeding that a minor is delinquent is not a condition precedent to the maintenance of a prosecution for contributing to the delinquency of the minor, where the affidavit filed against the one charged with contributing to the delinquency and the evidence on his trial shows that the minor is delinquent: *State ex rel Meng v. Todaro*, 161 OS 348, 53 OO 252, 119 NE(2d) 281.

23. Where the parents of a female person under 16 years of age actively participate in enabling such person to enter into a marriage relationship, such participation constitutes acts tending to cause the child to become a "delinquent child" as defined by RC § 2151.02 and the parents "act in a way tending to cause delinquency in such child," in violation of this section: *State v. Gans*, 168 OS 174, 5 OO(2d) 472, 151 NE(2d) 709.

24. Where it is charged only that defendant did aid, abet, induce, cause, encourage or contribute toward the delinquency of a minor child, it is essential, in order to sustain a conviction, to establish by evidence beyond a reasonable doubt that there was some delinquency of such child which defendant either aided, abetted, induced, caused or to which he contributed: *State v. Miclau*, 167 OS 38, 4 OO(2d) 6, 146 NE(2d) 293.

25. Where it is charged that a defendant did "act in a way tending to cause delinquency" in a child, it is not necessary for a conviction, to establish an actual delinquency, but only that the acts of the defendant were within themselves of such a nature that they would tend to cause delinquency in such child, as delinquency is defined by this section: *State v. Gans*, 168 OS 174, 5 OO(2d) 472, 151 NE(2d) 709.

26. A person who engages in a conspiracy to carry on a lottery known as "numbers" or policy, in violation of law, is charged with knowledge of the minority of a person under the age of eighteen, used as a runner in the furtherance of the conspiracy; and ignorance of such fact does not constitute a defense in a prosecution for contributing to the delinquency of a minor, under the provisions of this section: *State v. Davis*, 95 App 23, 52 OO 369, 117 NE(2d) 55.

27. An affidavit drawn pursuant to this section, charging a person with contributing toward the delinquency of a minor child, which neither charges that such child is a delinquent nor sets forth facts showing such child to be a delinquent within the purview of GC §

1639-2 (RC § 2151.02), and which does not set forth facts showing any conduct on the part of the accused which, within the purview of this section, would tend to cause the delinquency of such child, does not charge an offense: *State v. Holbrook*, 95 App 526, 54 OO 135, 121 NE(2d) 81.

28. The provision of GC § 1639-45 (RC §§ 2151.41 and 2151.99), that "whoever . . . acts in a way tending to cause delinquency in such child . . . shall be fined . . ." is not void for uncertainty and does not lack uniform operation throughout the state: *State v. Cotterel*, 97 App 48, 55 OO 272, 123 NE(2d) 438.

29. An affidavit which charges that the accused "did act in a manner tending to cause the delinquency of . . . a minor . . . in that he did engage in immoral and indecent conduct with said minor," properly charges an offense under this section, which makes it an offense to "act in a way tending to cause delinquency in such child"; and such affidavit need not allege facts showing such minor to be a delinquent: *State v. Patty*, 102 App 18, 1 OO(2d) 480, 140 NE(2d) 804.

30. An affidavit which charges an offense in the exact words of the statute describing such offense is not open to legal objection: *State v. Parks*, 105 App 208, 6 OO(2d) 40, 152 NE(2d) 154.

31. In a prosecution on the charge of contributing to the neglect of a minor based on the fact that defendant unlawfully removed the minor from the control and custody of the child welfare board, it is essential that such removal be done against the will and without the consent of the board and where the proof according to the record is that at no time did the defendant have custody of the minor except by and with the consent of the board, the prosecution fails completely to establish the essentials of the offense charged: *State v. Jones*, 76 OLA 112, 145 NE(2d) 458 (App).

32. One who establishes a separate domicile with another, living as husband and wife, knowing him to be the father of three young minor children, is guilty of the violation of this section, which holds in part that "No person shall . . . aid, abet, induce, cause, encourage . . . the neglect . . . of a child": *State v. Fullen*, 86 OLA 300, 176 NE(2d) 605 (App).

33. A mother is not guilty of contributing to the delinquency of a minor under this section when instructing her daughter, who is under eighteen years of age, on matters of sex and health: *State v. McLaughlin*, 4 OApp(2d) 327, 33 OO(2d) 389, 212 NE(2d) 635.

33.1 A drug store proprietor is not guilty of acting in a way tending to cause the delinquency of a fourteen-year old boy to whom he has sold a magazine containing lewd pictures: *State v. Crary*, 10 OO(2d) 36, 155 NE(2d) 262 (CP).

33.2 The court of common pleas and municipal courts have jurisdiction in offenses involving adults, concurrent with that of the juvenile court, arising under this section or RC § 2151.42: 1958 OAG No. 2016 [1950 OAG No. 1901, overruled].

33.3 In a prosecution for violation of RC § 2151.-41, such section should be considered and construed together with RC § 2945.12 and Const. Art. I, § 10: *State v. Walker*, 108 App 333, 9 OO(2d) 296, 161 NE(2d) 521.

33.4 Inasmuch as an indigent adult may in juvenile court be found guilty of only a misdemeanor, there is no present requirement that counsel must be appointed to defend him: 1967 OAG No. 67-068.

DECISIONS UNDER FORMER GC § 1654

Nature of offense

34. Contributing to the delinquency of a female minor is a misdemeanor: *Stockum v. State*, 106 OS 249, 139 NE 855.

35. The jurisdiction of the juvenile court to prosecute an adult must be predicated on delinquency, dependency or neglect of minor under eighteen years of age: 1915 OAG vol.1, p.143.

36. An affidavit charging that F, on or about the first day of March, 1909, and at divers other days and times between that date and the first day of April, 1910, did unlawfully aid, abet, induce, cause, encourage and contribute to the delinquency of L S, a female minor child, and further stating the acts, means and methods by which he contributed to such delinquency, states an offense under the provisions of this section, is not bad for duplicity: *Fisher v. State*, 84 OS 360, 95 NE 908.

37. A proprietor of a pool room who permits and encourages boys under eighteen to frequent his pool room and to play pool there, is guilty of contributing to their delinquency: *Anss v. State*, 16 App 502, 22 OLR 44.

37.1 Statute defining offense cannot be extended by construction to person or things not within its terms, though apparently within its spirit: *Peefer v. State*, 42 App 276, 182 NE 117.

37.2 Marriage of girl of nearly fifteen to man of forty-one years of age without parent's consent did not constitute her a "delinquent," nor render man guilty of contribution to her delinquency: *Peefer v. State*, 42 App 276, 182 NE 117.

38. In prosecution on charge of contributing to the delinquency of a minor, the nature of the charge permits of a wider latitude in the character of proof required to support it than would be permitted upon a charge of other specific offenses such as rape or assault with intent to rape or kill. One may be guilty of the offense of contributing to the delinquency of a minor by conduct or a series of acts, the commission of no one of which would, in itself, constitute a crime: *Pustoy v. State*, 12 OLA 560.

39. Finding of guilty on charge of contributing to delinquency of ten year old child, based on excessive punishment by striking with iron poker, was held justified by evidence; one hundred dollar fine and six months workhouse sentence were not unreasonable punishment for such offense: *Ford v. State*, 13 OLA 139.

39.1 Acts might tend to contribute to delinquency though they would not constitute the offense of contributing to the delinquency; and while a finding of delinquency on the part of the minor is a prerequisite to finding the defendant guilty of the offense of contributing to the delinquency of such minor, such a finding of delinquency is not required in order to convict defendant of the offense of tending to contribute to the delinquency of a minor: *State v. Hannawalt*, 26 OLA 641 (App).

39.2 Held: 21 year old woman may be convicted of contributing to the delinquency of a minor where she had sexual intercourse with a thirteen year old boy despite his incapacity to emit semen: *State ex rel Farrell v. Hornavius*, 31 OLA 460 (App).

40. A person owning and conducting a house of ill-repute is guilty of contributing to the delinquency of a minor under seventeen years of age, where it is shown that such minor was admitted by a person apparently acting as a servant or employee and making no inquiry as to the age of the minor: *Smith v. State*, 14 CC(NS) 257, 24 CD 661.

40.1 While this section was amended in 103 v 864 (871), so as to add to the prior form of such section the offense of "acting in any way tending to cause delinquency in a child," one against whom an affidavit is filed charging him with "contributing to the delinquency

of a child," cannot be convicted in the absence of proof of the delinquency of such child, no matter how culpable the acts of such defendant may be; and even if the evidence would sustain a charge of tending to cause delinquency if such charge had been made in such affidavit: *Petri v. State*, 25 CC(NS) 255, 26 CD 331 [following *Fisher v. State*, 84 OS 360].

41. Under GC § 1654 (see now RC § 2151.41), a parent cannot be prosecuted for not sending his child to a public, private or parochial school, but may be prosecuted for not giving his child a proper education equivalent to a common school education: *In re Hargy*, 23 NP(NS) 129, 32 OD 8.

42. A female under 18 who elopes with a man who is 23, without the knowledge and consent of her parents, is a delinquent; and the man is guilty of contributing to her delinquency: *State v. Wilcox*, 26 NP(NS) 343.

Necessary allegations

43. In a prosecution for contributing to the delinquency of a minor, the affidavit, in order to charge a crime, must allege that the minor is under eighteen years of age, and is a delinquent within the meaning of the statute, and that the defendant is guilty of contributing to such delinquency: *Willison v. State*, 3 App 244, 21 CC(NS) 526, 28 CD 558.

44. Affidavit charging one with contributing to delinquency of a minor states no charge, under GC § 1654 (see now RC § 2151.41), unless it charges one or more acts of delinquency specified in GC § 1644 (see now RC § 2151.38): *Edmonds v. State*, 30 App 195, 164 NE 649.

44.1 Allegations that minor was under 18, a delinquent within the meaning of statute, and that accused contributed to such delinquency, are essential to statement of offense: *Peefer v. State*, 42 App 276, 182 NE 117.

45. Delinquency must be an existing condition, to which all persons aiding or contributing may be held amenable under this section: *State v. Hawkins*, 56 Bull 166

Commitment

46. Imprisonment "at hard labor" under this section is lawful: *Stockum v. State*, 106 OS 249, 139 NE 855.

48. Contributing to delinquency of a minor, as defined in GC § 1654 (see now RC § 2151.41), is a misdemeanor and a person found guilty of a violation of its provisions cannot lawfully be sentenced to the Ohio reformatory for women: 1931 OAG No.2840.

Evidence

49. In a prosecution for contributing to the delinquency of minors, a judgment that such minors were delinquent is admissible in evidence, although it is rendered after the acts complained of: *Anss v. State*, 16 App 502, 22 OLR 44.

49.1 Testimony of the delinquent, partly corroborated by other witnesses and circumstances, where accused does not take witness stand, is sufficient evidence to justify conviction on charge of contributing to delinquency of minor: *DeHoff v. State*, 13 OLA 409.

50. Where a person is charged under this section with contributing to the delinquency of a minor under seventeen years of age, by renting a room to her for the purpose of illicit intercourse, and the testimony shows that the minor went there for that purpose, it is not error to permit testimony to be given as to the reputation of the house in which such room is located: *Smith v. State*, 14 CC(NS) 257, 24 CD 661.

51. Permitting witness who did not know accused to testify, in prosecution for contributing to delinquency of

a minor, that accused was immoral, held prejudicial error: *Peefer v. State*, 42 App 276, 182 NE 117.

Charge

52. For charge to jury in a prosecution for contributing to the delinquency of a female child, see *State v. Tollinger*, 66 Bull 141.

Other questions

53. Violation of this section is a misdemeanor; while violation of GC § 12413 (See now RC § 2907.02) is a felony: *State v. Rose*, 89 OS 383, 106 NE 50, LRA 1915A, 256.

54. Where a person has been in jeopardy upon an information or affidavit charging that he contributed to the moral delinquency of a female person in violation of GC § 1654 (see now RC § 2151.41), such jeopardy cannot be successfully pleaded as a bar to a prosecution by indictment on a charge of rape under GC § 12413 (RC § 2907.02). The provision of the constitution relating to jeopardy is in the following words: "No person shall be twice put in jeopardy for the same offense." The offense charged in the information is not the same offense and does not include the offense charged in the indictment, and hence the defense of jeopardy must fail: *State v. Rose*, 89 OS 383, 106 NE 50, LRA 1915A, 256.

56. When acting as judge of a juvenile court, a probate judge may not tax any costs against delinquent, dependent or neglected children, except the costs which may be taxed against delinquent minors under eighteen years of age by virtue of GC § 1654 (see now RC § 2151.41): *In re Costs*, 1925 OAG p.12, 3 OLA 625.

57. The judge of a juvenile court is not authorized to suspend the execution of a sentence after a person has been imprisoned for violation of GC §§ 1654 or 1655 (see now RC §§ 2151.41, 2151.42) and is not given authority to place such a person so imprisoned on parole or probation: 1934 OAG No.2517.

[§ 2151.41.1] § 2151.411 Liability of parents for acts of delinquent child.

A parent or guardian having custody of a child is charged with the control of such child and shall have the power to exercise parental control and authority over such child. In any case where a child is found delinquent and placed on probation, if the court finds at the hearing that the parent having custody of such child has failed or neglected to subject him to reasonable parental control and authority, and that such failure or neglect is the proximate cause of the act or acts of the child upon which the finding of delinquency is based, the court may require such parent to enter into a recognizance with sufficient surety, in an amount of not more than five hundred dollars, conditioned upon the faithful discharge of the conditions of probation of such child. If the child thereafter commits a second act and is by reason thereof found delinquent, or violates the conditions of probation, and the court finds at the hearing that the failure or neglect of such parent to subject him to reasonable parental control and authority or to faithfully discharge the conditions of probation of such child on the part of such parent, is the proximate cause of the act or acts of the child upon which such second finding of delinquency is based, or

upon which such child is found to have violated the conditions of his probation, the court may declare all or a part of the recognizance forfeited and the amount of such forfeited recognizance shall be applied in payment of any damages which may have been caused by such child, if there be such damages, otherwise, the proceeds therefrom, or part remaining after the payment of damages as aforesaid, shall be paid into the county treasury.

The provisions of this section as it relates to failure or neglect of parents to subject a child to reasonable parental control and authority shall be in addition to and not in substitution for any other sections of this chapter relating to failure or neglect to exercise such parental control or authority. The provisions of this section shall not apply to foster parents.

HISTORY: 127 v 21, § 1. Eff 9-13-57.

Text Discussion

1 *Anderson Fam. L.* § 6.15.

2 *Anderson Fam. L.* § 9.68.

Research Aids

Liability of parents for acts of child:

O-Jur2d: *Juvenile Courts* § 52

Am-Jur2d: *Parent and Child* §§ 130, 133

Right to exercise parental control:

O-Jur2d: *Parent and Child* § 9

Am-Jur2d: *Parent and Child* §§ 17 et seq.

Law Review

Intra-family immunities and the law of torts in Ohio. *John E. Sullivan*. 18 *WestResLRev* 447.

§ 2151.42 Repealed, 134 v H 511, § 2 [GC § 1639-46; 117 v 520; 119 v 731; 121 v 557; 130 v 625]. Eff 1-1-74.

CASE NOTES AND OAG

DECISIONS CONSTRUING FORMER RC § 2151.42

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1. This section and GC § 12123 (RC § 3111.17) authorize a court, in bastardy proceedings, to render

a judgment only for the mother's support and maintenance and necessary expenses of childbirth, and support of the child; these do not include attorney fees or care and maintenance of the child from its birth to the time of trial: *State ex rel Beebe v. Cowley*, 116 OS 377, 156 NE 214.

2. By both the statutory and common law of Ohio, parents are charged with the obligation of supporting their minor children: *State ex rel Wright v. Industrial Commission of Ohio*, 141 OS 187, 25 OO 277, 47 NE(2d) 209.

3. A father's duty to support his minor child is not extinguished by a decree granting him a divorce and giving to the mother custody of the child with a monetary award against the father, which was never paid: *State ex rel Wright v. Industrial Commission of Ohio*, 141 OS 187, 25 OO 277, 47 NE(2d) 209.

4. In a prosecution under this section, which provides in part, "whoever is charged by law with the care, support, maintenance or education of a legitimate or illegitimate child under eighteen years of age, and fails, neglects or refuses so to do, * * * may be, after trial and conviction, sentenced to imprisonment * * * or fined," the state must show beyond a reasonable doubt that the accused comes within the class of persons charged by statute with such duty. The record of a judgment in an action for divorce, wherein the mother of such child was plaintiff and the accused was defendant and wherein such child was found to be the issue of the marriage, is not admissible to establish that the accused was "charged by law" with the care and support of such child: *State v. Snyder*, 157 OS 15, 47 OO 24, 104 NE(2d) 169.

5. In a prosecution under this section, the accused may offer evidence tending to prove that he was not the father of the child or "charged by law" with the care and support thereof, and as a part of his defense he is entitled, on motion duly made, to an order of the court requiring the mother and child, along with the accused, to submit to blood-grouping tests, as provided in GC § 12122-2 (RC § 2317.47): *State v. Snyder*, 157 OS 15, 47 OO 24, 104 NE(2d) 169.

6. A man can be convicted under this section for failing to support a child although there has been no previous judicial determination that he is the father of such child. It is sufficient if such determination is made for the first time in the proceeding in which he is convicted: *State v. Carter*, 175 OS 98, 23 OO(2d) 390, 191 NE(2d) 541.

7. Where the mother of a child was lawfully married at the time the child must have been conceived, a man other than her husband cannot be convicted under this section for failing to support that child unless there is clear and convincing evidence that the child is not attributable to the mother's husband; and, even if there is such evidence, the state must prove such man's guilt beyond a reasonable doubt: *State v. Carter*, 175 OS 98, 23 OO(2d) 390, 191 NE(2d) 541.

8. A petition by a minor child, alleging that a defendant wrongfully induced the plaintiff's father to abandon his family thereby (1) depriving the plaintiff of his father's affection, companionship and guidance and (2) bringing unwanted attention and unwarranted publicity causing embarrassment, humiliation and loss of social standing to the plaintiff, is subject to demurrer on the ground that it fails to state a cause of action: *Kane v. Quigley*, 1 OS(2d) 1, 30 OO(2d) 1, 203 NE(2d) 338.

9. Revised Code § 2151.42 makes it a criminal offense for the father of an illegitimate child to fail to support such child, does not give rise to a civil action for support on behalf of such child: *Baston v. Sears*, 15 OS(2d) 166,

44 OO(2d) 144, 239 NE(2d) 62.

10. Prosecution in probate court upon affidavit of wife for nonsupport of minor child held erroneous; information being indispensable under statute: *Wilson v. Lasure*, 36 App 107, 172 NE 694.

11. Conviction for nonsupport of minor child for specific period does not bar another action for nonsupport during subsequent period: *Wilson v. Lasure*, 36 App 107, 172 NE 694.

12. Although some of the matters constituting an offense in GC § 12970 (RC § 2903.08), appear in this section, they are so provided in order to enforce protection for the child; there is no inconsistency with the criminal code, the jurisdiction of which lies in another court: *In re Cooper*, 58 App 519, 11 OO 442, 16 NE(2d) 954 [affirmed, 134 OS 40].

13. An affidavit charging an accused as being the father of an illegitimate minor child and with failing to support the child, without charging that such paternity has been adjudged by a court of competent jurisdiction, does not state an offense: *State v. Parker*, 82 App 235, 37 OO 555, 78 NE(2d) 427.

14. Where an accused is found guilty of nonsupport of an illegitimate minor child of which he was alleged to be the father, the overruling of a motion to vacate the judgment of guilty on the ground of newly discovered evidence is prejudicial error, where such evidence is a birth certificate showing that a person other than the accused is the father of such child: *State v. Parker*, 82 App 235, 37 OO 555, 78 NE(2d) 427.

15. The filing in juvenile court, pursuant to this section, of an affidavit charging nonsupport of a bastard child, a criminal offense, which court thereafter holds no hearing and makes no order, and into which court the reputed father voluntarily pays certain sums which are remitted to the mother for support of the bastard, does not prevent the common pleas court from exercising jurisdiction in a civil action to recover for the support and maintenance of such child: *Wiegel v. Burcham*, 94 App 423, 52 OO 132, 115 NE(2d) 847.

16. This section does not place upon the prosecution any duty to show that a person charged with a violation thereof (nonsupport of a minor child) is able to support such child: *State v. Priest*, 120 App 270, 29 OO(2d) 93, 202 NE(2d) 187.

17. The provisions of this section having to do with the support of a minor child and prohibiting the failure or neglect to provide such support, apply to either parent of such child; and a father who contributes nothing to the support of his two minor children for more than six months except two dresses and ten dollars as presents is guilty of failure to support such children, notwithstanding the fact that the mother of such children received welfare aid for their care and support: *State v. Priest*, 120 App 270, 29 OO(2d) 93, 202 NE(2d) 187.

18. Imprisonment imposed for a violation of RC § 2151.42, making it an offense for a person charged with the care, support, maintenance, or education of a child to fail to do so, is not imprisonment for debt and, therefore, RC § 2151.42 and RC § 2151.99 are not in violation of const. art. I, § 15, prohibiting imprisonment for debt: *State v. Ducey*, 25 OApp(2d) 50, 54 OO(2d) 80, 266 NE(2d) 233.

19. Inability to provide support is a proper defense in an action brought pursuant to RC § 2151.42: *State v. Ducey*, 25 OApp(2d) 50, 54 OO(2d) 80, 266 NE(2d) 233.

20. Only that class of persons capable of paying support money, but failing to do so, may be prosecuted under RC § 2151.42 and RC § 2151.99. These sections are not violative of the equal protection

clause of the fourteenth amendment to the Constitution of the United States: *State v. Ducey*, 25 OApp (2d) 50, 54 OO(2d) 80, 266 NE(2d) 233.

21. Where a criminal action was instituted in 1945 charging defendant with nonsupport under this section, such action was governed by the provisions of that section prior to its amendment, effective January 1, 1946: *State v. Sharp*, 47 OLA 339 (App).

22. The juvenile court had jurisdiction under this section, as effective prior to its amendment January 1, 1946, of a nonsupport proceeding filed by an unmarried woman in 1945 in which the defendant was charged with being the parent of her illegitimate child, notwithstanding the defendant had not been adjudged to be the father of the child under GC § 12110 (RC § 3111.01): *State v. Sharp*, 47 OLA 339 (App).

23. Court did not err in sustaining demurrer to complaint for nonsupport where defendant had never been adjudged by any court of competent jurisdiction to be the father of the illegitimate child, which was the subject of the action: *State ex rel Fisher v. McKinney*, 55 OLA 190, 85 NE(2d) 562 (App).

24. In a prosecution under this section, for failure to support an illegitimate child, the accused may offer evidence tending to prove that he is not the father of the child or charged by law with the care and support thereof, and as a part of his defense he is entitled, on motion duly made, to an order of the court requiring the mother and child, along with the accused to submit to blood grouping tests and it is prejudicial error to refuse him this right: *State v. Lockwood*, 84 OLA 257, 160 NE(2d) 131 (App).

25. Under the provisions of this section the juvenile court's criminal jurisdiction over a parent to compel the support of a minor child terminates when the child becomes eighteen years of age: *Calogeras v. Calogeras*, 10 OO(2d) 441, 163 NE(2d) 713 (JC).

26. Alleged offenses pertaining to neglecting or mistreating a child, neglecting to provide for a child, or abandoning a child are distinct and independent offenses of an entirely different class from that of manslaughter; they are not of the same general character and violation of the neglect statute does not constitute a lesser included offense of manslaughter: *State v. Ross*, 87 OLA 379, 176 NE(2d) 746 (CP).

DECISIONS UNDER FORMER GC § 1655

27. Under a former statute (94 v 105, Bates, § 1340-2) a nonresident parent was not within its provisions: *State v. Ewers*, without report, 76 OS 563, 81 NE 1196.

28. Under the act in its present form (see also GC § 13011 [RC § 3113.05]) a nonresident parent may be prosecuted for nonsupport: *State v. Sanner*, 81 OS 393, 90 NE 1007, 28 LRA(NS) 130.

29. The term "minor" found in this section (103 v 873) should receive its ordinary legal signification, and so construed embraces only minor children who are legitimate. The juvenile court acting under that section has no authority to proceed and punish the father of an illegitimate child, unless its paternity has been acknowledged after intermarriage in conformity to GC § 8591 (see now RC § 2105.18): *Creisar v. State*, 97 OS 16, 119 NE 128.

30. The fact that GC § 12123 (RC § 3111.17) provides only for the maintenance of an illegitimate child as a result of a proceeding in bastardy, tends to show that a duty of support, maintenance and education which is imposed by this section applies only to legitimate children: *Creisar v. State*, 97 OS 16, 119 NE 128 [disapproving *State v. Bone*, 25 CC(NS) 447, 27 CD 472, and explaining refusal of supreme court to

grant certiorari].

31. When one has been charged with an offense under GC § 1655 (see now RC § 2151.42), and has been tried, convicted, sentenced, and imprisoned in a county workhouse for a term of one year pursuant thereto, a proceeding in habeas corpus cannot be successfully maintained to secure his release: *Webster v. State ex rel Altick*, 129 OS 308, 2 OO 295, 195 NE 548.

32. The violation of GC § 1655 (see now RC § 2151.42), imposing a penalty for the failure to care for, educate, and support a minor under eighteen years of age, is properly charged before a juvenile court by affidavit, under GC § 1683-1 (see now RC §§ 2151.23, 2151.43), and such court has jurisdiction to hear and determine all further proceedings thereunder: *Webster v. State ex rel Altick*, 129 OS 308, 2 OO 295, 195 NE 548; *Baker v. State*, 19 OLA 126.

33. A judgment entered in a divorce proceeding releasing the defendant father from any further responsibility regarding his minor child, whose custody, support, and so forth, are committed to the mother, is available to him as a defense against a prosecution under GC § 1655 (see now RC § 2151.42), for failing to contribute to the support of such child: *Rowland v. State*, 14 App 238, 32 OCA 75 [motion to certify record overruled, *State v. Rowland*, 19 OLR 83].

34. Prosecution for violation of GC § 1655 (see now RC § 2151.42), based upon an affidavit, is within the jurisdiction of the juvenile court, under the provisions of GC § 1683-1 (see now RC §§ 2151.23, 2151.43), giving such court jurisdiction in all offenses against minors: *Snyder v. State ex rel McCoy*, 4 OO 537 (App).

35. Settlement of bastardy proceedings and the release executed by the complainant in connection therewith, purporting to release, discharge and save harmless the defendant from all claims which may be asserted by the complainant therein, is not a bar to prosecution of an action for nonsupport of a minor illegitimate child brought under GC § 1655 (see now RC § 2151.42): *Snyder v. State ex rel McCoy*, 4 OO 537 (App).

36. [A]n action for non-support of an illegitimate child can now be maintained without resorting to a bastardy proceeding (GC § 1655): *Seldenright v. Jenkins*, 22 OLA 576 (PC).

37. The juvenile court has power under GC § 1655 (see now RC § 2151.42) to compel the fathers of legitimate children of over sixteen and under eighteen years to support them in like manner as they are required to support their children who are under sixteen years of age: 1924 OAG p.718.

38. A step-parent is generally not liable for the support, care, maintenance and education of a minor stepchild as if it were his own. The provisions of the juvenile court chapter generally apply to a step-parent in the same manner as a real parent, where the application is consistent with the intent of the chapter: 1925 OAG p.281.

39. Bond given as a condition of suspension of sentence imposed upon parent for failure to support minor child. Disposition of money if parent fails to comply: 1927 OAG p.395.

[§ 2151.42.1] § 2151.421 Official report of abuse or neglect; investigation; disposition.

Any attorney, physician, including a hospital intern or resident, dentist, podiatrist, practitioner of a limited branch of medicine or surgery as defined in section 4731.15 of the Revised Code,

registered or licensed practical nurse, visiting nurse, or other health care professional, licensed psychologist, speech pathologist or audiologist, coroner, administrator or employee of a child day-care center, or administrator or employee of a certified child care agency or other public or private children services agency, school teacher or school authority, social worker, or person rendering spiritual treatment through prayer in accordance with the tenets of a well recognized religion, acting in his official or professional capacity, having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of such child, shall immediately report or cause reports to be made of such information to the children services board or the county department of welfare exercising the children services function, or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

Anyone having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or other condition of such nature as to reasonably indicate abuse or neglect of such child may report or cause reports to be made of such information to the children services board or the county department of welfare exercising the children services function, or to a municipal or county peace officer.

Such reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(A) The names and addresses of the child and his parents or person or persons having custody of such child, if known;

(B) The child's age and the nature and extent of the child's injuries, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(C) Any other information which might be helpful in establishing the cause of the injury, abuse, or neglect.

Any person who is required to report cases of child abuse or neglect may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated cause to be performed radiological examinations of the child.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the

necessary reports.

Upon the receipt of a report concerning the possible abuse or neglect of a child, the municipal or county peace officer shall refer such report to the appropriate county department of welfare or children services board.

No child upon whom a report is made shall be removed from his parents, step-parents, guardian, or other persons having custody by a municipal or county peace officer without consultation with the children services board or the county department of welfare exercising the children services function unless, in the judgment of the reporting physician and the officer, immediate removal is considered essential to protect the child from further abuse or neglect.

The county department of welfare or children services board shall investigate, within twenty-four hours, each report referred to it under this section to determine the circumstances surrounding the injury or injuries, abuse, or neglect, the cause thereof, and the person or persons responsible. Such investigation shall be made in cooperation with the law enforcement agency. The county department of welfare or children services board shall report each case to a central registry which the state department of public welfare shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The department or board shall submit a report of its investigation, in writing to the law enforcement agency.

The county department of welfare or children services board shall make such recommendations to the county prosecutor or city attorney as it deems necessary to protect such children as are brought to its attention.

Anyone or any hospital, institution, school, health department, or agency participating in the making of such reports, or anyone participating in a judicial proceeding resulting from such reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

Nothing in this section shall be construed to define as an abused or neglected child any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment, and no report shall be required as to such child.

Any report made under this section is confidential, and any person who permits or encour-

ages the unauthorized dissemination of its contents is guilty of a misdemeanor of the fourth degree.

Reports required by this section shall result in protective services and emergency supportive services being made available by the county department of welfare or children services board on behalf of children about whom such reports are made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The department of public welfare shall exercise rule-making authority under Chapter 119. of the Revised Code to aid in the implementation of this section.

There shall be placed on file with the juvenile court in each county and the department of public welfare an initial plan of cooperation jointly prepared and subscribed to by a committee consisting of the county peace officer, all chief municipal peace officers within the county, the prosecuting attorney of the county and each city, and the children services board or county welfare department exercising the children services function as convened by the county welfare director no later than six months after the effective date of this amendment. Such plan shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and section 2151.41 of the Revised Code. Such plan shall include a system for cross-referral of reported cases of abuse and neglect as necessary, and shall also include the name and title of the official directly responsible for making reports to the central registry.

HISTORY: 130 v 625 (Ef 10-10-63); 131 v 632 (Ef 11-11-65); 133 v S 49 (Ef 8-13-69); 133 v H 338 (Ef 11-25-69); 136 v H 85, Ef 11-28-75.

Cross-References to Related Sections

Penalty, RC § 2151.99(B).

Comparative Legislation

Child abuse statutes:

- Cal.—Penal Code, § 270
- Ill.—Rev Stat, ch 23, § 2051
- Ind.—Burns' Stat, § 35-46-1-4
- Mich.—MCLA, § 722.621
- N.Y.—Jud—Family Court, §§ 812, 1011
- Pa.—Purdon's Stat, Tit. 11, § 2201
- Fla.—FSA, § 827.04

Text Discussion

- 1 Anderson Fam. L. §§ 5.1-5.6.
- 2 Anderson Fam. L. §§ 11.18-11.20.

Research Aids

Reports of child abuse or neglect:

O-Jur2d: Juvenile Courts § 9.5; Hospitals and Asylums § 5

Law Review

Ohio's mandatory reporting statute for cases of child abuse. Mario C. Ciano. 18 WestResLRev 1405.

[PROCEDURE IN ADULTS' CASES]

[§ 2151.42.2] § 2151.422 Mentally ill, mentally deficient, or psychopathic adult offenders.

Sections 2947.25 to 2947.28, inclusive, of the Revised Code, relating to the psychiatric examination, court hearing, disposition of persons found guilty of certain offenses, and the placement of children under the care and custody of such persons, shall apply to cases of adults tried and found guilty of the designated offenses in a juvenile court.

HISTORY: 132 v S 316, § 1. Ef 12-13-67.

Research Aids

Disposition of mentally ill persons and custody of children:

O-Jur2d: Juvenile Courts § 75; Parent and Child § 66; Infants § 8

§ 2151.43 Charges against adults; defendant bound over to grand jury.

In cases against an adult under sections 2151.01 to 2151.54 of the Revised Code, any person may file an affidavit with the clerk of the juvenile court setting forth briefly, in plain and ordinary language, the charges against the accused who shall be tried thereon. When the child is a recipient of aid pursuant to Chapter 5107. or 5113. of the Revised Code, the county welfare department shall file charges against any person who fails to provide support to a child in violation of section 2919.21 of the Revised Code, unless the department files charges under section 3113.06 of the Revised Code, or unless charges of nonsupport are filed by a relative or guardian of the child, or unless action to enforce support is brought under Chapter 3115. of the Revised Code.

In such prosecution an indictment by the grand jury or information by the prosecuting attorney shall not be required. The clerk shall issue a warrant for the arrest of the accused, who, when arrested, shall be taken before the juvenile judge and tried according to such sections.

The affidavit may be amended at any time before or during the trial.

The judge may bind such adult over to the grand jury, where the act complained of constitutes a felony.

HISTORY: GC § 1639-39; 117 v 520 (533); 119 v 731; 127 v 847 (Ef 9-16-57); 132 v H 390 (Ef 11-7-67); 133 v H 361 (Ef 9-23-69); 134 v H 511, Ef 1-1-74.

Analogous to former GC § 1683-1.

Cross-References to Related Sections

Action against parent for county's cost of maintaining child, RC § 3113.06.

Comparative Legislation

Procedures in adult cases:

Ill.—Rev Stat, ch 23, § 2401
Ind.—Burns' Stat, § 35-46-1-4
Mich.—MCLA, § 722.563
N.Y.—Jud—Family Court, § 155.

Text Discussion

2 Anderson Fam. L. §§ 17.3-17.9

Research Aids

Practice and procedure:

O-Jur2d: Juvenile Courts § 63 et seq.

Am-Jur2d: Juvenile Courts etc § 66 et seq.

Who may file charges:

O-Jur2d: Juvenile Courts §§ 59, 63, 65; Parent and Child § 73; Poor Relief and Public Welfare § 58

Law Review

A synopsis of Ohio juvenile court law. Hon Don J. Young, Jr. 31 CinLRev 131.

Ohio Rules

This section is related to Crim. Rules 3 and 4(C).

CASE NOTES AND OAG

1. The procedure of filing a complaint in the juvenile court on a charge of contributing to the delinquency of a minor and then binding the prisoner over to the grand jury upon concluding that a felony over which the juvenile court lacked jurisdiction had been committed did not violate the federal right to be free from double jeopardy: *Greear v. Maxwell*, 35 OO(2d) 333, 355 F(2d) 991.

2. The court of common pleas and municipal courts have jurisdiction in offenses involving adults, concurrent with that of the juvenile court, arising under RC § 2151.41 or 2151.42; 1950 OAG No. 1901 overruled; 1958 OAG No. 2016.

§ 2151.44 Complaint after hearing. (GC §§ 1639-40, 1639-42)

If it appears at the hearing of a child that any person has abused or has aided, induced, caused, encouraged, or contributed to the dependency, neglect, or delinquency of a child or acted in a way tending to cause delinquency in such child, or that a person charged with the care, support, education, or maintenance of any child has failed to support or sufficiently contribute toward the support, education, and maintenance of such child, the juvenile judge may order a complaint filed against such person and proceed to hear and dispose of the case as provided in sections 2151.01 to 2151.54, inclusive, of the Revised Code.

On the request of the judge, the prosecuting attorney shall prosecute all adults charged with violating such sections.

HISTORY: GC §§ 1639-40, 1639-42; 117 v 520 (533, 534). **EFF** 10-1-53. Analogous to former GC §§ 1658, 1664.

Comment

The prosecuting attorney may be called upon to prosecute all adults charged with violating the juvenile code. This means all persons eighteen years of age or over.

Research Aids

Complaint after hearing:

O-Jur2d: Juvenile Courts §§ 63, 65

CASE NOTES AND OAG

1. When at a hearing upon a charge that a child is delinquent, neglected, or dependent, it appears that a person has contributed to bring about the commission of any of these offenses, or in a manner tending to cause them, all the provisions of GC § 1639-40 (RC § 2151.44) does is to vest authority in the juvenile judge to then order complaint filed against such person and proceed upon such complaint: *State v. Van Horn*, 32 OLA 406 (App).

2. This section is in nowise an exclusive provision and it does not contemplate that no charge of contributing or tending to contribute to the delinquency of a minor may be filed unless and until after hearing of a charge against the child: *State v. Van Horn*, 32 OLA 406 (App).

§ 2151.45 Expense of extradition. (GC § 1639-41)

When a person charged with the violation of sections 2151.01 to 2151.54, inclusive, of the Revised Code, has fled to another state or territory, and the governor has issued a requisition for such person, the board of county commissioners shall pay from the general expense fund of the county to the agent designated in such requisition all necessary expenses incurred in pursuing and returning such prisoner.

HISTORY: GC § 1639-41; 117 v 520 (533). **EFF** 10-1-53. Analogous to former GC § 1655-1.

Cross-References to Related Sections

Fees paid to officers of state on whose governor requisition is made for return of fugitive, RC § 2963.22.

Research Aids

Expense of extradition:

O-Jur2d: Juvenile Courts § 63

CASE NOTES AND OAG

1. When an individual charged with a felony in this state or a child charged with juvenile delinquency in this state is arrested and detained by the officers of another state and such individual or child is returned to this state without the issuance of a requisition by the governor, the fees charged by the officers of such other state for such arrest and detention may not be paid under RC § 307.50 or this section: 1956 OAG No.7308.

2. When a requisition for extradition has been issued by the governor, all expenses incurred in effecting the return of the accused must be reimbursed from the county treasury pursuant to either RC § 307.50 or § 2151.45, with the exception of fees paid to the officers of the foreign state, and any necessary travel expenses up to ten cents a mile, which must be paid out of the state treasury pursuant to RC § 2963.22: 1972 OAG No. 72-105.

§ 2151.46 Bail. (GC § 1639-43)

Sections 2937.21 to 2937.45, inclusive, of the Revised Code, relating to bail in criminal cases in the court of common pleas, shall apply to adults committed or held under sections 2151.01 to 2151.54, inclusive, of the Revised Code.

HISTORY: GC § 1639-43; 117 v 520 (534). **EFF** 10-1-53. Analogous to former GC § 1665.

Comment

Bail applies only to adults, that is, eighteen years of age or over.

Research Aids**Bail:**

O-Jur2d: Juvenile Courts § 70

§ 2151.47 Jury trial; procedure.

Any adult arrested under sections 2151.01 to 2151.54, inclusive, of the Revised Code, may demand a trial by jury, or the juvenile judge upon his own motion may call a jury. A demand for a jury trial must be made in writing in not less than three days before the date set for trial, or within three days after counsel has been retained, whichever is later. Sections 2945.17 and 2945.22 to 2945.36, inclusive, of the Revised Code, relating to the drawing and impaneling of jurors in criminal cases in the court of common pleas, other than in capital cases, shall apply to such jury trial. The compensation of jurors and costs of the clerk and sheriff shall be taxed and paid as in criminal cases in the court of common pleas.

HISTORY: GC § 1639-44; 117 v 520 (534); 132 v S 55, § 1. (Eff 10-24-67); 133 v H 1. Eff 3-18-69.

Analogous to former GC § 1651.

Comment

No person is entitled to a jury trial except an adult, that is eighteen years of age or over.

Comparative Legislation**Jury trial:**

Ind.—Burns' Stat., § 31-5-2-1

Mich.—MCLA, § 712A.17

Text Discussion

2 Anderson Fam. L. § 17.11.

Research Aids

Compensation of jurors and costs:

O-Jur2d: Juvenile Courts § 78; Jury § 143

Trial by jury:

O-Jur2d: Juvenile Courts § 71

ALR

Right to jury trial in juvenile court delinquency proceedings: 100 ALR2d 1241.

CASE NOTES AND OAG

1. Defendant may waive a jury trial in misdemeanor cases without the same being in writing and under this section one would have been entitled to a jury trial only upon demand being made for the same: State v. Edwards, 66 OLA 479, 117 NE(2d) 444 (App).

DECISIONS UNDER FORMER GC § 1651

1. The jurisdiction which is conferred upon the court of domestic relations for Lucas county is to be exercised in accordance with GC §§ 1639 to 1683-1 (see now RC §§ 2151.01 to 2151.55), and since this section provides for a jury trial in a proper case, GC §§ 1683-12 to 1683-19 (RC §§ 2153.01 to 2153.07) are not rendered unconstitutional by the fact that they fail to provide in express terms for a trial by

jury: State ex rel D'Alton v. Ritchie, 97 OS 41, 119 NE 124.

2. A jury may be waived by a defendant in the juvenile court, and where he elects so to do it is not necessary that the waiver be in writing: Walton v. State, 3 App 97, 19 CC(NS) 452, 27 CD 12.

3. While this section was amended in 103 v 864 (871), so as to add to the prior form of such section the offense of "acting in any way tending to cause delinquency in a child," one against whom an affidavit is filed charging him with "contributing to the delinquency of a child," cannot be convicted in the absence of proof of the delinquency of such child, no matter how culpable the acts of such defendant may be; and even if the evidence would sustain a charge of tending to cause delinquency if such charge had been made in such affidavit: Petri v. State, 25 CC (NS) 255, 26 CD 331 [following Fisher v. State, 84 OS 360].

4. If the record does not show distinctly that the defendant was not asked if he had anything to say why judgment should not be pronounced against him, it will be presumed that such question was asked in accordance with GC § 13694 (see now RC § 2947.05): Petri v. State, 25 CC(NS) 255, 26 CD 331.

5. While this section provides that a person who is charged with contributing to the delinquency or neglect of a child may demand a trial by jury, it is said that a record which shows that "defendant did not demand a trial by jury" is insufficient, since the waiver of the right to the jury trial must appear on the record clearly and affirmatively, and the reviewing court cannot assume or imply such waiver from the fact that the record shows that the accused did not demand a jury: Petri v. State, 25 CC (NS) 255, 26 CD 331 [following Simmons v. State, 75 OS 346].

6. General Code § 1651 has nothing to do with the defendant's right to waive a jury trial, but on the contrary gives him the right to demand a jury trial, and then it provides that if he does not demand a jury trial, the judge, upon his own motion, may call a jury; but that does not give the trial judge the right to call a jury where the defendant in compliance with GC § 13442-4 expressly waives a trial by jury and elects to be tried by the court; when that is done, GC § 13442-5 makes it the mandatory duty of the trial judge to try the case without a jury: Baker v. State, 15 OLA 505 (App).

7. The probate judge, exercising juvenile jurisdiction in proceedings against an adult for contributing to delinquency, is entitled to receive as clerk of his own court the same costs as are taxed and paid to the clerk of courts in criminal cases, to be accounted for to the probate judge's fee fund: 1915 OAG vol.1, p.541.

8. Juvenile courts may call a jury for the purpose of hearing several different bastardy cases, providing the cases are so far advanced as to enable the court to determine the necessity for a jury in each case: 1933 OAG No.336.

§ 2151.48 Commitment to women's reformatory in lieu of jail or workhouse. (GC § 1639-48)

When any female over the age of eighteen years is found guilty of a misdemeanor under sections 2151.01 to 2151.54, inclusive, of the Revised Code, the juvenile judge may order such female confined to the women's reformatory at Marysville for the same term for which said female could be committed to a workhouse or jail.

HISTORY: GC § 1639-48; 117 v 520 (535). Eff 10-1-53.

Research Aids

Commitment to women's reformatory:

O-Jur2d: Juvenile Courts § 76

CASE NOTES AND OAG

1. Since both male and female offenders under GC § 1639-45 (RC § 2151.41) are subjected to the same minimum and maximum penalties, the provision in this section that a convicted female may be confined to the woman's reformatory, is not discriminatory and is not a denial of equal protection of the law: *State v. Beddow*, 15 OO 270 (App).

2. Where a female is found guilty on seven counts, of contributing to the delinquency of children, and is sentenced pursuant to this section, such sentences by their terms being for a term "not to exceed one year" and the court has not specified that such sentences are to run concurrently, such prisoner should be held for the full period of seven years, unless she is sooner released by order of court: 1944 OAG No. 6998.

3. The provisions of GC § 13457-1 (RC § 2949.33), relating to increased sentences for second and third offenders in certain misdemeanor cases, apply to commitments made to the Ohio reformatory for women, pursuant to this section: 1944 OAG No. 6998.

§ 2151.49 Suspension of sentence.

In every case of conviction under sections 2151.01 to 2151.54, inclusive, of the Revised Code, where imprisonment is imposed as part of the punishment, the juvenile judge may suspend sentence, before or during commitment, upon such condition as he imposes. In the case of conviction for non-support of a child who is receiving aid under Chapter 5107, or 5113, of the Revised Code, if the juvenile judge suspends sentence on condition that the person make payments for support, the payment shall be made to the county welfare department rather than to the child or custodian of the child.

HISTORY: GC § 1639-49; 117 v 520 (535); 132 v H 390, § 1. Eff 11-7-67.

Analogous to former GC § 1666.

Cross-References to Related Sections

Bureau of support in common pleas court, RC § 2301.34.

Withholding personal earnings to pay support, RC § 3113.21.

See RC § 2151.50 which refers to this section.

Research Aids

Priority of garnishment order:

O-Jur2d: Attachment § 316; Exemption § 14; Executions § 353

Suspension of sentence:

O-Jur2d: Juvenile Courts § 77

CASE NOTES AND OAG

1. By the express terms of this section the juvenile court is authorized to "suspend sentence" either before or after commitment, which is construed to mean suspension of the execution of the sentence rather than postponement of imposition of sentence: *In re Keagy*, 76 App 95, 31 OO 405, 63 NE(2d) 216.

2. Where the jurisdiction of the juvenile court has been invoked by the arrest of a father of minor children on a charge of nonsupport filed by the mother, and upon trial the father pleads guilty and is sentenced, which sentence is suspended and the defendant put on probation, the condition of the probation being that the defendant will pay a specified sum weekly for support, the minor children thereby become wards of the juvenile court and the subject of their support and the power to enforce the condition of probation is exclusively in that court until each child has reached the age of eighteen years: *Anderson v. Anderson*, 4 OApp(2d) 90, 33 OO(2d) 145, 212 NE(2d) 643.

3. General Code §§ 13452-1 to 13452-11, 13451-8a, and 13451-8b (RC §§ 2951.02 to 2951.12, 2947.12 and 2947.13) have no application to persons convicted of violation of this section or GC § 1639-46 (RC § 2151.42), such suspensions of the execution of sentences being governed by GC §§ 1639-49 and 1639-50 (RC §§ 2151.49, 2151.50): 1942 OAG No. 4922.

4. Under the provisions of GC § 1639-49 (RC § 2151.49), read in the light of GC § 1639-50 (RC § 2151.50), a juvenile court is authorized and empowered to suspend the execution of sentences, imposed for violation of this section or GC § 1639-46 (RC § 2151.42), where imprisonment is imposed as part of the punishment, "before or during commitment, upon such condition as he imposes," at least for such period as the juvenile court does not, by reason of age or otherwise, lose jurisdiction over the dependent, neglected, or delinquent child involved: 1942 OAG No. 4922.

§ 2151.50 Forfeiture of bond. (GC § 1639-50)

When, as a condition of suspension of sentence under section 2151.49 of the Revised Code, bond is required and given, upon the failure of a person giving such bond to comply with the conditions thereof, such bond may be forfeited, the suspension terminated by the juvenile judge, the original sentence executed as though it had not been suspended, and the term of any sentence imposed in such case shall commence from the date of imprisonment of such person after such forfeiture and termination of suspension. Any part of such sentence which may have been served shall be deducted from any such period of imprisonment. When such bond is forfeited the judge may issue execution thereon without further proceedings.

HISTORY: GC § 1639-50; 117 v 520 (535). Eff 10-1-53. Analogous to former GC § 1667.

Research Aids

Suspension of sentence—forfeiture of bond:

O-Jur2d: Juvenile Courts § 77

§ 2151.51 Provision for dependent children of person sentenced to workhouse or jail.

When an adult is sentenced to imprisonment for any violation of section 2919.21 or 2919.22 of the Revised Code, the county from which such person is sentenced, on the order of the juvenile

judge, shall pay from the general revenue fund fifty cents for each day such prisoner is confined to the juvenile court of such county, for the maintenance of the dependent children of such prisoner. Such expenditure shall be made under the direction of the judge, who shall designate an employee for such purpose. The board of county commissioners of such county shall make an appropriation for such cases, and allowances therefrom shall be paid from the county treasury upon the warrant of the county auditor.

HISTORY: GC § 1639-47; 117 v 520 (535) (EF 10-1-53); 136 v H 1, EF 6-13-75.

Analogous to former GC § 1656.

Cross-References to Related Sections

Enforcement by division of social administration, RC § 5103.17.

Research Aids

Maintenance of dependent children of person sent to jail:

O-Jur2d: Parent and Child § 38

CASE NOTES AND OAG

1. General Code § 1639-47 (RC § 2151.51) is mandatory and where an order for the payment of funds under this section is made by the juvenile judge, it becomes the duty of the county to make payment in accordance therewith without regard to the fact that aid to the dependent children concerned is currently being extended under GC § 1359-31 (RC § 5107.01) et seq; 1953 OAG No.2426.

§ 2151.52 Appeals on questions of law.

The sections of the Revised Code relating to appeals on questions of law from the court of common pleas, including the allowance and signing of bills of exceptions, shall apply to prosecutions of adults under sections 2151.01 to 2151.54, inclusive, of the Revised Code, and from such prosecutions an appeal on a question of law may be taken to the court of appeals of the county under laws governing appeals in other criminal cases to such court of appeals.

HISTORY: GC § 1639-51; 117 v 520 (536); 129 v 290, § 1, EF 10-2-61.

Analogous to former GC § 1668.

Comparative Legislation

Appeals:

- Cal.—Welf & Inst Code, § 800
- Ill.—Rev Stat, ch 37, § 704-8
- Ind.—Burns' Stat, § 31-5-7-22
- Ky.—KRS, § 208.380
- Mich.—MCLA, § 712A.22
- N.Y.—Jud—Family Court, § 1111
- Fla.—FSA, § 39.14

Research Aids

Appellate review:

- O-Jur2d: Juvenile Courts § 80 et seq.
- Am-Jur2d: Juvenile Courts etc § 70

Ohio Appellate Rule

This section is affected by Appellate Rule 1. See Koykka: Ohio Appellate Process.

CASE NOTES AND OAG

1. An order of the Juvenile Court made pursuant to a finding that the children are "neglected children," and committing said children to the permanent custody of the child welfare board for the purpose of placing them for adoption, is a final appealable order under Sec. 6, Art IV, Ohio Constitution. In re Masters, 165 OS 503, 60 OO 474, 137 NE(2d) 752.

1.1 An alleged father who appears in juvenile court voluntarily at the hearing of an affidavit claiming his alleged daughter to be a neglected child, has no right to prosecute an appeal from the finding, where he is not being prosecuted, and under this section appeals on questions of law apply to the prosecution of adults: State v. Hayes, 62 App 289, 16 OO 10, 23 NE(2d) 956.

2. Where an adult father filed a motion to vacate the previous orders and to dismiss proceedings of a juvenile court, the one order, in part, adjudicating that his child is a dependent child and the other awarding its exclusive custody to the mother, and at the hearing on such motion it was stipulated that the sole issue was the court's jurisdiction to hear, decide and make the order delivered therein on a stated date, there is no right of appeal to the court of appeals on questions of law from the court's order overruling such motion, such proceedings not being classified as a prosecution of an adult within the meaning of the juvenile court code: In re Griffin, 73 App 110, 28 OO 177, 55 NE(2d) 133.

3. A bastardy proceeding, while having some characteristics of a criminal prosecution, is essentially a civil action and an appeal from a judgment therein is not controlled by the provisions of this section relating to appeals from judgments in criminal prosecutions of adults in the juvenile court: State ex rel Pennington v. Barger, 74 App 58, 29 OO 243, 57 NE(2d) 815.

4. Upon a motion for leave to appeal from a sentence imposed by the juvenile court, good cause is shown as that term is employed in GC § 1639-51 (RC § 2151.52), when a substantial question relating to the trial, conviction and sentence of the defendant is raised incident to the appeal: State ex rel Meng v. Todaro, 92 App 247, 49 OO 342, 109 NE(2d) 669.

4.1 Under the juvenile court act (RC § 2151.01 et seq) no appeal shall be taken to the court of appeals except for good cause shown, "upon motion and notice to the prosecuting attorney . . . or unless such motion is allowed by such court"; and where an appellant fails to make a showing of "good cause" preliminary to appealing, the appeal will be denied and the judgment of the lower court affirmed: State v. Parks, 105 App 208, 6 OO(2d) 40, 152 NE(2d) 154.

5. While former GC § 1668 (see now RC § 2151.52) did not authorize proceedings in error in prosecutions of persons under seventeen, such omission did not confer upon the delinquent child the right to attack the judgment of the juvenile court collaterally by a proceeding in habeas corpus: In re Januszewski, 196 Fed 123, 10 OLR 151.

6. General Code § 1668 (see now RC § 2151.52) does not confer jurisdiction upon the court of appeals to review a judgment of the juvenile court adjudging defendants, minors, to be dependents and committing them to an institution: Baker v. State, 17 OLA 384.

[GENERAL PROVISIONS]

§ 2151.53 Physical and mental examinations; records of examination; expenses. (GC (1639-54)

Any person coming within sections 2151.01 to 2151.54, inclusive, of the Revised Code, may be subjected to a physical and mental examination by competent physicians, psychologists, and psychiatrists to be appointed by the juvenile court. Whenever any child is committed to any institution by virtue of such sections, a record of such examinations shall be sent with the commitment to such institution. The compensation of such physicians, psychologists, and psychiatrists and the expenses of such examinations shall be paid by the county treasurer upon specifically itemized vouchers, certified by the juvenile judge.

HISTORY: GC § 1639-54; 117 v 520 (536). Eff 10-1-53. Analogous to former GC § 1652-1.

Research Aids

Physical and mental examinations:

O-Jur2d: Juvenile Courts §§ 46, 63

Law Review

The Juvenile Court; a court of law. Walter G. Whitlatch. 18 WestResLRev 1239.

§ 2151.54 Fees and costs.

The juvenile court shall tax and collect the same fees and costs as are allowed the clerk of the court of common pleas for similar services. No fees or costs shall be taxed in cases of delinquent, unruly, dependent, abused, or neglected children except when specifically ordered by the court. The expense of transportation of children to places to which they have been committed, and the transportation of children to and from another state by police or other officers, acting upon order of the court, shall be paid from the county treasury upon specifically itemized vouchers certified to by the judge.

HISTORY: GC § 1639-56; 117 v 520 (537); 119 v 731; 133 v H 931 (Eff 8-27-70); 136 v H 85. Eff 11-28-75.

Analogous to former GC § 1682.

Research Aids

Fees and costs:

O-Jur2d: Juvenile Courts §§ 56, 78

Ohio Rules

This section is affected by Juv.R. 32(D).

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proper official to render this service, the cost to be payable from the county treasury upon the certificate of the juvenile judge: 1918 OAG vol.1, p.341.

3. When a minor child under the age of eighteen years is arrested and taken before a justice of the peace and the latter transfers the case to the judge of the juvenile court as provided in GC § 1659 (see now RC § 2151.25), costs are chargeable in favor of the justice of the peace and the constable and should be paid as provided in GC § 1682 (see now RC § 2151.54): 1919 OAG vol.1, p.260.

4. There is no authority for the purchase, with county funds, of an automobile for a probation officer of the juvenile court. He may use his own car in the performance of his duties, and be reimbursed, in the manner provided in GC § 1682 (see now RC § 2151.54): 1919 OAG vol.2, p.1433.

5. Where delinquent juveniles are sentenced to the boys' industrial school or girls' industrial home, the cost of the case and the expense of transporting said juveniles to the place to which they have been committed, are, pursuant to GC § 1682 (see now RC § 2151.54), payable by the county and not the state: 1921 OAG vol.1, p.114.

6. The expense of gasoline and oil, and the necessary tires and repairs to an automobile owned by a probation officer, and used exclusively in carrying out the work of the juvenile court, may legally be paid from the county treasury under the provisions of this section: 1921 OAG vol.2, p.1014.

7. The judge of a juvenile court has the power to place a child, under its jurisdiction, in the custody of a relative or other fit person in a home outside the state: 1938 OAG No.1918.

8. Payment for transportation of a child placed in a home outside the state may be made from the county treasury upon specifically itemized vouchers certified to by the judge of juvenile court: 1938 OAG No.1918.

9. The department of public welfare must accept "when able to do so" a child committed by a juvenile court under the authority of this section for transportation to said child's legal settlement, but a lack of available funds to carry on such activity would render the department of public welfare unable "to do so," and therefore, under such circumstances, such department is not required to accept a child so committed: 1938 OAG No. 2391.

10. When a justice of the peace has transferred the case of a minor to the juvenile court, fees and costs of the justice of the peace and his constable, originally made, are to follow the case for allowance and payment under GC § 1682 (see now RC § 2151.54): 1935 OAG No. 4109.

§ 2151.55 Repealed, 130 v 1682, § 2 [GC § 1639-59; 117 v 520 (537)]. Eff 10-7-63.

This section stated purpose of RC §§ 2151.01 to 2151.54.

[INTERSTATE COMPACT ON JUVENILES]

§ 2151.56 Interstate compact on juveniles.

The governor is hereby authorized to execute a compact on behalf of this state with any other state or states legally joining therein in the form substantially as follows:

1. When a boy over sixteen years of age is committed to the Ohio state reformatory, the costs are paid by the county treasurer upon the certificate of the juvenile judge, as provided in GC § 1682 (see now RC § 2151.54): 1918 OAG vol.1, p.324.

2. The sheriff is not entitled to fees for conveying girls to industrial school. The probation officer is the

THE INTERSTATE COMPACT ON JUVENILES

The contracting states solemnly agree:

Article I—Findings and Purposes

That juveniles who are not under proper supervision and control, or who have absconded, escaped or run away, are likely to endanger their own health, morals and welfare, and the health, morals and welfare of others. The cooperation of the states party to this compact is therefore necessary to provide for the welfare and protection of juveniles and of the public with respect to (1) cooperative supervision of delinquent juveniles on probation or parole; (2) the return, from one state to another, of delinquent juveniles who have escaped or absconded; (3) the return, from one state to another, of nondelinquent juveniles who have run away from home; and (4) additional measures for the protection of juveniles and of the public, which any two or more of the party states may find desirable to undertake cooperatively. In carrying out the provisions of this compact the party states shall be guided by the noncriminal, reformatory and protective policies which guide their laws concerning delinquent, neglected or dependent juveniles generally. It shall be the policy of the states party to this compact to cooperate and observe their respective responsibilities for the prompt return and acceptance of juveniles and delinquent juveniles who become subject to the provisions of this compact. The provisions of this compact shall be reasonably and liberally construed to accomplish the foregoing purposes.

Article II—Existing Rights and Remedies

That all remedies and procedures provided by this compact shall be in addition to and not in substitution for other rights, remedies and procedures, and shall not be in derogation of parental rights and responsibilities.

Article III—Definitions

That, for the purposes of this compact, "delinquent juvenile" means any juvenile who has been adjudged delinquent and who, at the time the provisions of this compact are invoked, is still subject to the jurisdiction of the court that has made such adjudication or to the jurisdiction or supervision of an agency or institution pursuant to an order of such court; "probation or parole" means any kind of conditional release of juveniles authorized under the laws of the states party hereto; "court" means any court having jurisdiction over delinquent, neglected or dependent children; "state" means any state, territory or possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; and "residence" or any variant

thereof means a place at which a home or regular place of abode is maintained.

Article IV—Return of Runaways

(a) That the parent, guardian, person or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of such parent, guardian, person or agency may petition the appropriate court in the demanding state for the issuance of a requisition for his return. The petition shall state the name and age of the juvenile, the name of the petitioner and the basis of entitlement to the juvenile's custody, the circumstances of his running away, his location if known at the time application is made, and such other facts as may tend to show that the juvenile who has run away is endangering his own welfare or the welfare of others and is not an emancipated minor. The petition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship, or custody decrees. Such further affidavits and other documents as may be deemed proper may be submitted with such petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether for the purposes of this compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not he is an emancipated minor, and whether or not it is in the best interest of the juvenile to compel his return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, he shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of such juvenile. Such requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person or agency entitled to his legal custody, and that it is in the best interest and for the protection of such juvenile that he be returned. In the event that a proceeding for the adjudication of the juvenile as a delinquent, neglected or dependent juvenile is pending in the court at the time when such juvenile runs away, the court may issue a requisition for the return of such juvenile upon its own motion, regardless of the consent of the parent, guardian, person or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of

the requisition shall be filed with the compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of such court. Upon the receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon such order shall be delivered over to the officer whom the court demanding him shall have appointed to receive him, unless he shall first be taken forthwith before a judge of a court in the state, who shall inform him of the demand made for his return, and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall deliver such juvenile over to the officer whom the court demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a juvenile who has run away from another state party to this compact without the consent of a parent, guardian, person or agency entitled to his legal custody, such juvenile may be taken into custody without a requisition and brought forthwith before a judge of the appropriate court who may appoint counsel or guardian ad litem for such juvenile and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for his own protection and welfare, for such a time not exceeding ninety days as will enable his return to another state party to this compact pursuant to a requisition for his return from a court of that state. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein he is found any criminal charge, or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency. The duly accredited officers of any state party to this compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport such juvenile through any and all states party to this compact, without interference. Upon his return to the state from which he ran away, the juvenile

shall be subject to such further proceedings as may be appropriate under the laws of that state.

(b) That the state to which a juvenile is returned under this Article shall be responsible for payment of the transportation costs of such return.

(c) That "juvenile" as used in this Article means any person who is a minor under the law of the state of residence of the parent, guardian, person or agency entitled to the legal custody of such minor.

Article V—Return of Escapees and Absconders

(a) That the appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody he has escaped shall present to the appropriate court or to the executive authority of the state where the delinquent juvenile is alleged to be located a written requisition for the return of such delinquent juvenile. Such requisition shall state the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects such delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Such further affidavits and other documents as may be deemed proper may be submitted with such requisition. One copy of the requisition shall be filed with the compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the appropriate court. Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such delinquent juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon such order shall be delivered over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him, unless he shall first be taken forthwith before a judge of an appropriate court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall

deliver such delinquent juvenile over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with his legal custody or supervision in any state party to this compact, such person may be taken into custody in any other state party to this compact without a requisition. But in such event, he must be taken forthwith before a judge of the appropriate court, who may appoint counsel or guardian ad litem for such person and who shall determine, after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for such a time, not exceeding ninety days, as will enable his detention under a detention order issued on a requisition pursuant to this Article. If, at the time when a state seeks the return of a delinquent juvenile who has either absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision, there is pending in the state wherein he is detained any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency. The duly accredited officers of any state party to this compact, upon the establishment of their authority and the identity of the delinquent juvenile being returned, shall be permitted to transport such delinquent juvenile through any and all states party to this compact, without interference. Upon his return to the state from which he escaped or absconded, the delinquent juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(b) That the state to which a delinquent juvenile is returned under this Article shall be responsible for the payment of the transportation costs of such return.

Article VI—Voluntary Return Procedure

That any delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with his legal custody or supervision in any state party to this compact, and any juvenile who has run away from any state party to this compact, who is taken into custody without a requisition in an-

other state party to this compact under the provisions of Article IV (a) or of Article V (a), may consent to his immediate return to the state from which he absconded, escaped or ran away. Such consent shall be given by the juvenile or delinquent juvenile and his counsel or guardian ad litem if any, by executing or subscribing a writing, in the presence of a judge of the appropriate court, which states that the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, consent to his return to the demanding state. Before such consent shall be executed or subscribed, however, the judge, in the presence of counsel or guardian ad litem, if any, shall inform the juvenile or delinquent juvenile of his rights under this compact. When the consent has been duly executed, it shall be forwarded to and filed with the compact administrator of the state in which the court is located and the judge shall direct the officer having the juvenile or delinquent juvenile in custody to deliver him to the duly accredited officer or officers of the state demanding his return, and shall cause to be delivered to such officer or officers a copy of the consent. The court may, however, upon the request of the state to which the juvenile or delinquent juvenile is being returned, order him to return unaccompanied to such state and shall provide him with a copy of such court order; in such event a copy of the consent shall be forwarded to the compact administrator of the state to which said juvenile or delinquent juvenile is ordered to return.

Article VII—Cooperative Supervision of Probationers and Parolees

(a) That the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state") may permit any delinquent juvenile within such state, placed on probation or parole, to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, and the receiving state shall accept such delinquent juvenile, if the parent, guardian or person entitled to the legal custody of such delinquent juvenile is residing or undertakes to reside within the receiving state. Before granting such permission, opportunity shall be given to the receiving state to make such investigations as it deems necessary. The authorities of the sending state shall send to the authorities of the receiving state copies of pertinent court orders, social case studies and all other available information which may be of value to and assist the receiving state in supervising a probationer or parolee under this compact. A receiving state, in its discretion, may agree to accept supervision of a probationer or parolee in cases where the parent, guardian or person entitled to the legal custody of the delinquent juvenile is not a resident of the receiving

state, and if so accepted the sending state may transfer supervision accordingly.

(b) That each receiving state will assume the duties of visitation and of supervision over any such delinquent juvenile and in the exercise of those duties will be governed by the same standards of visitation and supervision that prevail for its own delinquent juveniles released on probation or parole.

(c) That, after consultation between the appropriate authorities of the sending state and of the receiving state as to the desirability and necessity of returning such delinquent juvenile, the duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any such delinquent juvenile on probation or parole. For that purpose, no formalities will be required, other than establishing the authority of the officer and the identity of the delinquent juvenile to be retaken and returned. The decision of the sending state to retake a delinquent juvenile on probation or parole shall be conclusive upon and not reviewable within the receiving state, but if, at the time the sending state seeks to retake a delinquent juvenile on probation or parole, there is pending against him within the receiving state any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for any act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency. The duly accredited officers of the sending state shall be permitted to transport delinquent juveniles being so returned through any and all states party to this compact, without interference.

(d) That the sending state shall be responsible under this Article for paying the costs of transporting any delinquent juvenile to the receiving state or of returning any delinquent juvenile to the sending state.

Article VIII—Responsibility for Costs

(a) That the provisions of Articles IV (b), V (b) and VII (d) of this compact shall not be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

(b) That nothing in this compact shall be construed to prevent any party state or subdivision thereof from asserting any right against any person, agency or other entity in regard to costs for which such party state or subdivision thereof may

be responsible pursuant to Articles IV (b), V (b) or VII (d) of this compact.

Article IX—Detention Practices

That, to every extent possible, it shall be the policy of states party to this compact that no juvenile or delinquent juvenile shall be placed or detained in any prison, jail or lockup nor be detained or transported in association with criminal, vicious or dissolute persons.

Article X—Supplementary Agreements

That the duly constituted administrative authorities of a state party to this compact may enter into supplementary agreements with any other state or states party hereto for the cooperative care, treatment and rehabilitation of delinquent juveniles whenever they shall find that such agreements will improve the facilities or programs available for such care, treatment and rehabilitation. Such care, treatment and rehabilitation may be provided in an institution located within any state entering into such supplementary agreement. Such supplementary agreements shall (1) provide the rates to be paid for the care, treatment and custody of such delinquent juveniles, taking into consideration the character of facilities, services and subsistence furnished; (2) provide that the delinquent juvenile shall be given a court hearing prior to his being sent to another state for care, treatment and custody; (3) provide that the state receiving such a delinquent juvenile in one of its institutions shall act solely as agent for the state sending such delinquent juvenile; (4) provide that the sending state shall at all times retain jurisdiction over delinquent juveniles sent to an institution in another state; (5) provide for reasonable inspection of such institutions by the sending state; (6) provide that the consent of the parent, guardian, person or agency entitled to the legal custody of said delinquent juvenile shall be secured prior to his being sent to another state; and (7) make provision for such other matters and details as shall be necessary to protect the rights and equities of such delinquent juveniles and of the cooperating states.

Article XI—Acceptance of Federal and Other Aid

That any state party to this compact may accept any and all donations, gifts and grants of money, equipment and services from the federal or any local government, or any agency thereof and from any person, firm or corporation, for any of the purposes and functions of this compact, and may receive and utilize the same subject to the terms, conditions and regulations governing such donations, gifts and grants.

Article XII—Compact Administrators

That the governor of each state party to this compact shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

Article XIII—Execution of Compact

That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

Article XIV—Renunciation

That this compact shall continue in force and remain binding upon each executing state until renounced by it. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto. The duties and obligations of a renouncing state under Article VII hereof shall continue as to parolees and probationers residing therein at the time of withdrawal until retaken or finally discharged. Supplementary agreements entered into under Article X hereof shall be subject to renunciation as provided by such supplementary agreements, and shall not be subject to the six months' renunciation notice of the present Article.

Article XV—Severability

That the provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states, and in full force and effect as to the state affected as to all severable matters.

Article XVI—Additional Article

[Note: Article XVI of the compact follows RC § 2151.61 in the enrolled bill.]

That this article shall provide additional remedies, and shall be binding only as among and between those party states which specifically execute the same.

For the purposes of this Article, "child," as used herein, means any minor within the jurisdictional age limits of any court in the home state.

When any child is brought before a court of a state of which such child is not a resident, and such state is willing to permit such child's return to the home state of such child, such home state, upon being so advised by the state in which such proceeding is pending, shall immediately institute proceedings to determine the residence and jurisdictional facts as to such child in such home state, and upon finding that such child is in fact a resident of said state and subject to the jurisdiction of the court thereof, shall within five days authorize the return of such child to the home state, and to the parent or custodial agency legally authorized to accept such custody in such home state, and at the expense of such home state, to be paid from such funds as such home state may procure, designate, or provide, prompt action being of the essence.

HISTORY: 127 v 530, § 1. **EF** 9-17-57.

Cross-References to Related Sections

See RC §§ 2151.23, 2151.57 which refer to this section.

Comparative Legislation

Interstate compact on juveniles:

Cal.—Welf & Inst Code, § 1300

Ill.—Rev Stat, ch 23, § 2592

Ind.—Burns' Stat, § 31-5-3-1

Ky.—KRS, § 208.600

Mich.—MCLA, § 3.701

N.Y.—Unconsol Laws, § 1801

Pa.—Purdon's Stat, Tit. 62, § 731

Fla.—FSA, § 39.25

Text Discussion

2 Anderson Fam. L. § 2.9.

Research Aids

Interstate compact on juveniles:

O-Jur2d: Juvenile Courts § 34

Ohio Rules

See Juv.R. 45 which affects RC §§ 2151.56-2151.80.

CASE NOTES AND OAG

1. The provisions of RC § 2151.39, are not applicable to the acceptance of a juvenile delinquent by the Ohio compact administrator pursuant to the provisions of RC §§ 2151.56 to 2151.61, inclusive: 1959 OAG No. 1041.

§ 2151.57 Compact administrator; powers and duties.

Pursuant to section 2151.56 of the Revised Code, the governor is hereby authorized and empowered, with the advice and consent of the senate, to designate an officer who shall be the compact administrator and who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms of the compact. Such compact administrator shall serve subject to the

pleasure of the governor. The compact administrator is hereby authorized, empowered and directed to cooperate with all departments, agencies and officers of and in the government of this state and its subdivisions in facilitating the proper administration of the compact or of any supplementary agreement or agreements entered into by this state thereunder.

HISTORY: 127 v 530 (537), § 1. **EF** 9-17-57.

Research Aids

Interstate compact on juveniles:
O-Jur2d: Juvenile Courts § 34

CASE NOTES AND OAG

See case note under RC § 2151.56.

§ 2151.58 Supplementary agreements.

The compact administrator is hereby authorized and empowered to enter into supplementary agreements with appropriate officials of other states pursuant to the compact. In the event that such supplementary agreement shall require or contemplate the use of any institution or facility of this state or require or contemplate the provision of any service by this state, said supplementary agreement shall have no force or effect until approved by the head of the department or agency under whose jurisdiction the institution or facility is operated or whose department or agency will be charged with the rendering of such service.

HISTORY: 127 v 530 (538), § 1. **EF** 9-17-57.

Research Aids

Interstate compact on juveniles:
O-Jur2d: Juvenile Courts § 34

CASE NOTES AND OAG

See case note under RC § 2151.56.

§ 2151.59 Financial obligations.

The compact administrator, subject to the approval of the auditor of state, may make or arrange for any payments necessary to discharge any financial obligations imposed upon this state by the compact or by any supplementary agreement entered into thereunder.

HISTORY: 127 v 530 (538), § 1. **EF** 9-17-57.

Research Aids

Interstate compact on juveniles:
O-Jur2d: Juvenile Courts § 34

CASE NOTES AND OAG

See case note under RC § 2151.56.

§ 2151.60 Enforcement by agencies of state and subdivisions.

The courts, departments, agencies and officers of this state and its subdivisions shall enforce

this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions.

HISTORY: 127 v 530 (538), § 1. **EF** 9-17-57.

Research Aids

Interstate compact on juveniles:
O-Jur2d: Juvenile Courts § 34

CASE NOTES AND OAG

See case note under RC § 2151.56.

§ 2151.61 Additional article.

In addition to any procedure provided in Articles IV and VI of the compact for the return of any runaway juvenile, the particular states, the juvenile or his parents, the courts, or other legal custodian involved may agree upon and adopt any other plan or procedure legally authorized under the laws of this state and the other respective party states for the return of any such runaway juvenile.

HISTORY: 127 v 530 (538), § 1. **EF** 9-17-57.

Cross-References to Related Sections

Article XVI of the compact will be found under RC § 2151.58, following Article XV.

Research Aids

Interstate compact on juveniles:
O-Jur2d: Juvenile Courts § 34

CASE NOTES AND OAG

See case note under RC § 2151.56

§ 2151.65 Single-county and joint-county juvenile facilities.

Upon the advice and recommendation of the juvenile judge, the board of county commissioners may provide by purchase, lease, construction, or otherwise a school, forestry camp, or other facility or facilities where delinquent, dependent, abused, or neglected children or juvenile traffic offenders may be held for training, treatment, and rehabilitation. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties may form themselves into a joint board and proceed to organize a district for the establishment and support of a school, forestry camp, or other facility or facilities for the use of the juvenile courts of such counties, where delinquent, dependent, abused, or neglected children, or juvenile traffic offenders may be held for treatment, training, and rehabilitation, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district school, forestry camp, or other facility or facilities shall be maintained as provided in sections

2151.01 to 2151.80 of the Revised Code. Children who are adjudged to be delinquent, dependent, neglected, abused, or juvenile traffic offenders may be committed to and held in any such school, forestry camp, or other facility or facilities for training, treatment, and rehabilitation.

The juvenile court shall determine:

(A) The children to be admitted to any school, forestry camp, or other facility maintained under this section;

(B) The period such children shall be trained, treated, and rehabilitated at such facility;

(C) The removal and transfer of children from such facility.

HISTORY: 130 v 626 (EF 10-14-63); 136 v H 85. EF 11-28-75.

Cross-References to Related Sections

Additional tax levy, RC § 5705.19.

Election on question of issuance of county bonds for acquisition or construction of youth rehabilitation facilities, RC § 133.15.1.

Foster care facilities, RC § 5139.36.

Resolution relative to tax levy in excess of ten-mill limitation, RC § 5705.19.

Standards of construction of youth rehabilitation facility, RC § 5139.27.

Standards of operation of youth rehabilitation facility, RC §§ 5139.28 to 5139.30.

Tax levy for youth rehabilitation facility, RC § 5705.19.

See RC §§ 2151.34.13, 2151.34.14, 2151.35.5, 2151.65.1 to 2151.65.4, 2151.66 to 2151.79 which refer to this section.

Comparative Legislation

Facilities for training, treatment and rehabilitation of children:

Cal.—Welf & Inst Code, § 800

Ill.—Rev Stat, ch 37, § 705-7

Ind.—Burns' Stat, § 11-3-5-1

Ky.—KRS, § 208.520

N.Y.—Jud—Family Court, § 756

Pa.—Purdon's Stat, Tit. 11, § 2213

Fla.—FSA, § 39.11

Research Aids

Single county and joint county juvenile facilities:

O-Jur2d: Juvenile Courts §§ 15.5, 15.6

[§ 2151.65.1] § 2151.651 State assistance for juvenile facilities.

The board of county commissioners of a county which, either separately or as part of a district, is planning to establish a school, forestry camp, or other facility under section 2151.65 of the Revised Code, to be used exclusively for the rehabilitation of male children between the ages of ten to eighteen years or female children between the ages of twelve to eighteen years, other than psychotic or mentally retarded children, who are designated delinquent by order of a juvenile court as the result of having violated any law of this state, or the United States, or any ordinance of a subdivision of this state, may make application to the youth commission, created under division

(B) of section 5139.01 of the Revised Code, for financial assistance in defraying the county's share of the cost of acquisition or construction of such school, camp, or other facility, as provided in section 5139.27 of the Revised Code. Such application shall be made on forms prescribed and furnished by the youth commission.

HISTORY: 131 v 633. EF 8-10-65.

Cross-References to Related Sections

Inspection by youth commission of youth rehabilitation facility, RC § 5139.31.

Standards of construction of youth rehabilitation facility, RC § 5139.27.

[§ 2151.65.2] § 2151.652 State assistance for operation and maintenance.

The board of county commissioners of a county or the board of trustees of a district maintaining a school, forestry camp, or other facility established under section 2151.65 of the Revised Code, used exclusively for the rehabilitation of male children between the ages of ten to eighteen years or female children between the ages of twelve to eighteen years, other than psychotic or mentally retarded children, who are designated delinquent by order of a juvenile court as the result of having violated any law of this state, or the United States, or any ordinance of a subdivision of this state, may make application to the youth commission, created under division (B) of section 5139.01 of the Revised Code, for financial assistance in defraying the cost of operating and maintaining such school, forestry camp, or other facility, as provided in section 5139.28 of the Revised Code.

Such application shall be made on forms prescribed and furnished by the youth commission.

HISTORY: 131 v 633. EF 8-10-65.

Cross-References to Related Sections

Inspection by youth commission of youth rehabilitation facility, RC § 5139.31.

Standards of operation of youth rehabilitation facility, RC § 5139.28.

Research Aids

State assistance:

O-Jur2d: Houses of Correction § 15.5

[§ 2151.65.3] § 2151.653 Education of youths.

The board of county commissioners of a county or the board of trustees of a district maintaining a school, forestry camp, or other facility established under section 2151.65 of the Revised Code, shall provide a program of education for the youths admitted to such school, forestry camp, or other facility. Either of such boards and the board of education of any school district may enter into an agreement whereby such board of

education provides teachers for such school, forestry camp, or other facility, or permits youths admitted to such school, forestry camp, or other facility to attend a school or schools within such school district, or both. Either of such boards may enter into an agreement with the appropriate authority of any university, college, or vocational institution to assist in providing a program of education for the youths admitted to such school, forestry camp, or other facility.

HISTORY: 131 v 634. Eff 8-10-65.

Research Aids

Education of youths:

O-Jur2d: Houses of Correction § 15.5

[§ 2151.65.4] § 2151.654 Nonresident admission.

The board of county commissioners of a county or the board of trustees of a district maintaining a school, forestry camp, or other facility established under section 2151.65 of the Revised Code, may enter into an agreement with the board of county commissioners of a county which does not maintain such a school, forestry camp, or other facility, to admit to such school, forestry camp, or other facility a child from the county not maintaining such a school, forestry camp, or other facility.

HISTORY: 131 v 634. Eff 8-10-65.

Research Aids

Nonresident admission:

O-Jur2d: Houses of Correction § 15.5

§ 2151.66 District tax levies.

The joint boards of county commissioners of district schools, forestry camps, or other facility or facilities created under section 2151.65 of the Revised Code, shall make annual assessments of taxes sufficient to support and defray all necessary expenses of such school, forestry camp, or other facility or facilities.

HISTORY: 130 v 627, § 1. Eff 10-14-63.

Research Aids

Tax levies:

O-Jur2d: Houses of Correction § 15.5

§ 2151.67 Gifts and bequests.

The board of county commissioners of a county or the board of trustees of a district maintaining a school, forestry camp, or other facility established or to be established under section 2151.65 of the Revised Code may receive gifts, grants, devises, and bequests, either absolutely or in trust, and may receive any public moneys made available to it. Each of such boards shall use such gifts, grants, devises, bequests, and public moneys in whatever manner it determines is most likely to carry out the purposes for which such

school, forestry camp, or other facility was or is to be established.

HISTORY: 131 v 635 (Eff 8-10-65); 132 v H 1, § 1. Eff 2-21-67.

Analogous to former RC § 2151.67, repealed in 131 v 2019, § 2 [130 v 627]. Eff 8-10-65.

Style deviations in this section were corrected by the amendment in HB 1 (132 v —). No change in the law was intended; see RC § 1.28.

Research Aids

Gifts or bequests to support facility:

O-Jur2d: Houses of Correction § 15.5

§ 2151.68 Appointment of district boards of trustees.

Immediately upon the organization of the joint board of county commissioners as provided by section 2151.65 of the Revised Code, or so soon thereafter as practicable, such joint board of county commissioners shall appoint a board of not less than five trustees, which shall hold office and perform its duties until the first annual meeting after the choice of an established site and buildings, or after the selection and purchase of a building site, at which time such joint board of county commissioners shall appoint a board of not less than five trustees, one of whom shall hold office for a term of one year, one for the term of two years, one for the term of three years, half of the remaining number for the term of four years, and the remainder for the term of five years. Annually thereafter, the joint board of county commissioners shall appoint one or more trustees, each of whom shall hold office for the term of five years, to succeed any trustee whose term of office expires. A trustee may be appointed to succeed himself upon such board of trustees, and all appointments to such board of trustees shall be made from persons who are recommended and approved by the juvenile court judge or judges of the county of which such person is a resident. The annual meeting of the board of trustees shall be held on the first Tuesday in May in each year.

HISTORY: 130 v 627, § 1. Eff 10-14-63.

Cross-References to Related Sections

See RC §§ 2151.69, 2151.72, 2151.74 to 2151.76, 2151.78 which refer to this section.

Research Aids

Appointment of district boards of trustees:

O-Jur2d: Houses of Correction § 15.5

§ 2151.69 Procedures of district boards of trustees.

A majority of the trustees appointed under section 2151.68 of the Revised Code constitutes a quorum. Board meetings shall be held at least quarterly. The presiding juvenile court judge of each of the counties of the district organized

pursuant to section 2151.65 of the Revised Code shall attend such meetings, or shall designate a member of his staff to do so. The members of the board shall receive no compensation for their services, except their actual traveling expenses, which, when properly certified, shall be allowed and paid by the treasurer.

HISTORY: 130 v 628, § 1. Eff 10-14-63.

Research Aids

Procedures of district boards of trustees:

O-Jur2d: Houses of Correction § 15.5

§ 2151.70 Employees of juvenile facilities.

The judge, in a county maintaining a school, forestry camp, or other facility or facilities created under section 2151.65 of the Revised Code, shall appoint the superintendent of any such facility. In the case of a district facility created under such section, the board of trustees shall appoint the superintendent. A superintendent, before entering upon his duties, shall give bond with sufficient surety to the judge or to the board, as the case may be, in such amount as may be fixed by the judge or the board, such bond being conditioned upon the full and faithful accounting of the funds and properties coming into his hands.

Compensation of the superintendent and other necessary employees of a school, forestry camp, or other facility or facilities shall be fixed by the judge in the case of a county facility, or by the board of trustees in the case of a district facility. Such compensation and other expenses of maintaining the facility shall be paid in the manner prescribed in section 2151.13 of the Revised Code in the case of a county facility, or in accordance with rules and regulations provided for in section 2151.77 of the Revised Code in the case of a district facility.

The superintendent of a facility shall appoint all employees of such facility. All such employees, except the superintendent, shall be in the classified civil service.

The superintendent of a school, forestry camp, or other facility shall have entire executive charge of such facility, under supervision of the judge, in the case of a county facility, or under supervision of the board of trustees, in the case of a district facility. The superintendent shall control, manage, and operate the facility, and shall have custody of its property, files, and records.

HISTORY: 130 v 628, § 1. Eff 10-14-63.

Research Aids

Appointment of superintendent:

O-Jur2d: Houses of Correction § 15.5

§ 2151.71 Manner of operating facilities.

District schools, forestry camps, or other facilities created under section 2151.65 of the Revised Code shall be established, operated, maintained,

and managed in the same manner, so far as applicable, as county schools, forestry camps, or other facilities.

HISTORY: 130 v 629, § 1. Eff 10-14-63.

Research Aids

Operation of district facilities:

O-Jur2d: Houses of Correction § 15.5

§ 2151.72 Selection of site for district facility.

When the board of trustees appointed under section 2151.68 of the Revised Code does not choose an established institution in one of the counties of the district, it may select a suitable site for the erection of a district school, forestry camp, or other facility or facilities created under section 2151.65 of the Revised Code.

HISTORY: 130 v 629, § 1. Eff 10-14-63.

Research Aids

Selection of site for district facility:

O-Jur2d: Houses of Correction § 15.5

§ 2151.73 Apportionment of board of trustees posts; executive committee.

Each county in the district, organized under section 2151.65 of the Revised Code, shall be entitled to one trustee, and in districts composed of but two counties, each county shall be entitled to not less than two trustees. In districts composed of more than four counties, the number of trustees shall be sufficiently increased so that there shall always be an uneven number of trustees constituting such board. The county in which a district school, forestry camp, or other facility created under section 2151.65 of the Revised Code is located shall have not less than two trustees, who, in the interim period between the regular meetings of the board of trustees, shall act as an executive committee in the discharge of all business pertaining to the school, forestry camp, or other facility.

HISTORY: 130 v 629, § 1. Eff 10-14-63.

Research Aids

Apportionment of trustees posts:

O-Jur2d: Houses of Correction § 15.5

§ 2151.74 Removal of trustees.

The joint board of county commissioners organized under section 2151.65 of the Revised Code may remove any trustee appointed under section 2151.68 of the Revised Code, but no such removal shall be made on account of the religious or political convictions of such trustee. The trustee appointed to fill any vacancy shall hold his office for the unexpired term of his predecessor.

HISTORY: 130 v 630, § 1. Eff 10-14-63.

Cross-References to Related Sections

See RC § 2151.78 which refers to this section.

Research Aids

Removal of trustees:

O-Jur2d: Houses of Correction § 15.5

§ 2151.75 Interim duties of trustees; trustees' fund; reports.

In the interim, between the selection and purchase of a site, and the erection and occupancy of a district school, forestry camp, or other facility or facilities created under section 2151.65 of the Revised Code, the joint board of county commissioners provided by section 2151.65 of the Revised Code may delegate to a board of trustees appointed under section 2151.68 of the Revised Code, such powers and duties as, in its judgment, will be of general interest or aid to the institution. Such joint board of county commissioners may appropriate a trustees' fund, to be expended by the board of trustees in payment of such contracts, purchases, or other expenses necessary to the wants or requirements of the school, forestry camp, or other facility or facilities which are not otherwise provided for. The board of trustees shall make a complete settlement with the joint board of county commissioners once each six months, or quarterly if required, and shall make a full report of the condition of the school, forestry camp, or other facility or facilities and inmates, to the board of county commissioners, and to the juvenile court of each of the counties.

HISTORY: 130 v 630, § 1. Eff 10-14-63.

Research Aids

Interim duties of trustees and appropriation of trustees' fund:

O-Jur2d: Houses of Correction § 15.5

§ 2151.76 Authority for choice, construction, and furnishing of district facility.

The choice of an established site and buildings, or the purchase of a site, stock, implements, and general farm equipment, should there be a farm, the erection of buildings, and the completion and furnishing of the district school, forestry camp, or other facility or facilities for occupancy, shall be in the hands of the joint board of county commissioners organized under section 2151.65 of the Revised Code. Such joint board of county commissioners may delegate all or a portion of these duties to the board of trustees provided for under section 2151.68 of the Revised Code, under such restrictions and regulations as the joint board of county commissioners imposes.

HISTORY: 130 v 630, § 1. Eff 10-14-63.

Research Aids

Authority of joint board of county commissioners:

O-Jur2d: Houses of Correction § 15.5

§ 2151.77 Capital and current expenses of district.

When an established site and buildings are

used for a district school, forestry camp, or other facility or facilities created under section 2151.65 of the Revised Code the joint board of county commissioners organized under section 2151.65 of the Revised Code shall cause the value of such site and buildings to be properly appraised. This appraisal value, or in case of the purchase of a site, the purchase price and the cost of all betterments and additions thereto, shall be paid by the counties comprising the district, in proportion to the taxable property of each county, as shown by its tax duplicate. The current expenses of maintaining the school, forestry camp, or other facility or facilities and the cost of ordinary repairs there-to shall be paid by each such county in proportion to the number of children from such county who are maintained in the school, forestry camp, or other facility or facilities during the year, or by a levy submitted by the joint board of county commissioners under division (A) of section 5705.19 of the Revised Code and approved by the electors of the district. The board of trustees shall, with the approval of the joint board of county commissioners, adopt rules and regulations for the management of funds used for the current expenses of maintaining the school, forestry camp, or other facility or facilities.

HISTORY: 130 v 631 (Eff 10-14-63); 134 v H 258. Eff 1-27-72.

Cross-References to Related Sections

See RC § 2151.70 which refers to this section.

Research Aids

Capital and current expenses:

O-Jur2d: Houses of Correction § 15.5

§ 2151.78 Withdrawal of county from district; continuity of district tax levy.

The board of county commissioners of any county within a school, forestry camp, or other facility or facilities district may, upon the recommendation of the juvenile court of such county, withdraw from such district and dispose of its interest in such school, forestry camp, or other facility or facilities selling or leasing its right, title, and interest in the site, buildings, furniture, and equipment to any counties in the district, at such price and upon such terms as are agreed upon among the boards of county commissioners of the counties concerned. Section 307.10 of the Revised Code does not apply to this section. The net proceeds of any such sale or lease shall be paid into the treasury of the withdrawing county.

Any county withdrawing from such district or from a combined district organized under sections 2151.34 and 2151.65 of the Revised Code shall continue to have levied against its tax duplicate any tax levied by the district during the period in which the county was a member of the district for current operating expenses, permanent im-

provements, or the retirement of bonded indebtedness. Such levy shall continue to be a levy against such duplicate of the county until such time that it expires or is renewed.

Members of the board of trustees of a district school, forestry camp, or other facility or facilities who are residents of a county withdrawing from such district are deemed to have resigned their positions upon the completion of the withdrawal procedure provided by this section. Vacancies then created shall be filled according to sections 2151.68 and 2151.74 of the Revised Code.

HISTORY: 130 v 631 (Eff 10-14-63); 134 v H 258, Eff 1-27-72.

Research Aids

Withdrawal from district:

O-Jur2d: Houses of Correction § 15.5

§ 2151.79 Designation of fiscal officer of district; duties of county auditors in district.

The county auditor of the county having the greatest population, or, with the unanimous concurrence of the county auditors of the counties composing a facilities district, the auditor of the county wherein the facility is located, shall be the fiscal officer of a district organized under section 2151.65 of the Revised Code or a combined district organized under sections 2151.34 and 2151.65 of the Revised Code. The county auditors of the several counties composing a school, forestry camp, or other facility or facilities district, shall meet at the district school, forestry camp, or other facility or facilities not less than once in each six months, to review accounts and to transact such other duties in connection with the institution as pertain to the business of their office.

HISTORY: 130 v 631 (Eff 10-14-63); 134 v H 258 (Eff 1-27-72); 135 v H 1033, Eff 10-2-74.

Research Aids

District auditor:

O-Jur2d: Houses of Correction § 15.5

§ 2151.80 Expenses of members of boards of county commissioners.

Each member of the board of county commissioners who meets by appointment to consider the organization of a district school, forestry camp, or other facility or facilities shall, upon presentation of properly certified accounts, be paid his necessary expenses upon a warrant drawn by the county auditor of his county.

HISTORY: 130 v 632, § 1. Eff 10-14-63.

Research Aids

Expenses of board members:

O-Jur2d: Houses of Correction § 15.5

§ 2151.99 Penalties.

(A) Whoever violates section 2151.41 of the Revised Code is guilty of a misdemeanor of the first degree.

(B) Whoever violates section 2151.313 [2151.31.3] or 2151.421 [2151.42.1] of the Revised Code is guilty of a misdemeanor of the fourth degree.

HISTORY: Bureau of Code Revision (Eff 10-1-53); 130 v 632 (Eff 10-10-63); 133 v H 320 (Eff 11-19-69); 134 v H 511, Eff 1-1-74.

Comment

This section was derived from GC §§ 1639-45 and 1639-46. See also RC § 2151.41.

Cross-References to Related Sections

Judges of court of domestic relations, jurisdiction, RC § 2301.03.

Penalty for misdemeanor, RC § 2929.21.

Research Aids

Penalties:

O-Jur2d: Juvenile Courts § 75; Hospitals and Asylums § 5

CASE NOTES AND OAG

1. Different statutes providing different penalties for offenses against minors will not be deemed inconsistent or in conflict with each other where the principal elements thereof are similar but are accompanied by varying circumstances aggravating or affecting the degree of such offenses: In re Cooper, 134 OS 40, 11 OO 416, 15 NE(2d) 634 [affirming 58 App 519].

2. By the express terms of RC § 2151.49 the juvenile court is authorized to "suspend sentence" either before or after commitment, which is construed to mean suspension of the execution of the sentence rather than postponement of imposition of sentence: In re Keagy, 76 App 95, 31 OO 405, 63 NE(2d) 216.

3. Imprisonment imposed for a violation of RC § 2151.42, making it an offense for a person charged with the care, support, maintenance, or education of a child to fail to do so, is not imprisonment for debt and, therefore, RC §§ 2151.42 and 2151.99 are not in violation of Section 15, Article I, Ohio Constitution, prohibiting imprisonment for debt: State v. Ducey, 25 OApp(2d) 50, 54 OO(2d) 80, 266 NE(2d) 233 (1970).

4. Only that class of persons capable of paying support money, but failing to do so, may be prosecuted under RC §§ 2151.42 and 2151.99; these sections are not violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States: State v. Ducey, 25 OApp(2d) 50, 54 OO(2d) 80, 266 NE(2d) 233 (1970).

5. A judge of a juvenile court may not commit a child who has been found to be a delinquent child, or a juvenile traffic offender, to the county jail upon the failure, refusal, or inability of such child to pay a fine and court costs: 1970 OAG No. 70-143.

CHAPTER 2153: CUYAHOGA COUNTY JUVENILE COURT

Section

- 2153.01 Juvenile court division established.
- 2153.02 Judges; qualifications.
- 2153.03 Election of judges; terms of office; administrative judge.
- 2153.04 [Repealed.]
- 2153.05 Substitute judge; vacancies.
- 2153.06 Removal from office.
- 2153.07 Accommodations for court.
- 2153.08 Administrative judge to be clerk of court; may appoint deputies and clerks; bonds.
- 2153.09 Compensation of employees.
- 2153.10 Bond of clerk; amount.
- 2153.11 Bailiffs; compensation.
- 2153.12 Calendar of court; term.
- 2153.13 Contempt proceedings.
- 2153.14 Seal of court; form.
- 2153.15 May vacate and modify judgments.
- 2153.16 Jurisdiction of court.
- 2153.17 Laws now in force to apply.

tion and receive the same compensation as other judges of the court of common pleas.

HISTORY: GC § 1683-13; 114 v 45, § 2; 121 v 290; 127 v 482 (Eff 9-14-57); 134 v H 574 (Eff 6-29-72); 136 v H 468, Eff 2-20-76.

Former GC § 1683-13 repealed, 108 v Pt I 380, § 1.

Research Aids

Compensation of judges:

O-Jur2d: Judges § 65

Number of judges:

O-Jur2d: Judges § 42

Qualifications:

O-Jur2d: Judges §§ 13, 14

§ 2153.03 Election of judges; terms of office; administrative judge.

Each of the judges of the juvenile court division shall be elected for six years at the general election next preceding the year in which the term, as provided in this section, commences, and his successor shall be elected at the general election next preceding the expiration of such term.

Each judge shall be elected by the electors of Cuyahoga county in the same manner as is provided for the election of judges of the court of common pleas. The terms of office of the judges of the juvenile court shall begin as follows: January 1, 1959, January 2, 1959, January 1, 1963, January 2, 1963, and January 3, 1977. Each of the judges of the juvenile court shall have the same judicial duties.

In addition to his regular judicial duties, one of the judges shall be the administrator of the juvenile court's subdivisions and departments.

The administrative judge shall be elected in the manner provided by rule 3 of the rules adopted by the supreme court of Ohio for the superintendence of the common pleas court. During any absence from the court by the administrative judge, he may designate one of the other judges to serve in his place and stead as the clerk of the court and as the administrator of the court's subdivisions and departments.

HISTORY: GC § 1683-14; 114 v 45, § 3; 121 v 290; 127 v 482 (Eff 9-14-57); 134 v H 574 (Eff 6-29-72); 136 v H 468, Eff 2-20-76.

Former GC § 1683-14 repealed, 108 v Pt. I 380, § 1.

Research Aids

Administrative judge:

O-Jur2d: Judges § 42

Election of judges:

O-Jur2d: Judges §§ 6, 7

Term of office:

O-Jur2d: Judges §§ 10, 11

§ 2153.01 Juvenile court division established.

There is hereby established within the court of common pleas of Cuyahoga county a juvenile division, which shall be styled "the court of common pleas, juvenile court division," referred to in sections 2153.02 to 2153.17 of the Revised Code, as "the juvenile court."

HISTORY: 134 v H 574, Eff 6-29-72.

Analogous to former RC § 2153.01 (GC § 1683-12; 114 v 45) repealed 134 v H 574, § 2, eff 6-29-72.

Cross-References to Related Sections

See RC §§ 2153.15, 2153.16 which refer to § 2153.01 et seq.

Research Aids

Establishment of juvenile court:

O-Jur2d: Juvenile Courts § 10; Judges § 42

CASE NOTES AND OAG

1. The authority of the juvenile court to expend public funds to publish and distribute pamphlets under GC §§ 1683-12 to 1683-31 (RC § 2153.01 et seq) and 1639-1 to 1639-61 (RC § 2151.01 et seq) discussed: 1944 OAG No.6877.

§ 2153.02 Judges; qualifications.

The juvenile court shall consist of five judges, each of whom, at the time of his election or appointment, shall be a qualified elector and resident of Cuyahoga county and shall have been admitted to practice as an attorney at law in this state for a period of at least six years immediately preceding his appointment or commencement of his term. They shall be elected and designated as judges of the court of common pleas, juvenile court division, and shall exercise the same powers and jurisdic-

§ 2153.04 Repealed, 134 v H 574, § 2 [GC § 1683-15; 114 v 45; 121 v 290]. Eff 6-29-72.

§ 2153.05 Substitute judge; vacancies. (GC § 1683-16)

In case of the temporary absence or disability of a juvenile judge, or when the volume of cases pending in the juvenile court necessitates the assistance of an additional judge, and upon the request of a juvenile judge, the chief justice or, in his absence, the presiding judge of the court of common pleas of Cuyahoga county shall designate a judge of the court of common pleas of such county to act as juvenile judge during such absence or disability. If no judge of the court of common pleas is available for such purpose, the chief justice of the supreme court shall designate a juvenile judge, a probate judge, or a judge of the court of common pleas from some other county to act as judge. Such judge shall receive such compensation for his services and expenses as is provided by section 141.07 of the Revised Code for judges of the courts of common pleas designated by the chief justice to hold court outside their respective counties.

Vacancies occurring in the office of the juvenile judge of Cuyahoga county shall be filled in the manner prescribed for the filling of vacancies in the office of the judges of the courts of common pleas.

HISTORY: GC § 1683-16; 114 v 45, § 5; 121 v 290 (291). Eff 10-1-53. Former § 1683-16 repealed, 108 v Ptl 380, § 1.

Research Aids

Assignment of judges to fill vacancies:

O-Jur2d: Judges §§ 43, 121

Compensation:

O-Jur2d: Judges §§ 62, 65

§ 2153.06 Removal from office. (GC § 1683-17)

A juvenile judge is subject to the same disabilities and may be removed from office for the same causes and in the same manner as a judge of the court of common pleas.

HISTORY: GC § 1683-17; 114 v 45, § 6. Eff 10-1-53. Former § 1683-17 repealed, 108 v Ptl 380, § 1.

Research Aids

Removal from office:

O-Jur2d: Judges §§ 79, 112

§ 2153.07 Accommodations for court. (GC § 1683-18)

The board of county commissioners of Cuyahoga county shall provide suitable accommodations, facilities, and equipment for the juvenile court, its officers, and employees. The expense

of maintaining and operating the court shall be paid out of the treasury of Cuyahoga county.

HISTORY: GC § 1683-18; 114 v 45, § 7. Eff 10-1-53. Former § 1683-18 repealed, 108 v Ptl 380, § 1.

Research Aids

Accommodations for court:

O-Jur2d: Juvenile Courts § 11

§ 2153.08 Administrative judge to be clerk of court; may appoint deputies and clerks; bonds.

The administrative juvenile judge shall have the care and custody of the files, papers, books, records, and moneys pertaining to the juvenile court, and shall be the clerk of said court, with all the powers and duties of a clerk of the court of common pleas in connection with the business of said juvenile court. He may appoint and employ such deputies, clerks, stenographers, and other assistants and attaches as are reasonably necessary in connection with the work of said court, and shall file with the county auditor certificates of such appointments. Any such appointee may be dismissed by the administrative judge. Each appointee shall qualify by taking the oath of office required by the clerk of the court of common pleas under sections 3.22 and 3.23 of the Revised Code. When so qualified, each deputy clerk may perform the duties of the clerk and shall have the same powers as a deputy clerk of the court of common pleas in matters of which the court of common pleas now has concurrent jurisdiction by virtue of section 2151.07 of the Revised Code. The administrative judge may require any of his appointees to give bond in the sum of not less than one thousand dollars, conditioned for the honest and faithful performance of his duties. The approval of the sureties, the terms, the filing, and the beneficiaries of such bonds shall be the same as in the case of the bond of the clerk under section 2153.10 of the Revised Code. The clerk shall not be personally liable for the default, misfeasance, or nonfeasance of any appointee from whom a bond has been required, approved, and filed as provided in this section.

HISTORY: GC § 1683-20; 114 v 45, § 9; 134 v H 574. Eff 6-29-72.

Research Aids

Administrative judge to be clerk—may appoint subordinates:

O-Jur2d: Juvenile Courts § 13; Courts § 38

Appointee—bond:

O-Jur2d: Courts § 42

Appointee—duties:

O-Jur2d: Courts § 69

Appointee—oath of office:

O-Jur2d: Courts § 43

Appointee—term of office:

O-Jur2d: Courts § 46

Custody of papers:

O-Jur2d: Courts § 64

Liability of clerk for acts of appointees:

O-Jur2d: Judges § 74

CASE NOTES AND OAG

1. An administrative judge of the juvenile division of a court of common pleas is not authorized to enter into an employment agreement with employees of the court: *Malone v. Court of Common Pleas*, 45 OS(2d) 245, 74 OO(2d) 413, 344 NE(2d) 126 (1976).

§ 2153.09 Compensation of employees.

The compensation of the employees of the juvenile court shall be fixed by the administrative juvenile judge, which compensation shall not exceed in the aggregate the amount fixed by the board of county commissioners for such purpose. Such compensation so fixed shall be paid from the county treasury in semimonthly installments on the warrant of the county auditor.

HISTORY: GC § 1683-21; 114 v 45, § 10; 134 v H 574. Eff 6-29-72.

Research Aids

Compensation of employees:

O-Jur2d: Courts § 54

§ 2153.10 Bond of clerk; amount.

Before entering upon the duties of his office, the administrative juvenile judge, as judge and clerk of the juvenile court, and each judge shall execute and file with the county treasurer of Cuyahoga county a bond in the sum of not less than five thousand dollars, to be determined by the board of county commissioners of Cuyahoga county, with sufficient surety, to be approved by said board, conditioned for the faithful performance of such duties as clerk. Said bond shall be given for the benefit of Cuyahoga county, the state, and any person who may suffer loss by reason of a default in any of the conditions of said bond.

HISTORY: GC § 1683-22; 114 v 45, § 11; 134 v H 574. Eff 6-29-72.

Cross-References to Related Sections

See RC § 2153.08 which refers to this section.

Research Aids

Bond of clerk:

O-Jur2d: Courts § 42; Judges § 16

§ 2153.11 Bailiffs; compensation.

The administrative juvenile judge may appoint one or more bailiffs to preserve order and perform such other duties as such judge requires, as provided for constables in section 2701.07 of the Revised Code. The compensation of any such appointee shall be fixed and paid on the same

basis as provided by section 2701.08 of the Revised Code for the compensation of constables in the court of common pleas of Cuyahoga county.

HISTORY: GC § 1683-23; 114 v 45, § 12; 134 v H 574. Eff 6-29-72.

Research Aids

Appointment of bailiffs:

O-Jur2d: Juvenile Courts § 13

§ 2153.12 Calendar of court; term. (GC § 1683-24)

The calendar of the juvenile court shall be divided into four terms of three months each commencing on the first day of January, April, July, and October of each year. All actions and other business of the court pending at the expiration of any term of court shall be continued to the following term of court without any special or general entry or order to that effect. The juvenile judges may adjourn the court from day to day or to any other day in the same term whenever, in their opinion, the business of the court permits.

HISTORY: GC § 1683-24; 114 v 45, § 13. Eff 10-1-53.

Research Aids

Calendar of court:

O-Jur2d: Juvenile Courts § 11

§ 2153.13 Contempt proceedings. (GC § 1683-25)

The juvenile court has the same jurisdiction in contempt of court proceedings provided for the court of common pleas and for other courts of record.

HISTORY: GC § 1683-25; 114 v 45, § 14. Eff 10-1-53.

Research Aids

Jurisdiction in contempt:

O-Jur2d: Juvenile Courts § 24

§ 2153.14 Seal of court; form.

The juvenile court shall have a seal which shall consist of the coat of arms of the state within a circle one and one-fourth inches in diameter and shall be surrounded by the words, "the juvenile court of Cuyahoga county, Ohio." Such seal shall have no other words or device engraved thereon. Such seal shall be affixed to the processes of the court, which shall be attested and be in the general form and served as provided for process of the court of common pleas.

HISTORY: GC § 1683-26; 114 v 45, § 15; 132 v H 164, § 1. Eff 12-15-67.

Research Aids

Seal of court:

O-Jur2d: Juvenile Courts § 13

Form of process:

O-Jur2d: Juvenile Courts § 38; Process § 4 et seq.

§ 2153.15 May vacate and modify judgments. (GC § 1683-27)

The juvenile court has the same power to vacate and modify its own judgments or orders during or after term as the probate court has under section 2101.33 of the Revised Code, and may adopt, publish, and revise rules and regulations for practice in said court not inconsistent with sections 2153.01 to 2153.17, inclusive, of the Revised Code.

HISTORY: GC § 1683-27; 114 v 45, § 16. **Eff** 10-1-53.

Research Aids

Modification or vacation of judgments:

O-Jur2d: Juvenile Courts § 55

Rules of practice:

O-Jur2d: Juvenile Courts § 12

§ 2153.16 Jurisdiction of court.

The juvenile court shall exercise the jurisdiction and powers conferred upon the juvenile court by Chapter 2151. and other sections of the Revised Code, unless such jurisdiction and powers are inconsistent with sections 2153.01 to 2153.17, inclusive, of the Revised Code, or plainly inapplicable.

HISTORY: GC § 1683-28; 114 v 45, § 17; 127 v 847 (**Eff** 9-16-57); 134 v H 574. **Eff** 6-29-72.

Research Aids

Jurisdiction:

O-Jur2d: Juvenile Courts § 10; Judges § 42

CASE NOTES AND OAG

1. In 1934 the common pleas court of Cuyahoga county had jurisdiction concurrent with that of the juvenile court, under authority of Section 1639, General Code (108 Ohio Laws, pt. 2, 1130). Hence, conviction of juvenile for crime of burglary by common pleas court was not void for lack of jurisdiction: *In re Giordano*, 164 OS 509, 58 OO 353, 132 NE(2d) 211.

§ 2153.17 Laws now in force to apply. (GC § 1683-29)

The sections of the Revised Code regulating the manner and grounds of appeal from any judgment, order, or decree rendered by the court of common pleas in the exercise of juvenile jurisdiction shall apply to the juvenile court.

HISTORY: GC § 1683-29; 114 v 45, § 18. **Eff** 10-1-53.

Research Aids

Appellate review:

O-Jur2d: Juvenile Courts § 80

CASE NOTES AND OAG

1. Habeas corpus may not be used as a substitute for appeal, nor may it be resorted to where an adequate remedy for review exists under this section: *In re Piazza*, 7 OS(2d) 102, 36 OO(2d) 84, 218 NE(2d) 459.

OHIO RULES OF JUVENILE PROCEDURE

(Including Latest Amendments Effective July 1, 1976)

In conformance with Ohio Constitution Art. IV, § 5, the Rules were prepared and submitted by the Ohio Supreme Court to the 109th General Assembly on January 15, 1972. Amendments thereto were submitted April 30, 1972. The Rules not being disapproved by affirmative action by the General Assembly, become effective July 1, 1972.

RULE 1. Scope of rules: applicability; construction; exceptions

- (A) Applicability
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RULE 3. Waiver of rights

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- (A) Right to counsel; when arises
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- (C) Guardian ad litem as counsel
- (D) Appearance of attorneys
- (E) Withdrawal of counsel or guardian ad litem
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RULE 5. [Reserved]

RULE 6. Taking into custody

RULE 7. Detention and shelter care

- (A) Detention: standards
- (B) Priorities in placement prior to hearing
- (C) Initial procedure upon detention
- (D) Admission
- (E) Procedure after admission
- (F) Detention hearing
 - (1) Hearing: time; notice
 - (2) Hearing: advisement of rights
 - (3) Hearing procedure
- (G) Rehearing
- (H) Separation from adults
- (I) Medical examination
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RULE 8. [Reserved]

RULE 9. Intake

- (A) Court action to be avoided
- (B) Screening; referral

RULE 10. Complaint

- (A) Filing
- (B) Complaint: general form
- (C) Complaint: juvenile traffic offense
- (D) Complaint: permanent custody
- (E) Complaint: habeas corpus

RULE 11. Transfer to another county

- (A) Residence in another county; transfer optional
- (B) Proceedings in another county; transfer required
- (C) Adjudicatory hearing in county where complaint filed
- (D) Transfer of records

RULE 12. [Reserved]**RULE 13. Temporary disposition; temporary orders; emergency medical and surgical treatment**

- (A) Temporary disposition
- (B) Temporary orders
- (C) Emergency medical and surgical treatment
- (D) Ex parte proceedings
- (E) Hearing; notice
- (F) Payment

RULE 14. [Reserved]**RULE 15. Process: issuance, form**

- (A) Summons: issuance
- (B) Summons: form
- (C) Summons: endorsement
- (D) Warrant: issuance
- (E) Warrant: form

RULE 16. Process: service

- (A) Summons: service, return
- (B) Warrant: execution; return
 - (1) By whom
 - (2) Territorial limits
 - (3) Manner
 - (4) Return

RULE 17. Subpoena

- (A) For attendance of witnesses; form; issuance
- (B) Parties unable to pay
- (C) For production of documentary evidence
- (D) Service
- (E) Subpoena for taking depositions; place of examination
- (F) Subpoena for a hearing
- (G) Contempt

RULE 18. Time

- (A) Time: computation.
- (B) Time: enlargement
- (C) Time: unaffected by expiration of term
- (D) Time: for motions; affidavits
- (E) Time: additional time after service by mail

RULE 19. Motions

RULE 20. Service and filing of papers

- (A) Service: when required
- (B) Service: how made
- (C) Filing

RULE 21. Preliminary conferences**RULE 22. Pleadings and motions; defenses and objections**

- (A) Pleadings and motions
- (B) Amendment of pleadings
- (C) Answer
- (D) Prehearing motions
- (E) Motion time
- (F) State's right to appeal upon granting a motion to suppress

RULE 23. Continuance**RULE 24. Discovery**

- (A) Request for discovery
- (B) Order granting discovery: limitations; sanctions
- (C) Failure to comply

RULE 25. Depositions**RULE 26. [Reserved]****RULE 27. Hearings: general****RULE 28. [Reserved]****RULE 29. Adjudicatory hearing**

- (A) Scheduling the hearing
- (B) Advisement and findings at the commencement of the hearing
- (C) Entry of admission or denial
- (D) Initial procedure upon entry of an admission
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- (F) Procedure upon determination of the issues

RULE 30. Relinquishment of jurisdiction for purposes of criminal prosecution

- (A) Preliminary hearing
- (B) Investigation
- (C) Prerequisites to transfer
- (D) Retention of jurisdiction
- (E) Determination of amenability to rehabilitation
- (F) Waiver of mental and physical examination
- (G) Order of transfer
- (H) Release of transferred child

RULE 31. [Reserved]**RULE 32. Social history; physical examination; mental examination; custody investigation**

- (A) Social history and physical or mental examination: availability before adjudication
- (B) Limitations on preparation and use
- (C) Availability of social history or investigation report
- (D) Investigation: custody; habeas corpus

RULE 33. [Reserved]**RULE 34. Dispositional hearing**

- (A) Scheduling the hearing
- (B) Hearing procedure
- (C) Judgment

- (D) Restraining orders
- (E) Advisement of rights after hearing

RULE 35. Proceedings after judgment

- (A) Continuing jurisdiction; invoked by motion
- (B) Revocation of probation
- (C) Detention

RULE 36. [Reserved]

RULE 37. Recording of proceedings

- (A) Recording of hearings
- (B) Restrictions on use of recording or transcript

RULE 38. [Reserved]

RULE 39. [Reserved]

RULE 40. Referees: appointment; powers; duties

- (A) Appointment
- (B) Powers
- (C) Proceedings
 - (1) Meetings
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 - (1) Contents and filing
 - (2) Objections to report
 - (3) Stipulation as to findings
 - (4) Draft report
 - (5) When effective

RULE 41. [Reserved]

RULE 42. Consent to marry

- (A) Application where parental consent not required
- (B) Contents of application
- (C) Application where minor female pregnant or delivered of illegitimate child
- (D) Contents of application
- (E) Investigation
- (F) Notice
- (G) Judgment
- (H) Certified copy

RULE 43. [Reserved]

RULE 44. Jurisdiction unaffected

RULE 45. Procedure not otherwise specified

RULE 46. Forms

RULE 47. Effective date

- (A) Effective date of rules
- (B) Effective date of amendments
- (C) Effective date of amendments
- (D) Effective date of amendments

RULE 48. Title

RULE 1. Scope of rules: applicability; construction; exceptions

(A) **Applicability.** These rules prescribe the procedure to be followed in all juvenile courts of this state in all proceedings coming within the jurisdiction of such courts, with the exceptions stated in subdivision (C).

(B) **Construction.** These rules shall be liberally interpreted and construed so as to effectuate the following purposes:

(1) to effect the just determination of every juvenile court proceeding by ensuring the parties a fair hearing and the recognition and enforcement of their constitutional and other legal rights;

(2) to secure simplicity and uniformity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay;

(3) to provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and

(4) to protect the public interest by treating children as persons in need of supervision, care and rehabilitation.

(C) **Exceptions.** These rules shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) upon the trial of criminal actions, (3) upon the trial of divorce, annulment, and alimony actions, (4) in proceedings to determine the paternity of any child born out of wedlock, and (5) in the commitment of the mentally ill and mentally retarded; provided that when any statute provides for procedure by general or specific reference to the statutes governing procedure in juvenile court actions such procedure shall be in accordance with these rules.

Related Statutes:

RC §§ 2151.01 and 2151.23

Text Discussion

2 Anderson Fam. L. §§ 1.3, 1.5, 15.2.

Research Aids

Applicability:

O-Jur2d: Juvenile Courts §§ 1, 4.5, 16, 32.5

Construction:

O-Jur2d: Juvenile Courts §§ 4.5, 32.5

Exceptions:

O-Jur2d: Juvenile Courts §§ 1, 18, 23

RULE 2. Definitions

As used in these rules:

(1) "Adjudicatory hearing" means a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, neglected, or dependent or otherwise within the jurisdiction of the court or whether temporary legal custody should be converted to permanent custody.

(2) "Child" means a person who is under the age of eighteen years. A child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a child irrespective of his age at the time the complaint is filed or hearing had thereon.

(3) "Complaint" means the legal document which sets forth the allegations which form the basis for juvenile court jurisdiction.

(4) "Court proceeding" means all action taken by a court from the earlier of (a) the time a complaint is filed and (b) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child.

(5) "Custodian" means a person who has been granted custody of a child by a court.

(6) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition, or execution of a court order.

(7) "Detention hearing" means a hearing to determine whether a child shall be held in detention or shelter care prior to or pending execution of a final dispositional order.

(8) "Dispositional hearing" means a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.

(9) "Guardian" means a court appointed guardian of the person of a child.

(10) "Guardian ad litem" means a person appointed to protect the interests of a party in a juvenile court proceeding.

(11) "Hearing" means any portion of a juvenile court proceeding before the court, whether summary in nature or by examination of witnesses.

(12) "Indigent person" means a person who, at the time his need is determined, is unable by reason of lack of property or income to provide for full payment of legal counsel and all other necessary expenses of representation.

(13) "Juvenile court" means a division of the court of common pleas, or a juvenile court

separately and independently created, having jurisdiction under R.C. Chapter 2151.

(14) "Juvenile judge" means a judge of a court having jurisdiction under R.C. Chapter 2151.

(15) "Mental examination" means an examination by a psychiatrist or psychologist.

(16) "Party" means a child who is the subject of a juvenile court proceeding, his spouse, if any, his parent, or if the parent of a child be himself a child, the parent of such parent and, in appropriate cases, his custodian, guardian or guardian ad litem, the state and any other person specifically designated by the court.

(17) "Person" includes an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(18) "Physical examination" means an examination by a physician.

(19) "Rule of court" means a rule promulgated by the supreme court or a rule concerning local practice adopted by another court which is not inconsistent with the rules promulgated by the supreme court and which rule is filed with the supreme court.

(20) "Shelter care" means the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition, or execution of a court order.

(21) "Social history" means the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court.

(22) "Ward of court" means a child over whom the court assumes continuing jurisdiction.

Related Statutes:

RC §§ 2151.01-2151.05, 2151.17, 2151.25, 2151.28.1

Research Aids

Definitions:

Adjudicatory hearing:

O-Jur2d: Juvenile Courts § 44.9

Child:

O-Jur2d: Juvenile Courts §§ 8.5, 25, 26

Complaint:

O-Jur2d: Juvenile Courts § 36.1

Court proceeding:

O-Jur2d: Juvenile Courts § 4.5

Custodian:

O-Jur2d: Juvenile Courts § 40.5

Detention:

O-Jur2d: Juvenile Courts § 40.6

Dispositional hearing:

O-Jur2d: Juvenile Courts § 44.10

Guardian:

O-Jur2d: Juvenile Courts § 8.5

Juvenile Court:

O-Jur2d: Juvenile Courts §§ 10, 16

Juvenile Judge:

O-Jur2d: Juvenile Courts § 10

Mental examination:

O-Jur2d: Juvenile Courts § 46.5

Party:

O-Jur2d: Juvenile Courts § 8.5

Person:

O-Jur2d: Juvenile Courts § 8.5

Shelter care:

O-Jur2d: Juvenile Courts § 40.6

Social history:

O-Jur2d: Juvenile Courts § 46.5

RULE 3. Waiver of rights

A child's right to be represented by counsel at a hearing to determine whether the juvenile court shall relinquish its jurisdiction for purposes of criminal prosecution may not be waived. No other right of a child may be waived without the permission of the court.

Related Statutes:

RC §§ 2151.01, 2151.02, 2151.26, 2151.28, 2151.28.1, 2151.35, 2151.35.1, 2151.35.2

Text Discussion

2 *Anderson Fam. L.* §§ 3.1-3.6.

Research Aids

Waiver of rights:

O-Jur2d: Juvenile Courts §§ 22.5, 32.5, 44.8, 45.5

Am-Jur2d: Juvenile Courts etc. § 39

CASE NOTES AND OAG

1. Constitutional due process in juvenile cases: In re Gault, 387 US 1, 87 SCt 1428, 18 LEd(2d) 527, 40 OO(2d) 378; In re Winship, 397 US 358, 90 SCt 1068, 25 LEd(2d) 368, 51 OO(2d) 323; *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 LEd(2d) 647.

RULE 4. Right to counsel; guardian ad litem

(A) **Right to counsel; when arises.** Every party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent. These rights shall arise when a person becomes a party to a juvenile court proceeding. When the complaint alleges that a child is an abused child, the court must appoint an attorney to represent the interests of the child.

(B) **Guardian ad litem; when appointed.** The court shall appoint a guardian ad litem to protect the interests of a child or incompetent adult in a juvenile court proceeding when:

(1) The child has no parent, guardian, or legal custodian;

(2) The interests of the child and the interests of the parent may conflict;

(3) The parent is under eighteen years of age or appears to be mentally incompetent;

(4) Appointment is otherwise necessary to meet the requirements of a fair hearing.

(C) **Guardian ad litem as counsel.** When the guardian ad litem is an attorney admitted to practice in this state, he may also serve as counsel to his ward.

(D) **Appearance of attorneys.** An attorney shall enter his appearance by filing a written notice with the court or by appearing personally at a court hearing and informing the court that he represents a party.

(E) **Withdrawal of counsel or guardian ad litem.** An attorney or guardian ad litem may withdraw only with the consent of the court upon good cause shown.

(F) **Costs.** The court may fix compensation for the services of appointed counsel and guardians ad litem, tax the same as part of the costs and assess them against the child, his parents, custodian, or other person in loco parentis of such child.

(Amended, eff 7-1-76)

Related Statutes:

RC §§ 2151.28.1, 2151.31.4, 2131.35.1, 2151.35.2

Text Discussion

2 Anderson Fam. L. §§ 4.1-4.12.

Research Aids

Appearance of attorneys:

O-Jur2d: Juvenile Courts § 45.5

Costs:

O-Jur2d: Juvenile Courts §§ 45.5, 45.6

Guardian ad litem:

O-Jur2d: Juvenile Courts § 45.6

Right to counsel:

O-Jur2d: Juvenile Courts §§ 22.5, 45.5, 49.8

Am-Jur2d: Juvenile Courts etc. §§ 38, 39

Withdrawal of counsel or guardian ad litem:

O-Jur2d: Juvenile Courts §§ 45.5, 45.6

CASE NOTES AND OAG

1. The guarantee of the right to be represented by counsel set forth in Juvenile Rule 4(A) does not, as to a nonindigent party, require that trial be continued indefinitely until counsel can be obtained, but merely requires, if it does not appear that counsel cannot be obtained through the exercise of reasonable diligence and a willingness to enter into reasonable contractual arrangements for counsel's services, that a reasonable opportunity be given to the party before trial to employ such counsel: *In re Bolden*, 37 OApp (2d) 7, 66 OO(2d) 26, 306 NE(2d) 166 (1973).

2. Constitutional due process in juvenile cases: *In re Gault*, 387 US 1, 87 SCt 1428, 18 LEd(2d) 527, 40 OO(2d) 378; *In re Winship*, 397 US 358, 90 SCt 1068, 25 LEd(2d) 368, 51 OO(2d) 323; *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 LEd(2d) 647.

RULE 5. [Reserved]

RULE 6. Taking into custody

A child may be taken into custody: (1) pursuant to an order of the court, (2) pursuant to the law of arrest, (3) by a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, or is in immediate danger from his surroundings, and that his removal is necessary, (4) by a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian, and (5) where, during the pendency of court proceedings, it appears to the court that the conduct, condition or surroundings of the child are endangering the health, welfare, person or property of himself or others, or that he may abscond or be removed from the jurisdiction of the court or will not be brought to the court.

Related Statutes:

RC §§ 2151.31, 2151.41

Text Discussion

2 Anderson Fam. L. §§ 5.1, 5.3-5.11, 5.13, 9.12-9.44.

Research Aids

Taking into custody:

O-Jur2d: Juvenile Courts § 40.5

Am-Jur2d: Juvenile Courts § 35

RULE 7. Detention and shelter care

(A) **Detention: standards.** A child taken into custody shall not be placed in detention or shelter care prior to final disposition unless his detention or care is required to protect the person and property of others or those of the child, or the child may abscond or be removed from the jurisdiction of the court, or he has no parent, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required.

(B) **Priorities in placement prior to hearing.** A person taking a child into custody shall, with all reasonable speed, either:

(1) Release the child to his parent, guardian, or other custodian; or

(2) Where his detention or shelter care appears to be required under the standards of subdivision (A) bring the child to the court or deliver him to a place of detention or shelter care designated by the court.

(C) **Initial procedure upon detention.** Any person who delivers a child to a shelter or detention facility shall give the admissions officer at the facility a signed report stating why the child was taken into custody and why he was not released to his parent, guardian or custodian, and shall assist the admissions officer, if necessary, in notifying the parent pursuant to subdivision (E)(3).

(D) **Admission.** The admissions officer in a shelter or detention facility, upon receipt of a child, shall review the report submitted pursuant to subdivision (C), make such further investigation as is feasible and either:

(1) Release the child to the care of his parents, guardian or custodian; or

(2) Where detention or shelter care is required under the standards of subdivision (A), admit the child to the facility or place him in some appropriate facility.

(E) **Procedure after admission.** When a child has been admitted to detention or shelter care the admissions officer shall:

(1) Prepare a report stating the time the child was brought to the facility and the reasons he was admitted;

(2) Advise the child of (a) his right to telephone his parents and counsel immediately and at reasonable times thereafter and (b) the time, place and purpose of the detention hearing; and

(3) Use reasonable diligence to contact the child's parent, guardian or custodian and advise him of:

(a) The place of and reasons for detention;

(b) The time the child may be visited;

(c) The time, place and purpose of the detention hearing; and

(d) The right to counsel and appointed counsel in the case of indigency.

(F) **Detention hearing.**

(1) **Hearing: time; notice.** When a child has been admitted to detention or shelter care, a detention hearing shall be held promptly, not later than seventy-two hours after the child is placed in detention or shelter care or the next court day, whichever is earlier, to determine whether detention or shelter care is required. Reasonable oral or written notice of the time, place, and purpose of the detention hearing shall be given to the child, and,

if he can be found, to his parent, guardian, or other custodian.

(2) **Hearing: advisement of rights.** Prior to the hearing, the court shall inform the parties as to: (a) the right to counsel and to appointed counsel if indigent and (b) the child's right to remain silent with respect to any allegation of a juvenile traffic offense, delinquency, or unruliness.

(3) **Hearing procedure.** The court may consider any evidence, including the reports filed by the person who brought the child to the facility and the admissions officer, without regard to formal rules of evidence. Unless it appears from the hearing that the child's detention or shelter care is required under subdivision (A), the court shall order his release to his parent, guardian or custodian.

(G) **Rehearing.** Any decision relating to detention or shelter care may be reviewed at any time upon motion of any party. If a parent, guardian, or custodian did not receive notice of the initial hearing and did not appear or waive appearance at the hearing, the court shall rehear the matter promptly.

(H) **Separation from adults.** No child shall be placed in or committed to any prison, jail, lockup or any other place where he can come in contact or communication with any adult convicted of crime, under arrest or charged with crime.

A child may be detained in jail or other facility for detention of adults only if the child is alleged to be delinquent, there is no detention center for delinquent children under the supervision of the court or other agency approved by the court, and the detention is in a room separate and removed from those for adults. The court may order that a child over the age of fifteen years who is alleged to be delinquent be detained in a jail in a room separate and removed from adults if public safety or protection of the child or others reasonably requires such detention.

A child alleged to be neglected or dependent shall not be detained in jail or other facility intended or used for detention of adults charged with criminal offenses or of children alleged to be delinquent unless upon order of the court.

(I) **Medical examination.** The supervisor of a shelter or detention facility may provide for

a physical examination of a child placed therein.

(J) Telephone and visitation rights. A child may telephone his parents and attorney immediately after being admitted to a shelter or detention facility and at reasonable times thereafter.

The child may be visited at reasonable visiting hours by his parents and adult members of his family, his pastor and his teachers. He may be visited by his attorney at any time.

Related Statutes:

RC §§ 2151.01.1, 2151.31-2151.31.4, 2151.33, 2151.34, 2151.35.1, 2151.35.2, 2151.37

Text Discussion

2 Anderson Fam. L. § 4.7.

Research Aids

Detention and shelter care—standards and procedure:

O-Jur2d: Juvenile Courts §§ 40.6-40.9

Medical examination:

O-Jur2d: Juvenile Courts §§ 42, 46.5

Telephone and visitation rights:

O-Jur2d: Juvenile Courts §§ 40.8, 45.7

CASE NOTES AND OAG

1. Constitutional due process in juvenile cases: In re Gault, 387 US 1, 87 SCt 1428, 18 LEd(2d) 527, 40 OO(2d) 378; In re Winship, 397 US 358, 90 SCt 1068, 25 LEd(2d) 368, 51 OO(2d) 323; McKeiver v. Pennsylvania, 403 US 528, 91 SCt 1976, 29 LEd(2d) 647.

2. Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

RULE 8. [Reserved]

RULE 9. Intake

(A) Court action to be avoided. In all appropriate cases formal action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court.

(B) Screening; referral. Information that a child is within the court's jurisdiction may be informally screened prior to the filing of a complaint to determine whether the filing of a complaint is in the best interest of the child and the public.

Related Statutes:

RC §§ 2151.01, 2151.11, 2151.40

Text Discussion

2 Anderson Fam. L. §§ 6.1-6.7

Research Aids

Formal court action to be avoided:

O-Jur2d: Juvenile Courts §§ 32.5, 35.5
Informal screening:

O-Jur2d: Juvenile Courts §§ 32.5, 35.5

RULE 10. Complaint

(A) Filing. Any person having knowledge of a child who appears to be a juvenile traffic offender, delinquent, unruly, neglected, dependent, or abused may file a complaint with respect to such child in the juvenile court of the county in which the child has a residence or legal settlement, or in which the traffic offense, delinquency, unruliness, neglect, dependency, or abuse occurred.

Any person may file a complaint to have determined the custody of a child not a ward of another court of this state, and any person entitled to the custody of a child and unlawfully deprived of such custody may file a complaint requesting a writ of habeas corpus. Complaints concerning custody shall be filed in the county where the child is found or was last known to be.

When a case concerning a child is transferred or certified from another court, the certification from the transferring court shall be deemed to be the complaint. The juvenile court may order the certification supplemented upon its own motion or that of a party.

(B) Complaint: general form. The complaint, which may be upon information and belief, shall:

(1) State in ordinary and concise language the essential facts which bring the proceeding within the jurisdiction of the court and in juvenile traffic offense and delinquency proceedings shall contain the numerical designation of the statute or ordinance alleged to have been violated;

(2) Contain the name and address of the parent, guardian, or custodian of the child or, if such name or address is unknown, shall so state; and

(3) Be made under oath.

(C) Complaint: Juvenile traffic offense. A Uniform Traffic ticket shall be used as a complaint in juvenile traffic offense proceedings.

(D) Complaint: permanent custody. A complaint seeking permanent custody of a child shall so state.

(E) Complaint: habeas corpus. Where a complaint for a writ of habeas corpus involv-

ing the custody of a child is based on the existence of a lawful court order, a certified copy of such order shall be attached to the complaint.

(Effective 7-1-75; Amended, eff 7-1-76)

Related Statutes

RC §§ 2151.02-2151.02.2, 2151.06, 2151.23, 2151.27, 2151.27.1, 2151.35.3

Text Discussion

2 Anderson Fam. L. §§ 6.3, 6.8, 6.14.

Forms

2 Anderson Fam. L. Nos. 1-3.

Research Aids

Complaint:

O-Jur2d: Juvenile Rules § 36.1

Am-Jur2d: Juvenile Courts etc. § 40 et seq.

CASE NOTES AND OAG

1. A complaint under Juv.R. 10 and RC § 2151.27 alleging that a child is dependent must state the essential facts which bring the proceeding within the jurisdiction of the court: In re Hunt, 46 OS(2d) 378, 75 OO(2d) 450, 348 NE(2d) 727 (1976).

RULE 11. Transfer to another county

(A) **Residence in another county; transfer optional.** If the child resides in a county of this state and the proceeding is commenced in a court of another county, that court, on its own motion or a motion of a party, may transfer the proceeding to the county of the child's residence upon the filing of the complaint or after the adjudicatory or dispositional hearing for such further proceeding as required. The court of the child's residence shall then proceed as if the original complaint had been filed in that court. Transfer may also be made if the residence of the child changes.

(B) **Proceedings in another county; transfer required.** The proceedings shall be so transferred if other proceedings involving the child are pending in the juvenile court of the county of his residence.

(C) **Adjudicatory hearing in county where complaint filed.** Where either the transferring or receiving court finds that the interests of justice and the convenience of the parties so require, the adjudicatory hearing shall be held in the county wherein the complaint was filed. Thereafter the proceeding may be transferred to the county of the child's residence for disposition.

(D) **Transfer of records.** Certified copies of

all legal and social records pertaining to the proceeding shall accompany the transfer.

Related Statutes:

RC §§ 2151.23, 2151.27.1

Text Discussion

2 Anderson Fam. L. § 6.10.

Research Aids

Transfer to another county:

O-Jur2d: Juvenile Courts §§ 44.1, 44.9

RULE 12. [Reserved]

RULE 13. Temporary disposition; temporary orders; emergency medical and surgical treatment

(A) **Temporary disposition.** Pending hearing on a complaint, the court may make such temporary orders concerning the custody or care of a child who is the subject of the complaint as the child's interest and welfare may require.

(B) **Temporary orders.** Pending hearing on a complaint, the court may issue such temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require.

(C) **Emergency medical and surgical treatment.** Upon the certification of one or more reputable practicing physicians, the court may order such emergency medical and surgical treatment as appears to be immediately necessary for any child concerning whom a complaint has been filed.

(D) **Ex parte proceedings.** Where it appears to the court that the interest and welfare of the child require that action be taken immediately, the court may proceed summarily and without notice under subdivision (A), (B) or (C).

(E) **Hearing; notice.** Wherever possible, the court shall provide an opportunity for hearing before proceeding under subdivision (A), (B) or (C) and shall give notice of the time and place of the hearing to the parties and any other person who may be affected by the proposed action. Where the court has proceeded without notice under subdivision (D), it shall give notice of the action it has taken to the parties and any other affected person and provide them an opportunity for a hearing

concerning the continuing effects of such action.

(F) Payment. The court may order the parent, guardian or custodian, if able, to pay for any emergency medical or surgical treatment provided pursuant to subdivision (C). Such order of payment may be enforced by judgment, upon which execution may issue, and a failure to pay as ordered may be punished as for a contempt of court.

Related Statutes:

RC §§ 2151.30, 2151.33, 2151.41

Text Discussion

2 Anderson Fam. L. §§ 11.21-11.25.

Forms

2 Anderson Fam. L. No. 2

Research Aids

Emergency medical and surgical treatment:

O-Jur2d: Juvenile Courts § 42

Temporary disposition and orders:

O-Jur2d: Juvenile Courts § 44.2

CASE NOTES AND OAG

1. A temporary custody order will be declared invalid where the affected person is not given notice or opportunity to be heard where such is possible, unless the record reflects circumstances justifying an ex parte hearing: *Williams v. Williams*, 44 OS(2d) 28, 73 OO(2d) 121, 336 NE(2d) 426 (1975).

2. A temporary order of a juvenile court changing custody under Juvenile Rule 13 or 29, is not a dispositional order under Juvenile Rule 34, and hence is not a final appealable order: *Morrison v. Morrison*, 45 OApp(2d) 299, 74 OO(2d) 441, 344 NE(2d) 144 (1973).

3. Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

RULE 14. [Reserved]

RULE 15. Process: issuance, form

(A) Summons: issuance. After the complaint has been filed, the clerk shall promptly issue summons to the parties and to any person with whom the child may be, requiring the parties or person to appear before the court at the time fixed for hearing. A copy of the complaint shall accompany the summons.

(B) Summons: form. The summons shall contain:

(1) The name of the party or person with whom the child may be or, if unknown, any name or description by which the party or person can be identified with reasonable certainty.

(2) A summary statement of the complaint and in juvenile traffic offense and delinquency proceedings the numerical designation of the applicable statute or ordinance.

(3) A statement that any party is entitled to be represented by an attorney and that upon request the court will appoint an attorney for an indigent party entitled to appointed counsel under Rule 4(A).

(4) An order to the party or person to appear at a stated time and place with a warning that the party or person may lose valuable rights or be subject to court sanction if he fails to appear at the time and place stated in the summons.

(5) If a complaint requests permanent custody a statement that the parent, guardian or other custodian may be permanently divested of all parental rights.

(C) Summons: endorsement. The court may endorse upon the summons an order directed to the party, or person with whom the child may be, to appear personally and bring the child to the hearing.

(D) Warrant: issuance. If it appears that summons will be ineffectual or the welfare of the child requires that he be brought forthwith to the court, a warrant may be issued against the child. A copy of the complaint shall accompany the warrant.

(E) Warrant: form. The warrant shall contain the name of the child or, if that is unknown, any name or description by which he can be identified with reasonable certainty. It shall contain a summary statement of the complaint and in juvenile traffic offense and delinquency proceedings the numerical designation of the applicable statute or ordinance. A copy of the complaint shall be attached to the warrant. The warrant shall command that the child be taken into custody and be brought before the court issuing such warrant without unnecessary delay.

Related Statutes:

RC §§ 2151.01.1, 2151.02.1, 2151.21, 2151.28, 2151.29, 2151.30, 2151.35.3

Text Discussion

2 Anderson Fam. L. §§ 6.17-6.21

Forms

2 Anderson Fam. L. Nos. 5-7.

Research Aids

Form and issuance of process:

O-Jur2d: Juvenile Courts § 37.5
Am-Jur2d: Juvenile Courts § 43
Taking child into custody:
O-Jur2d: Juvenile Courts § 40.6

RULE 16. Process: service

(A) **Summons: service, return.** Summons shall be served as provided in Civil Rules 4(A), (C) and (D), 4.1, 4.2, 4.3, 4.5 and 4.6. The summons shall direct the party served to appear at a stated time and place; where service is by certified mail such time shall not be less than twenty-one days after the date of mailing.

When the residence of a party is unknown, and cannot with reasonable diligence be ascertained, service shall be made by publication. Before service by publication can be made, an affidavit of a party or his counsel must be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant and cannot with reasonable diligence be ascertained.

Upon the filing of the affidavit the clerk shall cause service of notice to be made by publication in a newspaper of general circulation in the county in which the complaint is filed. If no newspaper is published in that county, then publication shall be in a newspaper published in an adjoining county. The publication shall contain the name and address of the court, the case number, the name of the first party on each side, and the name and last known address, if any, of the person or persons whose residence is unknown. The publication shall also contain a summary statement of the object of the complaint and shall notify the person to be served that he is required to appear at the time and place stated; such time shall not be less than fourteen days after the date of publication. The publication shall be published once and service shall be complete on the date of publication.

After the publication, the publisher or his agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service.

(B) **Warrant: execution; return.**

(1) **By whom.** The warrant shall be exe-

cuted by any officer authorized by law.

(2) **Territorial limits.** The warrant may be executed at any place within this state.

(3) **Manner.** The warrant shall be executed by taking the party against whom it is issued into custody. The officer need not have the warrant in his possession at the time he executes it, but in such case he shall inform the party of the complaint made and the fact that the warrant has been issued. A copy of the warrant shall be given to the person named therein as soon as possible.

(4) **Return.** The officer executing a warrant shall make return thereof to the issuing court. Unexpected warrants shall upon request of the issuing court be returned to that court.

A warrant returned unexecuted and not cancelled or a copy thereof may, while the complaint is pending, be delivered by the court to an authorized officer for execution.

An officer executing a warrant shall take the person named therein without unnecessary delay before the court which issued the warrant.

Related Statutes:

RC §§ 2151.28, 2151.29, 2151.30

Text Discussion

2 Anderson Fam. L. § 6.22.

Research Aids

Service of process:

O-Jur2d: Juvenile Courts § 37.5

Am-Jur2d: Juvenile Courts § 43

RULE 17. Subpoena

(A) **For attendance of witnesses; form; issuance.** Every subpoena issued by the clerk shall be under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in and file a copy thereof with the clerk before service.

(B) **Parties unable to pay.** The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a party upon a satisfactory

showing that the presence of the witness is necessary and that the party is financially unable to pay the witness fees required by subdivision (D). If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the state in a criminal prosecution.

(C) For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein; but the court upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that the books, papers, documents or other objects designated in the subpoena be produced before the court at a time prior to the hearing or prior to the time they are offered in evidence and may upon their production permit them or portions thereof to be inspected by the parties or their attorneys.

(D) Service. A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, probation officer or a deputy of any, by an attorney at law or his agent or by any person designated by order of the court who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by reading it to him in person or by leaving it at his usual place of residence, and by tendering to him upon demand the fees for one day's attendance and the mileage allowed by law. The person serving the subpoena shall file a return thereof with the clerk. If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand. The return may be forwarded through the postal service, or otherwise.

(E) Subpoena for taking depositions; place of examination. When the attendance of a witness before an official authorized to take depositions is required, the subpoena shall be

issued by such person and shall command the person to whom it is directed to attend and give testimony at a time and place specified therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents or tangible objects which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 25.

A person whose deposition is to be taken may be required to attend an examination in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

(F) Subpoena for a hearing. At the request of any party subpoenas for attendance at a hearing shall be issued by the clerk of the court in which the hearing is held. A subpoena requiring the attendance of a witness at a hearing may be served at any place within this state.

(G) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court or officer issuing the subpoena.

Related Statutes:

RC § 2151.21

Text Discussion

2 Anderson Fam. L. § 6.23.

Forms

2 Anderson Fam. L. No. 12.

Research Aids

Contempt:

O-Jur2d: Juvenile Courts §§ 35.5, 44.7, 44.8

Subpoena for hearing:

O-Jur2d: Juvenile Courts §§ 35.5; 44.8

Subpoena for production of documentary evidence and taking depositions:

O-Jur2d: Juvenile Courts § 44.7

RULE 18. Time

(A) Time: computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a

legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in computation.

(B) Time: enlargement. When an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before expiration of the period originally prescribed or of that period as extended by a previous order, or (2) upon motion permit the act to be done after expiration of the specified period if the failure to act on time was the result of excusable neglect or would result in injustice to a party, but the court may not extend the time for taking any action under Rule 7(F)(1), Rule 22(F), Rule 29(A) and Rule 29(F)(2)(b), except to the extent and under the conditions stated in them.

(C) Time: unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a juvenile proceeding.

(D) Time: for motions; affidavits. A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than seven days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion, and opposing affidavits may be served not less than one day before the hearing unless the court permits them to be served at a later time.

(E) Time: additional time after service by mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to service of summons.

Research Aids

Additional time after service by mail:

O-Jur2d: Juvenile Courts § 44.5
Computation and enlargement of time:
O-Jur2d: Juvenile Courts § 4.5
Time for motions:
O-Jur2d: Juvenile Courts § 44.6

RULE 19. Motions

An application to the court for an order shall be by motion. A motion other than one made during trial or hearing shall be in writing unless the court permits it to be made orally. It shall state with particularity the grounds upon which it is made and shall set forth the relief or order sought. It shall be supported by a memorandum containing citations of authority and may be supported by an affidavit.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Text Discussion

2 Anderson Fam. L. § 9.35.

Research Aids

Motions:

O-Jur2d: Juvenile Courts § 44.6

RULE 20. Service and filing of papers

(A) Service: when required. Written notices, requests for discovery, designation of record on appeal and written motions, other than those which are heard *ex parte*, and similar papers shall be served upon each of the parties.

(B) Service: how made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon the party shall be made in the manner provided in Civil Rule 5(B).

(C) Filing. All papers required to be served upon a party shall be filed simultaneously with or immediately after service. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and the manner of service and shall be signed and filed in the manner provided in Civil Rule 5(D).

Research Aids

Service and filing of papers:

O-Jur2d: Juvenile Courts § 44.5

RULE 21. Preliminary conferences

At any time after the filing of a complaint, the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious proceeding.

Research Aids

Preliminary conferences:

O-Jur2d: Juvenile Courts § 44.3

RULE 22. Pleadings and motions; defenses and objections

(A) **Pleadings and motions.** Pleadings in juvenile proceedings shall be the complaint and the answer, if any, filed by a party. A party may move to dismiss the complaint or for other appropriate relief.

(B) **Amendment of pleadings.** Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties, or if the interests of justice require, upon order of court. Such order shall where requested grant a party reasonable time in which to respond to an amendment.

(C) **Answer.** No answer shall be necessary. A party may file an answer to the complaint, which, if filed, shall contain specific and concise admissions or denials of each material allegation of the complaint.

(D) **Prehearing motions.** Any defense, objection or request which is capable of determination without hearing on the allegations of the complaint may be raised before the adjudicatory hearing by motion. The following must be heard before the adjudicatory hearing, though not necessarily on a separate date:

(1) Defenses or objections based on defects in the institution of the proceeding;

(2) Defenses or objections based on defects in the complaint (other than failure to show jurisdiction in the court or to charge an offense) which objections shall be noticed by the court at any time during the pendency of the proceeding;

(3) Motions to suppress evidence on the ground that it was illegally obtained;

(4) Motions for discovery.

(E) **Motion time.** All prehearing motions shall be filed by the earlier of (1) seven days prior to hearing, or (2) ten days after the appearance of counsel. The court in the interest of justice may extend the time for making prehearing motions.

The court for good cause shown may permit a motion to suppress evidence under subsection (D) (3) to be made at the time such evidence is offered.

(F) **State's right to appeal upon granting a motion to suppress.** In delinquency proceedings the state may take an appeal as of right from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that (1) the appeal is not taken for the purpose of delay and (2) the granting of the motion has rendered proof available to the state so weak in its entirety that any reasonable possibility of proving the complaint's allegations has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the juvenile court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal which may be taken under this rule shall be diligently prosecuted.

A child in detention or shelter care may be released pending this appeal when the state files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

Related Statutes:

RC §§ 2151.17, 2151.35.5

Text Discussion

2 Anderson Fam. L. §§ 6.15, 6.16, 9.7-9.9.

Research Aids**Complaint:**

O-Jur2d: Juvenile Courts § 36.1

Am-Jur2d: Juvenile Courts § 40 et seq.

Motions:

O-Jur2d: Juvenile Courts § 44.6

Pleadings:

O-Jur2d: Juvenile Courts § 35.6

Am-Jur2d: Juvenile Courts § 40 et seq.

State's right to appeal upon granting a motion to suppress:

O-Jur2d: Juvenile Courts § 81

RULE 23. Continuance

Continuances shall be granted only when imperative to secure fair treatment for the parties.

Text Discussion

2 Anderson Fam. L. § 9.45.

Research Aids**Continuance:**

O-Jur2d: Juvenile Courts § 44.4

RULE 24. Discovery

(A) **Request for discovery.** Upon written request, each party of whom discovery is requested shall forthwith produce for inspection, copying or photographing the following information, documents and material in his custody, control or possession:

(1) The names and last known addresses of each witness to the occurrence which forms the basis of the charge or defense;

(2) Copies of any written statements made by any party or witness;

(3) Transcriptions, recordings and summaries of any oral statements of any party or witness, except the work product of counsel;

(4) Any scientific or other reports which a party intends to introduce at the hearing, or which pertain to physical evidence which a party intends to introduce;

(5) Photographs and any physical evidence which a party intends to introduce at the hearing.

(B) **Order granting discovery: limitations; sanctions.** If a request for discovery is refused, application may be made to the court for a written order granting the discovery. Motions for discovery shall certify that a request for discovery has been made and refused. An order granting discovery may make such discovery reciprocal for all parties to the proceeding, including the party requesting discovery. Notwithstanding the provisions of subdivision (A), the court may deny, in whole or part, or otherwise limit or set conditions on the discovery authorized by such subdivision, upon its own motion, or upon a showing by a party upon whom a request for discovery is made that granting discovery may jeopardize the safety of a party or, witness, or confidential informant, result in the production of perjured testimony or evidence, endanger the existence of physical evidence, violate a priv-

ileged communication, or impede the criminal prosecution of a minor as an adult or of an adult charged with an offense arising from the same transaction or occurrence.

(C) **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a person has failed to comply with an order issued pursuant to this rule, the court may grant a continuance, prohibit the person from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

Text Discussion

2 Anderson Fam. L. §§ 7.1-7.15

Forms

2 Anderson Fam. L. Nos. 9-11

Research Aids**Discovery:**

O-Jur2d: Juvenile Courts § 44.7

RULE 25. Depositions

The court upon good cause shown may grant authority to take the deposition of a party or other person upon such terms and conditions and in such manner as the court may fix.

Text Discussion

2 Anderson Fam. L. § 7.15.

Research Aids**Depositions:**

O-Jur2d: Juvenile Courts § 44.7

RULE 26. [Reserved]**RULE 27. Hearings: general**

The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case the general public may be excluded and only such persons admitted as have a direct interest in the case.

All cases involving children shall be heard separate and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in neglect, dependency, or abuse cases. The court shall hear and determine all cases of children without a jury.

(Amended, eff 7-1-76)

Related Statutes:

RC § 2151.35

Text Discussion

2 Anderson Fam. L. §§ 8.3, 8.4

Research Aids

Hearings in general:

O-Jur2d: Juvenile Courts § 44.8

Am-Jur2d: Juvenile Courts etc § 44 et seq.

Law Review

The juvenile and his constitutional right to a jury trial. William A. Huddleson. 1 NoKyStLF 164 (1973).

CASE NOTES AND OAG

1. Constitutional due process in juvenile cases: In re Gault, 387 US 1, 87 SCt 1428, 18 LEd(2d) 527, 40 OO(2d) 378; In re Winship, 397 US 358, 90 SCt 1068, 25 LEd(2d) 368, 51 OO(2d) 323; McKeiver v Pennsylvania, 403 US 528, 91 SCt 1976, 29 LEd(2d) 647.

2. Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

RULE 28. [Reserved]**RULE 29. Adjudicatory hearing**

(A) **Scheduling the hearing.** The date for the adjudicatory hearing shall be set when the complaint is filed, or as soon thereafter as is practicable. If the child who is the subject of the complaint is in detention or shelter care, the hearing shall be held not later than ten days after the filing of the complaint; upon a showing of good cause the adjudicatory hearing may be continued and detention or shelter care extended.

(B) **Advisement and findings at the commencement of the hearing.** At the beginning of the hearing, the court shall:

(1) Ascertain whether notice requirements have been complied with, and if not, whether the affected parties waive compliance;

(2) Inform the parties of the substance of the complaint, the purpose of the hearing and possible consequences thereof, including the possibility that the cause may be transferred to the appropriate adult court under Rule 30 where the complaint alleges that a child fifteen years of age or over is delinquent by conduct which would constitute a felony if committed by an adult;

(3) Inform unrepresented parties of their right to counsel, and determine if such parties are waiving their right to counsel;

(4) Appoint counsel for any unrepresented party under Rule 4 (A) who does not waive his right to counsel; and

(5) Inform any unrepresented party who waives counsel of his rights: to obtain counsel

at any stage of the proceedings, to remain silent, to offer evidence, to cross-examine witnesses, and, upon request, to have a record of all proceedings made, at public expense if indigent.

(C) **Entry of admission or denial.** The court shall request each party against whom allegations are made in the complaint to admit or deny the allegations. A failure or refusal to admit the allegations shall be deemed a denial.

(D) **Initial procedure upon entry of an admission.** The court may refuse to accept an admission and shall not accept an admission without addressing the party personally and determining that:

(1) He is making the admission voluntarily with understanding of the nature of the allegations and the consequences of the admission; and

(2) He understands that by entering his admission he is waiving his rights to challenge the witnesses and evidence against him, to remain silent and to introduce evidence at the adjudicatory hearing.

The court may hear testimony, review documents, or make further inquiry, as it deems appropriate, or it may proceed directly to the action required by subdivision (F).

(E) **Initial procedure upon entry of a denial.** If a party denies the allegations, the court shall:

(1) Direct the prosecuting attorney or another attorney-at-law to assist the court by presenting evidence in support of the allegations of a complaint;

(2) Order the separation of witnesses, upon request of any party;

(3) Take all testimony under oath or affirmation in either question-answer or narrative form; and

(4) Determine the issues by proof beyond a reasonable doubt in juvenile traffic offense, delinquency, and unruly proceedings, by clear and convincing evidence in dependency, neglect, and child abuse proceedings, and by a preponderance of the evidence in all other cases.

(F) **Procedure upon determination of the issues.** Upon the determination of the issues, the court shall:

(1) If the allegations of the complaint were

not proved, dismiss the complaint;

(2) If the allegations of the complaint are admitted or proved:

- (a) enter an adjudication and proceed forthwith to disposition; or
- (b) enter an adjudication and continue the matter for disposition for not more than six months and may make appropriate temporary orders; or
- (c) postpone judgment of adjudication for not more than six months; or
- (d) dismiss the complaint if such action is in the best interests of the child and the community;

(3) Upon request make written findings of fact and conclusions of law pursuant to Civil Rule 52.

(Amended, eff 7-1-76)

Related Statutes:

RC §§ 2151.02, 2151.28, 2151.35, 2151.35.2-2151.35.6, 2151.40

Text Discussion

2 *Anderson Fam. L.* §§ 5.23, 5.27, 5.28, 6.17, 8.5-8.17, 11.26.

Forms

2 *Anderson Fam. L. No. 13.*

Research Aids

Adjudicatory hearing:

O-Jur2d: *Juvenile Courts* § 44.9

Procedure upon determination of issues:

O-Jur2d: *Juvenile Courts* § 49.6

Law Review

Juvenile delinquency proceedings in Ohio: due process and the hearsay dilemma. *Comment.* 24 *ClevStLRev* 356.

Juvenile delinquent and unruly proceedings in Ohio: unconstitutional adjudications. *Note.* 24 *ClevStLRev* 602 (1975).

CASE NOTES AND OAG

1. A temporary order of a juvenile court changing custody under Juvenile Rule 13 or 29, is not a dispositional order under Juvenile Rule 34, and hence is not a final appealable order: *Morrison v. Morrison*, 45 *OApp(2d)* 299, 74 *OO(2d)* 441, 344 *NE(2d)* 144 (1973).

2. To hold that the mother of an illegitimate child by her subsequent interracial marriage had neglected her child and thus forfeited the custody of her child would infringe upon the right to marry a person of another race: *In the Matter of Brenda H.*, 66 *OO(2d)* 178 (1973).

3. Constitutional due process in juvenile cases: *In re Gault* 387 US 1, 87 SCt 1428, 18 *LEd(2d)* 527, 40 *OO(2d)* 378; *In re Winship*, 397 US 358, 90 SCt 1068, 25 *LEd(2d)* 368, 51 *OO(2d)* 323; *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 *LEd(2d)* 647.

4. Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071.

RULE 30. Relinquishment of jurisdiction for purposes of criminal prosecution

(A) **Preliminary hearing.** In any proceeding where the court may transfer a child fifteen or more years of age for prosecution as an adult, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that such act would be a felony if committed by an adult. Such hearing may be upon motion of the court, the prosecuting attorney or the child.

(B) **Investigation.** If the court finds probable cause, it shall continue the proceedings for full investigation. Such investigation shall include a mental and physical examination of the child by the Ohio Youth Commission, a public or private agency, or by a person qualified to make such examination. When the investigation is completed, a hearing shall be held to determine whether to transfer jurisdiction. Written notice of the time, place and nature of the hearing shall be given to the parties at least three days prior to the hearing.

(C) **Prerequisites to transfer.** The proceedings may be transferred if the court finds there are reasonable grounds to believe:

(1) The child is not amenable to care or rehabilitation in any facility designed for the care, supervision and rehabilitation of delinquent children; and

(2) The safety of the community may require that the child be placed under legal restraint for a period extending beyond the child's majority.

(D) **Retention of jurisdiction.** If the court retains jurisdiction, it shall set the proceedings for hearing on the merits.

(E) **Determination of amenability to rehabilitation.** In determining whether the child is amenable to the treatment or rehabilitative processes available to the juvenile court, the court shall consider:

- (1) The child's age and his mental and physical health;
- (2) The child's prior juvenile record;
- (3) Efforts previously made to treat or rehabilitate the child;
- (4) The child's family environment; and
- (5) School record.

(F) **Waiver of mental and physical examination.** The child may waive the mental and physical examination required under subdivision (B). Refusal to submit to a mental and physical examination or any part thereof by the child shall constitute waiver thereof.

(G) **Order of transfer.** The order of transfer shall state the reasons therefor.

(H) **Release of transferred child.** The juvenile court shall set terms and conditions for the release of the transferred child in accordance with Criminal Rule 46.

(Amended, eff 7-1-76)

Related Statutes:

RC §§ 2151.02, 2151.26, 2151.35.5

Text Discussion

2 Anderson Fam. L. §§ 9.45-9.47

Research Aids

Relinquishment of jurisdiction for purposes of criminal prosecution:

O-Jur2d: Juvenile Courts § 22.5

RULE 31. [Reserved]**RULE 32. Social history; physical examination; mental examination; custody investigation**

(A) **Social history and physical or mental examination: availability before adjudication.** The court may order and utilize a social history or physical or mental examination at any time after the filing of a complaint:

(1) Upon the request of the party concerning whom the history or examination is to be made;

(2) Where transfer of a child for adult prosecution is an issue in the proceeding;

(3) Where a material allegation of a neglect, dependency, or abused child complaint relates to matters that such a history or examination may clarify;

(4) Where a party's legal responsibility for his acts or his competence to participate in the proceedings is an issue;

(5) Where a physical or mental examination is required to determine the need for emergency medical care under Rule 13; or

(6) Where authorized under Rule 7(I).

(B) **Limitations on preparation and use.** Until there has been an admission or adjudication that the child who is the subject of the proceedings is a juvenile traffic offender, delinquent, unruly, neglected, dependent, or abused, no social history, physical examination or mental examination shall be ordered except as authorized under subdivision (A) and any social history, physical examination or mental examination ordered pursuant to subdivision (A) shall be utilized only for the limited purposes therein specified. The person preparing a social history or making a physical or mental examination shall not testify about the history or examination or information received in its preparation in any juvenile traffic offender, delinquency, or unruly child adjudicatory hearing, except as may be required in a hearing to determine

whether a child should be transferred to an adult court for criminal prosecution.

(C) **Availability of social history or investigation report.** A reasonable time before the dispositional hearing, or any other hearing at which a social history or physical or mental examination is to be utilized, counsel shall be permitted to inspect any social history or report of a mental or physical examination. The court may, for good cause shown, deny such inspection or limit its scope to specified portions of the history or report. The court may order that the contents of the history or report, in whole or part, not be disclosed to specified persons. If inspection or disclosure is denied or limited, the court shall state its reasons for such denial or limitation to counsel.

(D) **Investigation: custody; habeas corpus.** On the filing of a complaint for custody or for a writ of habeas corpus to determine the custody of a child, or on the filing of a motion for change of custody, the court may cause an investigation to be made as to the character, health, family relations, past conduct, present living conditions, earning ability and financial worth of the parties to the action. The report of such investigation shall be confidential, but shall be made available to the parties or their counsel upon written request not less than three days before hearing. The court may tax as costs all or any part of the expenses of each investigation.

(Amended, eff 7-1-73 eff 7-1-76)

Related Statutes:

RC §§ 2151.33, 2151.35.3, 2151.54

Text Discussion

2 Anderson Fam. L. §§ 9.4, 9.5, 13.7-13.12.

Research Aids

Social history, physical and mental examinations, etc.:

O-Jur2d: Juvenile Courts §§ 42, 46.5

RULE 33. [Reserved]**RULE 34. Dispositional hearing**

(A) **Scheduling the hearing.** The dispositional hearing may be held immediately following the adjudicatory hearing or at a later time fixed by the court. Where the dispositional hearing is to be held immediately following the adjudicatory hearing, the court, upon the request of a party shall continue the hearing for a reasonable time to enable the party to obtain or consult counsel.

(B) Hearing procedure. The hearing shall be conducted in the following manner:

(1) The judge who presided at the adjudicatory hearing shall, if possible, preside;

(2) The court may admit any evidence that is material and relevant, including hearsay, opinion and documentary evidence; and

(3) Medical examiners and each investigator who prepared a social history shall not be cross-examined, except upon consent of all parties, for good cause shown, or as the court in its discretion may direct. Any party may offer evidence supplementing, explaining, or disputing any information contained in the social history or other reports which may be used by the court in determining disposition.

(C) Judgment. After the conclusion of the hearing, the court shall enter an appropriate judgment within seven days. A copy of the judgment shall be given to any party requesting such copy. In all cases where a child is placed on probation, the child shall receive a written statement of the conditions of probation. If the judgment is conditional, the order shall state the conditions. If the child is not returned to his own home, the court shall determine which school district shall bear the cost of his education and may fix an amount of support to be paid by the responsible parent, or to be paid from public funds.

(D) Restraining orders. In any proceeding where a child is made a ward of the court, the court may grant a restraining order controlling the conduct of any party if the court finds that such order is necessary to control any conduct or relationship which may be detrimental or harmful to the child and tend to defeat the execution of a dispositional order.

(E) Advisement of rights after hearing. At the conclusion of the hearing, the court shall advise the child of his right to record expungement and, where any part of the proceeding was contested, advise the parties of their right to appeal.

Related Statutes:

RC §§ 2151.01.1, 2151.35, 2151.35.3-2151.35.9, 2151.36

Text Discussion

2 Anderson Fam. L. §§ 13.13, 13.15-13.18.

Forms

2 Anderson Fam. L. Nos. 13, 14

Research Aids

Dispositional hearing:

O-Jur2d: Juvenile Courts § 44.10
Judgment and restraining orders:
O-Jur2d: Juvenile Courts § 49.7

CASE NOTES AND OAG

1. Error cannot be predicated on the juvenile court's holding a dispositional hearing immediately following an adjudicatory hearing and its failure to continue the dispositional hearing for a reasonable time to enable the party to obtain or consult counsel, as prescribed by Juvenile Rule 34(A), unless it affirmatively appears in the record that the affected non-indigent party has requested such continuance: *In re Bolden*, 37 OApp(2d) 7, 66 OO(2d) 26, 306 NE(2d) 166 (1973).

2. Although the statutes relating to juvenile delinquency contemplate that more than one act of delinquency occurring in the same time reference may be the predicate for more than one complaint, and, upon trial, for more than one finding of delinquency, the plural findings that a child is a delinquent child constitute a finding of a single legal status existing at that point of time and permit one disposition for each finding based on a single complaint which must be consistent with and not mutually exclusive of the disposition for each other finding made pursuant to some other complaint: *In re Bolden*, 37 OApp(2d) 7, 66 OO(2d) 26, 306 NE(2d) 166 (1973).

3. A temporary order of a juvenile court changing custody under Juvenile Rule 13 or 29, is not a dispositional order under Juvenile Rule 34, and hence is not a final appealable order: *Morrison v. Morrison*, 45 OApp(2d) 299, 74 OO(2d) 441, 344 NE(2d) 144 (1973).

4. Constitutional due process in juvenile cases: *In re Gault*, 387 US 1, 87 SCt 1428, 18 LEd(2d) 527, 40 OO(2d) 378; *In re Winship*, 397 US 358, 90 SCt 1068, 25 LEd(2d) 368, 51 OO(2d) 323; *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 LEd(2d) 647.

5. Both the existing juvenile code and the Juvenile Rules require a hearing before a temporary commitment to the Ohio youth commission can be made permanent, which hearing requires the presence of the youth involved: 1972 OAG No. 72-071

RULE 35. Proceedings after judgment

(A) Continuing jurisdiction; invoked by motion. The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

(B) Revocation of probation. The court shall not revoke probation except after a hearing at which the child shall be present and apprised of the grounds on which such action is proposed. The parties shall have the right to counsel and the right to appointed counsel where entitled thereto under Rule 4(A). Probation shall not be revoked except upon a finding that the child has violated a condition of probation of which he had, pursuant to Rule 34(C), been notified.

(C) Detention. During the pendency of proceedings under this rule, a child may be

placed in detention in accordance with the provisions of Rule 7.

Related Statutes:

RC §§ 2151.35.3-2151.35.9, 2151.37

Text Discussion

2 Anderson Fam. L. § 14.9.

Research Aids

Proceedings after judgment:

O-Jur2d: Juvenile Courts § 49.8

RULE 36. [Reserved]

RULE 37. Recording of proceedings

(A) **Recording of hearings.** In all juvenile court hearings, upon request of a party, or upon the court's own motion, a complete record of all testimony, or other oral proceedings shall be taken in shorthand, stenotype or by any other adequate mechanical or electronic recording device.

(B) **Restrictions on use of recording or transcript.** No public use shall be made by any person, including a party, of any juvenile court record, including the recording or a transcript thereof of any juvenile court hearing, except in the course of an appeal or as authorized by order of the court.

Related Statutes:

RC §§ 2151.35, 2151.35.5, 2151.36, 2151.38

Research Aids

Recording of hearings:

O-Jur2d: Juvenile Courts § 44.8

Restrictions on use of recording or transcript:

O-Jur2d: Juvenile Courts §§ 44.8, 54

Am-Jur2d: Juvenile Courts etc § 56

RULE 38. [Reserved]

RULE 39. [Reserved]

RULE 40. Referees: appointment; powers; duties

(A) **Appointment.** The juvenile judge may appoint one or more referees. The appointment of a referee may empower him to act in a single proceeding or in a specified class of proceedings or portions thereof. The juvenile judge shall not appoint as referee any person who has contemporaneous responsibility for working with, or supervising the behavior of, children who are subject to dispositional orders of the appointing court or any other juvenile court.

(B) **Powers.** An order of reference to a referee may specify or limit his powers and may

direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power of the court to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call parties to the action and examine them upon oath. The referee shall make a report of the proceeding, including evidence offered and excluded, in the same manner and subject to the same limitations as provided in Rule 37 for hearings by the court.

(C) Proceedings.

(1) **Meetings.** When a special reference is made in a specific case, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys, or for the hearing of the case, to be held promptly after the date of the order of reference and shall notify the parties or their attorneys or both. When a general reference has been made for a specified class of proceedings or portions thereof, the clerk or the referee shall forthwith upon receiving the case set a time and place for hearing of the case, to be held promptly after receiving the case, and shall notify the parties or their attorneys or both.

Any party, on notice to the other parties and to the referee, may apply to the court for an order requiring the referee to expedite the matter and to make his report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte, or, in his dis-

cretion, may take appropriate steps to have the absent party brought before him forthwith or at a future day, or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 17. If without adequate excuse a witness fails to appear or to give evidence, he may be punished as for a contempt and be subject to the consequences, penalties, and remedies provided in Rule 17.

(D) Report.

(1) **Contents and filing.** The referee shall prepare a report upon the matters submitted to him by the order of reference or otherwise. He shall file the report with the judge and forthwith provide copies to the parties. The report shall set forth the findings of the referee upon the case submitted to him, together with his recommendation as to the judgment or order to be made in the case in question, but he shall file with his report a transcript of the proceedings and of the evidence only if the court so directs.

(2) **Objections to report.** A party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report. Such objections shall be considered a motion. Objections shall be specific and state with particularity the grounds therefor. Upon consideration of the objections the court may: adopt, reject or modify the report; hear additional evidence; return the report to the referee with instructions; or hear the matter itself.

(3) **Stipulation as to findings.** When the parties stipulate in writing that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) **Draft report.** Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The referee shall sign any findings or decision and file it together with any exceptions.

(5) **When effective.** The report of a referee shall be effective and binding only when

approved and entered as a matter of record by the court.

Effective 7-01-75

Related Statutes:
RC § 2151.16

Text Discussion
2 Anderson Fam. L. § 8.18

Research Aids
Appointment and powers of referees:
O-Jur2d: Juvenile Courts § 48.5
Proceedings:
O-Jur2d: Juvenile Courts § 48.6
Report:
O-Jur2d: Juvenile Courts § 48.7

RULE 41. [Reserved]

RULE 42. Consent to marry

(A) **Application where parental consent not required.** When a minor desires to contract matrimony and has no parent, guardian, or custodian whose consent to the marriage is required by law, the minor shall file an application under oath in the county where the female resides requesting that the judge of the juvenile court give consent and approbation in the probate court for such marriage.

(B) **Contents of application.** The application required by subdivision (A) shall contain:

- (1) The name and address of the person for whom consent is sought;
- (2) The age of said person;
- (3) The reason why consent of a parent is not required; and
- (4) The name and address, if known, of the parent, where the minor alleges that his parent's consent is unnecessary because the parent has neglected or abandoned him for one year or longer immediately preceding the application.

(C) **Application where minor female pregnant or delivered of illegitimate child.** Where a minor female is pregnant or has been delivered of an illegitimate child and the parents of such child seek to marry even though one or both of them is under the minimum age prescribed by law for persons who may contract marriage, such persons shall file an application under oath in the county where the female resides requesting that the judge of the juvenile court give consent in the probate court to such marriage.

(D) **Contents of application.** The application required by subdivision (C) shall contain:

- (1) The name and address of the person or persons for whom consent is sought;
- (2) The age of such person;
- (3) An indication of whether the female is pregnant or has already been delivered;
- (4) An indication of whether or not any applicant under eighteen years of age is already a ward of the court; and
- (5) Any other facts which may assist the court in determining whether to consent to such marriage.

If pregnancy is asserted, a certificate from a physician verifying pregnancy shall be attached to the application. If an illegitimate child has been delivered, the birth certificate of such child shall be attached.

The consent to the granting of the application by each parent whose consent to the marriage is required by law shall be indorsed on the application.

(E) **Investigation.** Upon receipt of an application under subdivision (C), the court shall set a date and time for hearing thereon at its earliest convenience and shall direct that an inquiry be made as to the circumstances surrounding the applicants.

(F) **Notice.** If neglect or abandonment is alleged in an application under subdivision (A) and the address of the parent is known, the court shall cause notice of the date and time of hearing to be served upon such parent.

(G) **Judgment.** If the court finds that the allegations stated in the application are true, and that the granting of the application is in the best interest of the applicants, the court shall grant the consent and shall make the applicant referred to in subdivision (C) a ward of the court.

(H) **Certified copy.** A certified copy of the judgment entry shall be transmitted to the probate court.

Related Statutes:

RC § 2151.23

Text Discussion

2 Anderson Fam. L. §§ 19.2, 19.3.

Research Aids

Consent to marry:

O-Jur2d: Marriage §§ 14, 15, 52

Am-Jur2d: Marriage § 15

RULE 43. [Reserved]

RULE 44. Jurisdiction unaffected

These rules shall not be construed to extend or limit the jurisdiction of the juvenile court.

Related Statutes:

RC § 2151.23

Research Aids

Jurisdiction of juvenile court unaffected by rules:

O-Jur2d: Juvenile Courts §§ 16, 32.5

RULE 45. Procedure not otherwise specified

If no procedure is specifically prescribed by these rules, the court shall proceed in any lawful manner not inconsistent therewith.

Related Statutes:

RC §§ 2151.01, 2151.17, 2151.35.5, 2151.35.6, 2151.56 et seq

Research Aids

Procedure not otherwise specified:

O-Jur2d: Juvenile Courts § 32.5

RULE 46. Forms

The forms contained in the Appendix of Forms which the supreme court from time to time may approve are illustrative and not mandatory.

RULE 47. Effective date

(A) **Effective date of rules.** These rules shall take effect on the first day of July, 1972. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(B) **Effective date of amendments.** The amendments submitted by the supreme court to the general assembly on January 12, 1973, shall take effect on the first day of July, 1973. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(C) **Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 10, 1975, and on April 29, 1975, shall take effect on July 1, 1975. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(D) **Effective date of amendments.** The amendments submitted by the supreme court to the general assembly on January 9, 1976 shall take effect on July 1, 1976. They govern all proceedings in actions brought after they

take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Amended, eff 7-1-73; 7-1-75; 7-1-76)

Research Aids

Effective date:

O-Jur2d: Juvenile Courts § 32.5

RULE 48. Title

These rules shall be known as Ohio Rules of Juvenile Procedure and may be cited as "Juvenile Rules" or "Juv. R. —."

APPENDIX A

Statutes affected by SB 145 (136 v —), effective 1-1-76, which remain applicable to estates of decedents dying prior to that date.

§2101.01 Probate division; location; equipment; employees.

A probate division of the court of common pleas shall be held at the county seat ♦ in each county ♦ in an office furnished by the board of county commissioners, in which the books, records, and papers pertaining to the probate division shall be deposited and safely kept by the judge thereof. The board shall provide suitable cases for the safekeeping and preservation of the books and papers of the court, and furnish such blankbooks, blanks, and stationery as the probate judge requires in the discharge of official duties. The probate judge shall employ and supervise all clerks, deputies, referees, and employees of the probate division.

As used in the Revised Code, "Probate Court" means the probate division of the court of common pleas, and "probate judge" means the judge of the court of common pleas who is judge of the probate division. All pleadings, forms, journals, and other records filed or used in the probate division shall be entitled "In the Court of Common Pleas, Probate Division," but are not defective if entitled "In the Probate Court."

HISTORY: GC § 10501-4; 114 v 320; 133 v H 7. Eff 11-19-69.

For an analogous section, see former GC § 1583.

§2101.12 Maintenance of books and records.

The following books or records shall be kept by the probate court:

(A) A criminal record, in which shall be made an entry of proceedings had in criminal actions instituted in the court prior to January 1, 1932;

(B) An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, a minute of the time of filing each paper, and a brief note of each order or proceeding relating to the estate with reference to the journal or record in which the order or proceeding is found;

(C) A guardian's docket, showing the name of each ward, and, if an infant, his age, the name of his father, the amount of bond and names of sureties therein, and a minute of papers, orders, and proceedings as in division (B) of this section;

(D) A civil docket, in which shall be noted the names of parties to actions and proceedings, a minute of the time of the commencement of such

actions and proceedings and of the filing of the papers relating thereto, a brief note of the orders made therein and the time of entering them;

(E) A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings;

(F) A record of wills, in which the wills proved in such court shall be recorded with a certificate of the probate thereof, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court;

(G) A final record, which shall contain a complete record in each cause or matter of the petitions, answers, demurrers, motions, returns, reports, verdicts, awards, orders, and judgments, which shall be completed within ninety days after the final order or judgment has been made in such cause or matter;

(H) A record by the probate judge, within thirty days after their return, of inventories, sale bills, and allowances to widows, in a book or record provided for that purpose;

(I) A record of accounts, which shall contain an entry of the appointment of executors, administrators, and guardians, partial and final accounts thereof, and the orders and proceedings of the courts thereon, which record shall be made within sixty days after the filing and approval of such account;

(J) An execution docket, in which shall be entered a memorandum of executions issued by the probate judge stating the names of the parties, the name of the person to whom delivered, his return thereon, the date of issuing the execution, the amount ordered to be collected, stating the costs separately from the fine or damages, the payments thereon, and the satisfaction thereof when it is satisfied;

(K) A marriage record, in which shall be entered licenses, the names of the parties to whom issued, the names of the persons applying therefor, a brief statement of the facts sworn to by such persons, and the returns of the person solemnizing the marriage;

(L) A record of bonds, in which shall be recorded bonds of executors, administrators, guardians, trustees, and assignees, which have been taken and approved by the probate judge;

(M) A naturalization record, in which shall be entered the declaration of intention of the person seeking to be naturalized, the oath of the person naturalized, and the affidavit or oath of witnesses who testify in his behalf, in which affidavit shall be stated the place of residence of such witnesses;

(N) A permanent record of all births and deaths occurring within the county, reported as provided by law, which shall be kept in such form and manner as may be designated by the director of health;

(O) A separate record and index of adoptions, in accordance with section 3107.14 of the Revised Code.

For each record required by this section, an index shall be maintained. Each index shall be kept current with the entries therein and shall refer to such entries alphabetically by the names of the persons as they were originally entered, indexing the page of the book or record where the entry is made. On the order of the judge, blankbooks or other record forms approved by the probate judge for such records and indexes shall be furnished by the board of county commissioners at the expense of the county.

HISTORY: GC §§ 10501-15, 10501-16; 114 v 320 (324, 325); 125 v 903 (958); 129 v 1484, § 1 (Eff 10-2-61); 129 v 1448, § 1. Eff 10-25-61.

§ 2101.16 Fees.

(A) The fees enumerated in this section shall be charged and collected, if possible, by the probate judge and shall be in full for all services rendered in the respective proceedings:

- (1) Account, in addition to advertising charges\$ 5.50
Waivers and proof of notice of hearing on account, per hundred words, minimum for each hundred words seventy-five cents\$.15
- (2) Account of distribution, in addition to advertising charges\$ 3.00
- (3) Adoption of child, petition for\$ 7.50
- (4) Alter or cancel contract for sale or purchase of real estate, petition to...\$10.00
- (5) Application and order not otherwise provided for in this section\$ 2.00
- (6) Appropriation suit, per day, hearing in\$10.00
- (7) Birth, application for registration of\$ 3.00
- (8) Birth record, application to correct\$ 2.00
- (9) Bond, application for new or additional\$ 2.00
- (10) Bond, application for release of surety or reduction of\$ 2.00
- (11) Bond, receipt for securities deposited in lieu of\$ 1.50
- (12) Certified copy of journal entry, record, or proceeding, per hundred words, minimum fee seventy-five cents\$.15
- (13) Citation and issuing citation, application for\$ 3.00
- (14) Change of name, petition for\$ 4.00
- (15) Claim, application of administrator or executor for allowance of his own\$ 4.00
- (16) Claim, application to compromise or settle\$ 4.00
- (17) Claim, petition for authority to present\$ 3.00
- (18) Commissioner, appointment of\$ 3.00
- (19) Compensation for extraordinary service and attorney fees for fiduciary, application for\$ 2.00
- (20) Competency, application to procure adjudication of\$ 5.00
- (21) Complete contract, application to ..\$ 4.00
- (22) Concealment of assets, citation for ..\$ 5.00
- (23) Construction of will, petition for ..\$10.00
- (24) Continue decedent's business, application to\$ 3.00
Monthly reports of operation\$ 1.50
- (25) Declaratory judgment, petition for\$10.00
- (26) Deposit of will\$ 1.00
- (27) Designation of heir\$ 3.00
- (28) Distribution in kind, application, assent, and order for\$ 3.00
- (29) Distribution under section 2109.-36 of the Revised Code, application for an order of\$ 5.00
- (30) Exceptions to any proceeding named in this section, contest of appointment or\$ 3.00
- (31) Election of surviving partner to purchase assets of partnership, proceedings relating to\$ 6.00
- (32) Election of surviving spouse under will\$ 2.00
- (33) Fiduciary, including assignee or trustee of an insolvent debtor or any guardian accountable to probate court, appointment of\$ 8.00
All proceedings where guardian of person is appointed for the purpose of giving consent\$ 4.00
- (34) Foreign will, application to record ..\$ 3.00
Record of such will, additional, per hundred words\$.15
- (35) Forms used for the complete administration, when supplied by probate court, not to exceed\$ 3.00
- (36) Heirship, petition to determine\$10.00
- (37) Injunction proceedings\$ 5.00
- (38) Improve real estate, petition to\$10.00
- (39) Inventory with appraisement\$ 5.00
- (40) Inventory without appraisement ...\$ 3.00
- (41) Investment or expenditure of funds, application for\$ 2.50
- (42) Invest in real estate, application to ..\$ 5.00
- (43) Lease for oil, gas, coal, or other mineral, petition to\$10.00
- (44) Lease or lease and improve real estate, petition to\$10.00

(45) Marriage license	\$ 2.00	order of distribution, motion to	\$ 3.00
Certified abstract of each marriage . . .	\$.15	(73) Writ of execution	\$ 1.00
(46) Minister's license to solemnize		(74) Writ of possession	\$ 3.00
marriages	\$ 1.00	(75) Wrongful death, application and	
(47) Minor or mentally ill person, etc.,		settlement of claim for	\$ 7.00
disposal of estate under five hun-		(76) Year's allowance, petition to review .	\$ 4.00
dred dollars of	\$ 2.50	(77) In estates of deceased persons, the	
(48) Mortgage or mortgage and repair		assets of which do not exceed one	
or improve real estate, petition to . .	\$10.00	thousand dollars in value, the total	
(49) Newly discovered assets, report of . .	\$ 3.00	fees of the probate judge charge-	
(50) Nonresident executor or adminis-		able against such estate shall not	
trator to bar creditor's claims, pro-		exceed	\$10.00
ceedings by	\$10.00	(B) The fees of witnesses, jurors, sheriffs,	
(51) Physician's or nurse's certificate,		coroners, and constables, for services rendered in	
recording	\$ 1.00	the probate court, or by order of the probate judge,	
(52) Power of attorney or revocation of		shall be the same as provided for like services in the	
power, bonding company	\$ 2.00	court of common pleas.	
(53) Presumption of death, petition to		HISTORY: GC §§ 10501-20, 10501-42; 114 v 320; 115 v 393; 119 v	
establish	\$10.00	297; 126 v 607 (Eff 8-5-55); 136 v H 1. Eff 6-13-75.	
(54) Probating will	\$ 7.00	For former analogous sections see former GC §§	
Proof of notice to beneficiaries	\$ 1.00	11204, 1601.	
(55) Purchase personal property,			
application of surviving spouse			
to	\$ 4.00		
(56) Purchase real estate at appraised			
value, petition of surviving spouse			
to	\$10.00		
(57) Receipts in addition to advertising			
charges, application and order to			
record	\$ 2.00		
Record of such receipts, addition-			
al, per hundred words	\$.15		
(58) Record in excess of fifteen hun-			
dred words in any proceeding in			
the probate court, per hundred			
words	\$.15		
(59) Release of estate by mortgagee or			
other lien holder	\$ 2.00		
(60) Relieving estate from administra-			
tion	\$ 2.00		
(61) Removal of fiduciary, application			
for	\$ 5.00		
(62) Requalification of executor or			
administrator	\$ 4.00		
(63) Resignation of fiduciary	\$ 2.00		
(64) Sale bill, public sale of personal			
property	\$ 5.00		
(65) Sale of personal property and			
report, application for	\$ 4.00		
(66) Sale of real estate, petition for	\$15.00		
(67) Schedule of debts	\$ 3.00		
(68) Schedule of debts, motion by			
fiduciary for hearing on	\$ 3.00		
(69) Terminate guardianship, petition to	\$ 5.00		
(70) Transfer of real estate, applica-			
tion, entry, and certificate for	\$ 3.00		
(71) Unclaimed money, application to			
invest	\$ 2.00		
(72) Vacate approval of account or			

§ 2101.17 Fees from county treasury. (GC § 10501-43)

The fees enumerated in this section shall be paid to the probate court from the county treasury upon the warrant of the county auditor which shall issue upon the certificate of the probate judge and shall be in full for all services rendered in the respective proceedings as follows:

- (A) For each inquest of lunacy when the person is committed to a state hospital or to relatives \$10.00;
- (B) When the person is discharged . . . 6.00;
- (C) For order of return of an insane person to a state hospital or removal therefrom 1.00;
- (D) For each inquest of epilepsy when a person is committed 8.00;
- (E) When an application is not granted 5.00;
- (F) For order of return of an epileptic insane person to a state hospital or removal therefrom 1.00;
- (G) For proceedings for committing a person to an institution for the feeble-minded 8.00;
- (H) For proceedings for sending or committing a person to the state school for the deaf or blind 5.00;
- (I) When commitment is made in proceedings against a juvenile disorderly person under section 3321.22 of the Revised Code 5.00;

- (J) When a child is discharged or judgment suspended 3.00;
- (K) For habeas corpus proceedings when a person is confined under color of proceedings in a criminal case and is discharged..... 5.00;
- (L) When acting as a juvenile judge, for each case filed against a delinquent, dependent, or neglected child..... 2.50;
- (M) For proceedings to take a child from parents or other persons having control thereof..... 2.50.

HISTORY: GC § 10501-43; 114 v 320 (332). Eff 10-1-53.
For an analogous section, see former GC § 1602.

§ 2101.24 Jurisdiction of probate court.

Except as otherwise provided by law, the probate court has jurisdiction:

(A) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country; provided, that in case of the unavoidable absence of the probate judge, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of such acts must be preserved in the usual records of the probate court;

(B) To grant and revoke letters testamentary and of administration;

(C) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(D) To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;

(E) To grant marriage licenses and licenses to ministers of the gospel to solemnize marriages;

(F) To make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject to guardianship;

(G) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(H) To authorize the sale of lands, equitable estates, or interests therein, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(I) To authorize the completion of real contracts on petition of executors and administrators;

(J) To issue writs of habeas corpus and determine the validity of the caption and detention of the persons brought before it on such writs; the probate court may refer the petition to the common pleas court when the petitioner is detained on a charge, indictment, or conviction of having committed a felony or misdemeanor under the laws of the United States, this state, or under an ordinance of any political subdivision thereof;

(K) To construe wills;

(L) To render declaratory judgments;

(M) To direct and control the conduct of fiduciaries and settle their accounts;

(N) To authorize the sale or lease of any estate created by will if the estate is held in trust on petition by trustee;

(O) To terminate a testamentary trust in any case in which a court of equity may do so.

Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law.

The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.

The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

HISTORY: GC §§ 10501-53, 10501-55; 114 v 320 (335); 125 v 903 (960); 127 v 27 (28), § 1 (Eff 9-9-57); 129 v 7, § 1 (Eff 10-5-61); 130 v 611, § 1. Eff 10-14-63.

§ 2101.26 Service of notice. (GC § 10501-21)

When notice of any proceeding in the probate court is required by law or deemed necessary by the court, and the statute providing for such notice neither directs nor authorizes the court to direct the manner of serving it, such notice shall be served in the following manner:

(A) By delivering such notice or a copy thereof to the person to be served;

(B) By leaving such notice or a copy thereof at the usual place of residence of such person;

(C) By depositing an envelope containing such notice or a copy thereof in the registered mail with postage prepaid, addressed to such person at his usual place of residence, if such place of residence is in the United States or any district, territory, or possession thereof, provided such envelope is not returned by the postal authorities as undelivered;

(D) By publication once each week for three consecutive weeks in some newspaper of general circulation in the county as to any person whose name, usual place of residence, or existence is unknown to and cannot with reasonable diligence be ascertained by the person causing service to be made, or as to any person whose usual place of residence is outside the state. If the residence of the person to be served is known, it shall be stated in the publication. Immediately after the first publication, the person causing service to be made shall mail a copy thereof to each person named in the publication, directed to his place of residence named therein, and make proof of such mailing by affidavit. In all other cases, the person causing service to be made, his agent or attorney, shall make and file an affidavit before

the hearing that the residence of the person to be served is unknown and cannot with reasonable diligence be ascertained. Service by publication shall be complete at the date of the last publication.

When the interval between the serving of notice and the time of the hearing is not fixed by statute, the court shall prescribe such period as it deems reasonable.

HISTORY: GC § 10501-21; 114 v 320 (326); 119 v 394 (395); 120 v 649 (650); 121 v 270, § 1; 125 v 903 (961). **Eff** 10-1-53. For an analogous section, see former GC § 11205.

§ 2101.27 Service of notice to persons under disability. (GC § 10501-21)

Service of notice of any proceeding in the probate court upon persons under disability shall be made as provided in section 2101.26 of the Revised Code by serving the following persons:

(A) When the person to be served with notice is a minor over fourteen years of age, service of such notice shall be made upon him and also upon his guardian, father, mother, the person having the care of such minor, or the person with whom he lives, in the order named.

(B) When the person to be served with notice is a minor under fourteen years of age, service need not be made upon him, but service of such notice shall be made upon his guardian, father, mother, the person having the care of such minor, or the person with whom such minor lives, in the order named. Such service shall constitute service of notice upon such minor.

(C) When the person to be served with notice is an adult under disability, service of such notice shall be made upon him and also upon his guardian or custodian, in the order named.

HISTORY: GC § 10501-21; 114 v 320 (326); 119 v 394 (395); 120 v 649 (650); 121 v 270, § 1. **Eff** 10-1-53. For an analogous section, see former GC § 11205.

§ 2101.28 Waiver of service of notice. (GC § 10501-21)

Service of notice in any proceeding in the probate court may be waived in writing by any person not under disability, including any fiduciary, the guardian, father, mother, person having the care of a minor, or the person with whom the minor lives, and the guardian or custodian of an adult person under disability. No person under disability shall be permitted to waive service of notice.

Unless otherwise directed by the court, a notice may be served by any competent person, including any fiduciary. Proof of service shall be made by affidavit.

HISTORY: GC § 10501-21; 114 v 320 (326); 119 v 394 (395); 120 v 649 (650); 121 v 270, § 1. **Eff** 10-1-53. For an analogous section, see former GC § 11205.

§ 2101.29 Service of summons. (GC §§ 10501-24, 10501-25)

All sections of the Revised Code with reference to summons and actual and constructive service, in the court of common pleas, shall apply to the probate court, except that:

(A) When the defendant is a minor under fourteen years of age, service of summons need not be made upon him, but shall be made upon his guardian, father, mother, the person having the care of such minor, or the person with whom such minor lives, in the order named. Such service shall constitute service of summons upon such minor.

(B) When the defendant is an adult person under disability, service of summons shall be made upon him and also upon his guardian or custodian, in the order named.

(C) Constructive service may be had upon the guardian, father, mother, the person having the care of the minor, or the person with whom a minor lives, in the order named, and upon the guardian or custodian of an adult person under disability, in the order named, in any case where no one of said persons can be served with summons in this state. Such service shall be made in the manner provided for constructive service on a nonresident in the court of common pleas. If the place of residence of any person upon whom constructive service may be made, as provided in this section, is unknown and cannot with reasonable diligence be ascertained, service shall be made upon the person next in the order named whose place of residence is known or can with reasonable diligence be ascertained. If there is no such person whose place of residence is known or can with reasonable diligence be ascertained, service need not be made upon any of said persons, and in such event service upon the person under disability is sufficient. This section does not prohibit constructive service upon a person under disability.

(D) A person who has no known fixed place of abode within this state is a nonresident of this state, within the meaning of this section, for the purpose of constructive service.

(E) Service may be waived in writing by any person not under disability, including any fiduciary, the guardian, father, mother, person having the care of a minor, or the person with whom he lives, and the guardian or custodian of an adult person under disability. No person under disability may waive service.

(F) Whenever, in a matter of [or] proceeding in the probate court, service is required on persons residing in a designated governmental subdivi-

sion, such service shall be required only on those persons known to reside there or whose addresses can with reasonable diligence be ascertained.

HISTORY: GC §§ 10501-24, 10501-25; 114 v 320 (326, 327); 116 v 385 (386), § 1; 119 v 394 (395); 120 v 649 (650); 121 v 270 (273); 122 v 21, § 1. Eff 10-1-53.

§ 2101.41 Prohibition. (GC §§ 12854, 12855, 12856)

No probate judge or his deputy clerk shall practice law or be associated with another as partner in the practice of law in a court or tribunal of this state, or prepare a petition or answer, or make out an account required for the settlement of an estate committed to the care or management of another, or appear as attorney before a court or judicial tribunal. Whoever violates this section shall forfeit his office.

The prosecuting attorney shall file his information against such judge or deputy clerk in the court of common pleas and proceed as upon indictment.

This section does not prevent a probate judge or deputy clerk from finishing business commenced by him prior to his election or appointment provided it is not connected with his official duty.

HISTORY: GC §§ 12854, 12855, 12856; RS § 534; S&S 627; S&C 1214; 59 v 19, § 7; 77 v 183 (Eff 10-1-53); 129 v 582 (733). Eff 1-10-61.

§ 2101.42 Cases appealable from probate court. (GC § 10501-56)

An appeal on a question of law and fact may be taken to the court of appeals in all cases in which such court has appellate jurisdiction. Such appeal may be taken from any order, decision, or judgment of the probate court, by a person against whom it is made or whom it affects, in the manner and within the time provided for the prosecution of such appeals from the court of common pleas to the court of appeals. The cause appealed shall be tried and decided in the court of appeals as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code.

From any final order, judgment, or decree of the probate court, an appeal on a question of law may be prosecuted to the court of appeals in the manner and within the time provided for the prosecution of such appeals from the court of common pleas to the court of appeals. For the purpose of prosecuting appeals on questions of law and questions of law and fact from the probate court, the probate court shall exercise judicial functions inferior only to the court of appeals and the supreme court. If a record has not been taken at the hearing of any matter before the probate court so that a bill of excep-

tions may be prepared as provided by sections 2321.02 to 2321.16, inclusive, of the Revised Code, then an appeal on questions of law and fact may be taken to the court of common pleas from any order, decision, or judgment of the probate court, by a person against whom it is made or whom it affects, in the manner provided for the prosecution of such appeal from the court of common pleas to the court of appeals. The court of common pleas shall advance said matter for hearing.

HISTORY: GC § 10501-56; 114 v 320 (336); 118 v 78; 119 v 394 (396), § 1. Eff 10-1-53. For an analogous section, see former GC § 11206.

§ 2103.05 Adultery a bar to dower. (GC § 10502-5)

A husband or wife who leaves the other and dwells in adultery will be barred from dower in the real property of the other, unless the offense is condoned by the injured consort.

HISTORY: GC § 10502-5; 114 v 320 (338). Eff 10-1-53. For an analogous section, see former GC § 8611.

§ 2105.06 Statute of descent and distribution.

When a person dies intestate having title or right to any personal property or to any real estate or inheritance in this state, such personal property shall be distributed and such real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of such intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one child or its lineal descendants surviving, one half to the spouse and one half to such child or its lineal descendants, per stirpes;

(C) If there is a spouse and more than one child or their lineal descendants surviving, one third to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

(D) If there are no children or their lineal descendants, three fourths to the surviving spouse and one fourth to the parents of the intestate equally, or to the surviving parent; if there are no parents, then the whole to the surviving spouse;

(E) If there is no spouse and no children or their lineal descendants, to the parents of such intestate equally, or to the surviving parent;

(F) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(G) If there are no brothers or sisters or their lineal descendants, one half to the paternal grandparents of the intestate equally, or to the survivor of them, and one half to the maternal grandparents of the intestate equally, or to the survivor of them;

(H) If there is no paternal grandparents or no maternal grandparent, one half to the lineal descendants of such deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;

(I) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(J) If there are no stepchildren or their lineal descendants, escheat to the state.

HISTORY: GC § 10503-4; 114 v 320 (339); 116 v 385 (388), § 1; 128 v 155, § 1. **EFF** 11-9-59.

§ 2105.10 Descent of estate which came from deceased spouse. (GC § 10503-5)

When a relict of a deceased husband or wife dies intestate and without issue, possessed of identical real estate or personal property which came to such relict from any deceased spouse by deed of gift, devise, bequest, descent, or by an election to take under section 2105.06 of the Revised Code, such estate, real and personal, except one half thereof which shall pass to and vest in the surviving spouse of such relict, shall pass to and vest in the children of the deceased spouse from whom such real estate or personal property came, or their lineal descendants, per stirpes. If there are no children or their lineal descendants, such estate, except for the one-half passing to the surviving spouse of such relict, shall pass and descend as follows:

(A) One half to the other heirs of such relict as provided by sections 2105.01 to 2105.09, inclusive, and 2105.11 to 2105.21, inclusive, of the Revised Code, and in the same manner and proportions as if the relict had left no surviving spouse;

(B) One half to the parents of the deceased spouse from whom such real estate or personal property came, equally, or the survivor of such parents;

(C) If there is no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of such deceased spouse, or their lineal descendants, per stirpes;

(D) If there are no children of the deceased spouse from whom such real estate or personal property came, or their lineal descendants, no parent and no brothers or sisters, whether of

the whole or of the half blood, or their lineal descendants, who survive such relict, then this section shall not apply and all such real estate and personal property shall pass and descend as provided by sections 2105.01 to 2105.09, inclusive, and 2105.11 to 2105.21, inclusive, of the Revised Code.

HISTORY: GC § 10503-5; 114 v 320 (340); 116 v 385 (389), § 1; 119 v 394 (396), § 1. **EFF** 10-1-53. See former GC § 8577.

§ 2105.17 Capability of bastards as to inheritance. (GC § 10503-14)

Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit or to whom she may transmit inheritance, as if born in lawful wedlock.

HISTORY: GC § 10503-14; 114 v 320 (342). **EFF** 10-1-53. For an analogous section, see former GC § 8590.

§ 2105.18 Illegitimate children deemed legitimate. (GC § 10503-15)

When a man has children by a woman and afterward intermarries with her, such issue, if acknowledged by him as his children, will be legitimate. The issue of parents whose marriage is null in law shall nevertheless be legitimate.

The natural father of a child by a woman unmarried at the time of the birth of such child, may file an application in the probate court of the county wherein he resides or in the county in which such child resides, acknowledging that such child is his, and upon consent of the mother, or if she be deceased or incompetent, or has surrendered custody, upon the consent of the person or agency having custody of such child, or of a court having jurisdiction over the custody thereof, the probate court, if satisfied that the applicant is the natural father and that establishment of such relationship is for the best interest of such child, shall enter the finding of such fact upon its journal and thereafter such child shall be the child of the applicant as though born to him in lawful wedlock.

HISTORY: GC § 10503-15; 114 v 320 (342); 125 v 347. **EFF** 10-14-53. For an analogous section, see former GC § 8591.

§ 2105.19 Murderer not to benefit. (GC § 10503-17)

No person finally adjudged guilty, either as principal or accessory, of murder in the first or second degree, shall inherit or take any part of the real or personal estate of the person killed, whether under sections 2105.01 to 2105.21, inclusive, of the Revised Code, or under the will of such person; nor shall such person inherit or take any real or personal estate of any other person as to which such homicide terminated an

intermediate estate or hastened the time of enjoyment. With respect to inheritance from or participation under the will of the person killed, such person shall be considered as though he had preceded in death the person killed. Such adjudication shall not affect the rights of an innocent purchaser of such property if the purchase was made prior to the time such person was finally adjudged guilty. A pardon shall restore all such rights, but shall not affect the rights of an innocent purchaser of such property.

HISTORY: GC § 10503-17; 114 v 320 (342). Eff 10-1-53.

This section was repealed by both SB 145 (136 v __), eff 1-1-76, and HB 490 (136 v __) eff. 11-20-75. The SB 145 re-enactment is identical to the HB 490 re-enactment. See page 91, supra.

§ 2107.13 Notice of probate.

No will shall be admitted to probate without notice to the surviving spouse and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator under sections 2105.01 to 2105.21, inclusive, of the Revised Code, if he had died intestate. Notice need not be given to any person who would be entitled to inherit from the testator solely by reason of relationship to a deceased spouse of the testator.

HISTORY: GC § 10504-17; 114 v 320 (348); 121 v 270 (272), § 1; 127 v 36, § 1. Eff 9-4-57.
See former GC § 10507.

§ 2107.14 Examination of witnesses.

(A) The probate court shall cause at least two of the witnesses to a will, and other witnesses whom a person interested in having such will admitted to probate may desire to have appear, to come before the court. On request of such interested person, the court shall compel the attendance of any witness by subpoena. Such witnesses shall be examined, and may be cross-examined, in open court and their testimony reduced to writing and filed.

(B) Any witness to a will may, during the testator's lifetime, execute an affidavit, stating those facts necessary to prove the will. If such affidavit is preserved and presented with the will, and no person interested in the will demands to cross-examine the witness, the statement is as effective as testimony given under division (A) of this section.

(C) Every affidavit executed pursuant to division (B) of this section shall be executed in substantially the following form:

AFFIDAVIT OF WITNESS

STATE OF OHIO

COUNTY OF _____, SS:

I, _____, being duly sworn to testify to the truth, in relation to the last will and testament of _____, state that I was present at the execution of said instrument in writing, dated _____, purporting to be the last will of _____; that I, at the request of said testator and in his presence and in the presence of the other witnesses to the will subscribed my name thereto as a witness; and that I saw said testator sign the instrument, or heard him acknowledge his signature; and that said testator, at the time of executing the same, was of full age, of sound mind and memory, and not under any restraint.

_____	_____
DATE	Signature of Witness

	Address"

State of Ohio
County of _____, SS:
Sworn to before me and signed in my presence at _____, Ohio, this ____ day of _____, 19...

Notary Public

HISTORY: GC § 10504-18; 114 v 320 (349); 127 v 36 (Eff 9-4-57); 135 v H 120. Eff 5-15-74.
See former GC § 10516.

§ 2107.15 Witness a devisee or legatee. (GC § 10504-19)

If a devise or bequest is made to a person who is a witness to a will and the will cannot be proved except by his testimony, the devise or bequest shall be void. The witness shall then be competent to testify to the execution of the will as if such devise or bequest had not been made. If such witness would have been entitled to a share of the testator's estate in case the will was not established, he shall have so much of such share which does not exceed the bequest or devise to him. The devisees and legatees must contribute for that purpose as for an absent or afterborn child under section 2107.34 of the Revised Code.

HISTORY: GC § 10504-19; 114 v 320 (349). Eff 10-1-53. Analogous to former GC § 10515.

§ 2107.17 Depositions taken by commission; [effect].

When a witness to a will, or other witness competent to testify at the probate proceeding, resides out of its jurisdiction, or resides within it but is infirm and unable to attend court, the probate court may issue a commission with the will annexed directed to any suitable person. In

lieu of the original will the probate court, in its discretion, may annex to the commission a copy of the will made by photostatic or any similar process. Such person to whom the commission is directed shall take the deposition or authorize the taking of such deposition of such a witness as provided by sections 2319.05 to 2319.31, inclusive, of the Revised Code. Such testimony, certified and returned, shall be admissible and have the same effect in such proceedings as if taken in open court.

HISTORY: GC § 10504-21; 114 v 320 (349); 116 v 385 (390), § 1; 127 v 36 (37), § 1. Eff 9-4-57.

Analogous to former GC § 10518.

§ 2107.18 Admission to probate.

The probate court shall admit a will to probate if it appears that such will was made by one of lawful age and attested and executed according to the law in force at the time of execution in the state where executed, or according to the law in force in this state at the time of death, or according to the law in force in the state where the testator was domiciled at the time of his death, and if it appears that the testator at the time of executing such will was of sound mind and memory, and not under restraint.

HISTORY: GC § 10504-22; 114 v 320 (349); 120 v 649 (650), § 1; 131 v 618. Eff 8-10-65.

Analogous to former GC § 10519.

[§ 2107.18.1] § 2107.181 Rehearing for admission to probate.

If it appears that the instrument purporting to be a will is not entitled to admission to probate, the court shall enter an interlocutory order denying probate of such instrument and shall continue the matter for further hearing. The court shall order that not less than ten days' notice of such further hearing be given by the applicant, the executor named in the instrument, or a commissioner appointed by the court, to all persons named in such instrument as legatees, devisees, beneficiaries of a trust, trustees, or executors in the manner provided by sections 2101.26, 2101.27 and 2101.28 of the Revised Code. Upon such further hearing witnesses may be called, subpoenaed, examined, and cross-examined in open court or by deposition and their testimony reduced to writing and filed in the same manner as in hearings for the admission of wills to probate. Thereupon the court shall revoke its interlocutory order denying probate to such instrument and admit the same to probate or enter a final order refusing to probate such instrument. A final order refusing to probate such instrument may be reviewed on appeal.

HISTORY: 125 v 411 (416). Eff 10-16-53.

§ 2107.23 Contest of will within six months; exceptions. (GC § 10504-32)

If within six months after a will is admitted to probate no person files an action to contest the validity of the will, the probate shall be forever binding, except to persons under any legal disability, or to such persons for six months after such disability is removed. The rights saved shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith, nor impose any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not such purchaser, lessee, encumbrancer, fiduciary, or other person had notice, actual or constructive, of such legal disability.

HISTORY: GC § 10504-32; 114 v 320 (351); 121 v 270 (273), § 1. Eff 10-1-53. See former GC § 10531.

§ 2107.25 Contest of later wills. (GC § 10504-34)

Sections 2107.23, 2107.24, and 2741.01 to 2741.09, inclusive, of the Revised Code apply in all respects to later wills admitted to probate.

HISTORY: GC § 10504-34; 114 v 320 (352). Eff 10-1-53. Analogous to former GC § 10524.

§ 2107.33 Revocation of will. (GC §§ 10504-47, 10504-48)

A will shall be revoked by the testator by tearing, canceling, obliterating, or destroying such will with the intention of revoking it, or by some person in such testator's presence, or by such testator's express written direction, or by some other written will or codicil, executed as prescribed by sections 2107.01 to 2107.62, inclusive, of the Revised Code, or by some other writing which is signed, attested, and subscribed in the manner provided by such sections. This section does not prevent the revocation implied by law, from subsequent changes in the circumstances of the testator.

A bond, agreement, or covenant made by a testator, for a valuable consideration, to convey property previously devised or bequeathed in a will, shall not revoke such devise or bequest. The property shall pass by such devise or bequest subject to the remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, which might be had by law against the heirs of the testator, or his next of kin, if it had descended to them.

HISTORY: GC §§ 10504-47, 10504-48; 114 v 320 (354). Eff 10-1-53. Analogous to former GC §§ 10555, 10556.

§ 2107.37 Marriage of testatrix. (GC § 10504-53)

A will executed by an unmarried woman is not revoked by her subsequent marriage.

HISTORY: GC § 10504-53; 114 v 320 (356). Eff 10-1-53. Analogous to former GC § 10560.

§ 2107.39 Election by surviving spouse.

After the probate of a will and the filing of the inventory, appraisal, and a schedule of debts where ordered, the probate court on the motion of the executor or administrator, or on its own motion, forthwith shall issue a citation to the surviving spouse, if any be living at the time of the issuance of such citation, to elect whether to take under the will or under section 2105.06 of the Revised Code. If such spouse elects to take under such section, such spouse shall take not to exceed one half of the net estate and unless the will shall expressly provide that in case of such election there shall be no acceleration of remainder or other interests bequeathed or devised by the will, the balance of the net estate shall be disposed of as though such spouse had predeceased the testator. The election shall be made within one month after service of the citation to elect, or if no citation is issued such election shall be made within seven months after the appointment of the executor or administrator. On a motion filed before the expiration of such seven months and for good cause shown, the court may allow further time for the making of the election. The election shall be entered on the journal of the court.

When proceedings for advice or to contest the validity of a will are begun within the time allowed by this section for making the election, such election may be made within three months after the final disposition thereof if the will is not set aside.

When a surviving spouse succeeds to the entire estate of the testator, having been named the sole devisee and legatee, it shall be presumed that the spouse elects to take under the will of the testator and no citation shall be issued to the spouse as provided herein, and no election shall be required, unless the spouse manifests a contrary intention.

HISTORY: GC §§ 10504-55, 10504-58; 114 v 320 (356); 116 v 385; 119 v 394; 125 v 411 (Eff 10-16-53); 133 v S 185 (Eff 1-1-71); 135 v H 374. Eff 10-31-73.

See former GC §§ 10566, 10571.

§ 2107.40 Petition for construction of will. (GC § 10504-57)

At any time before the period of the election provided by section 2107.39 of the Revised Code has expired, the surviving spouse may file a peti-

tion in the probate court or in the court of common pleas making all persons interested in the will defendants thereto, asking a construction of such will in favor of such spouse, and for the judgment of the court.

HISTORY: GC § 10504-57; 114 v 320 (357); 118 v 78, § 1. Eff 10-1-53. Analogous to former GC § 10567.

§ 2107.42 Election to take under the will; effect. (GC § 10504-61)

If a surviving spouse elects to take under the will, such spouse shall be barred of all right to an intestate share of the property passing under the will and shall take under the will alone, unless it plainly appears from the will that the provision therein for the spouse was intended to be in addition to an intestate share. Such election shall not bar the right of the surviving spouse to an intestate share of that portion of the estate as to which the decedent dies intestate. Unless the will expressly otherwise directs, such election shall not bar the right of the surviving spouse to remain in the mansion of the deceased consort, or to claim and receive the property or money in lieu thereof, which is not an asset of the estate for administration as provided by section 2115.13 of the Revised Code. Nor shall such election bar the right of the widow to receive the allowance for the support of herself and children provided by section 2117.20 of the Revised Code, unless the will expressly otherwise directs.

HISTORY: GC § 10504-61; 114 v 320 (357); 116 v 385 (390), § 1; 119 v 394 (397), § 1. Eff 10-1-53. See former GC §§ 10569, 10572.

§ 2107.43 Election made in person. (GC §§ 10504-56, 10504-59)

Whether or not a citation is issued, the election of a surviving spouse under section 2107.39 of the Revised Code shall be made in person before the probate judge, or a deputy clerk who has been appointed to act as a referee under the provisions of section 2315.37 of the Revised Code, except as provided in sections 2107.44 and 2107.45 of the Revised Code.

When the election is made in person before such judge or referee, the judge or referee shall explain the will, the rights under such will, and by law, in the event of a refusal to take under the will.

HISTORY: GC §§ 10504-56, 10504-59; 114 v 320 (357); 122 v 498, § 1; 125 v 411 (412). Eff 10-16-53. Analogous to former GC §§ 10570, 10571.

§ 2107.46 Action by fiduciary. (GC §§ 10504-66, 10504-67)

Any fiduciary may maintain an action in the

probate court or the court of common pleas against creditors, legatees, distributees or other parties and ask the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered and the rights of the parties in interest.

If any fiduciary fails for thirty days to bring such action after a written request from a party in interest, the party making such request may institute the suit.

HISTORY: GC §§ 10504-66, 10504-67; 114 v 320 (358, 359); 118 v 78 (79), § 1; 125 v 903 (963). Eff 10-1-53. Analogous to former GC §§ 10857, 10858.

§ 2109.02 Appointment and duties. (GC § 10506-2, 10506-22)

Every fiduciary, before entering upon the execution of a trust, shall receive letters of appointment from a probate court having jurisdiction of the subject matter of the trust.

The duties of a fiduciary shall be those required by law, and such additional duties as the court orders.

No act or transaction by a fiduciary shall be valid prior to the issuance of letters of appointment to him. This section does not prevent an executor named in a will from paying funeral expenses or prevent necessary acts for the preservation of the trust estate prior to the issuance of such letters.

HISTORY: GC §§ 10506-2, 10506-22; 114 v 320 (364, 368). Eff 10-1-53. See former GC § 10616.

§ 2109.07 Bond conditions, administrators. (GC § 10506-14)

The bond required by section 2109.04 of the Revised Code of an administrator shall be conditioned as follows:

(A) To make and return to the probate court on oath, within the time required by section 2115.02 of the Revised Code, a true inventory of all moneys, chattels, rights, and credits of the deceased which are to be administered and which come to such administrator's possession or knowledge, and an inventory of the real estate of the deceased;

(B) To administer and distribute according to law all the moneys, chattels, rights, and credits of the deceased, the proceeds of any action for wrongful death or of any settlement, with or without suit, of a wrongful death claim, and the proceeds of all his real estate sold which come to the possession of the administrator or to the possession of any person for him;

(C) To render upon oath a just and true account of his administration, at the times required

by section 2109.30 of the Revised Code;

(D) To deliver the letters of administration into court in case a will of the deceased is proved and allowed.

HISTORY: GC § 10506-14; 114 v 320 (366); 119 v 394 (398), § 1. Eff 10-1-53. See former GC § 10618.

§ 2109.21 Residence qualifications of fiduciary. (GC § 10506-65)

An administrator, special administrator, administrator de bonis non, or administrator with the will annexed shall be a resident of this state and shall be removed on proof that he is no longer such resident.

If the executor or trustee named in a will is a nonresident of this state, the probate court may refuse to issue letters of appointment to such person. If at the time of appointment such executor or trustee is a resident of this state and proof is thereafter established that he is no longer such resident, the court may remove such fiduciary.

A guardian shall be a resident of the county, except that the court may appoint a nonresident of the county who is a resident of the state as guardian of the person, of the estate, or of both, and except that a nonresident of the county or of the state may be appointed a guardian, if named in a will by a parent of a minor, as provided by section 2111.12 of the Revised Code. A guardian, other than a guardian named in a will by a parent of a minor, may be removed on proof that he is no longer a resident of the county in which he resided at the time of his appointment and shall be removed on proof that he is no longer a resident of the state.

Any fiduciary whose residence qualifications are not defined in this section shall be a resident of the state and shall be removed on proof that he is no longer such resident.

HISTORY: GC § 10506-65; 114 v 320 (378); 123 v 460, § 1. Eff 10-1-53.

§ 2109.22 Marriage no disqualification for fiduciary. (GC § 10506-66)

The marriage of a woman shall not disqualify her to act as fiduciary, whether such marriage occurs before or after her appointment and qualification, and all of her acts in such capacity shall have the same validity as though she were unmarried.

HISTORY: GC § 10506-66; 114 v 320 (378). Eff 10-1-53. Analogous to former GC §§ 10636, 10958.

§ 2109.30 Accounts of fiduciaries.

(A) Within seven months after his appoint-

ment, every executor and administrator shall render an account of his administration and shall render further accounts at least once each year thereafter. Every other fiduciary shall render an account of the administration of his estate or trust at least once in each two years. An account shall be rendered by any fiduciary at any time other than that mentioned in this section upon the order of the court either at its own instance, or upon the motion of any person interested in the estate or trust for good cause shown. Every fiduciary shall render a final account within thirty days after completing the administration of the estate or the termination of his trust, or within such other period of time as the court may order.

Every account shall include an itemized statement of all receipts of the fiduciary during the accounting period and of all disbursements and distributions made by him during such period, verified by vouchers or proof. In addition the account shall include an itemized statement of all funds, assets, and investments of the estate or trust known to or in the possession of the fiduciary at the end of the accounting period and shall show any changes in investments since the last previous account. The accounts of testamentary trustees shall, and the accounts of other fiduciaries may, show receipts and disbursements separately identified as to principal and income.

Every account shall be upon the signature and oath of the fiduciary. When an account is rendered by two or more joint fiduciaries, the court may allow the account upon the signature and oath of one of them.

Upon the filing of every account the fiduciary, except corporate fiduciaries subject to section 1109.16 of the Revised Code, shall exhibit to the court, for its examination, the securities shown in said account as being in the hands of the fiduciary or the certificate of the person in possession of such securities, if held as collateral or pursuant to section 2109.13 of the Revised Code, and a passbook or certified bank statement showing as to each depository the fund deposited therein to the credit of the trust. The court may designate a deputy clerk of said court, an agent of a corporate surety on the bond of such fiduciary, or another suitable person who the court appoints as commissioner to make such examination and report his findings to the court. When such securities are located outside the county, the court may appoint a commissioner or request another probate court to make such examination and report its findings to the court. The court may examine the fiduciary under oath touching the account.

When a fiduciary is authorized by law or by

the instrument governing distribution to distribute the assets of the estate or trust, in whole or in part, he may do so and include a report of such distribution in his succeeding account.

An account showing complete administration before distribution of assets shall be designated "final account." An account filed subsequent to the final account and showing distribution of assets shall be designated "account of distribution." An account showing complete administration and distribution of assets shall be designated "final and distributive account."

(B) In estates of decedents where the sole legatee or heir is also the executor or administrator, no partial accountings are required.

In estates of decedents where none of the legatees or heirs is under a legal disability, each partial accounting of the executor or administrator may be waived by the written consent of all such legatees or heirs filed in lieu of a partial accounting otherwise required.

HISTORY: GC § 10506-34; 114 v 320 (371); 120 v 649; 121 v 270; 125 v 903 (965) (Eff 10-1-53); 133 v H 176 (Eff 10-2-69); 133 v S 185 (Eff 1-1-71); 134 v S 500. Eff 10-16-72.

Analogous to former GC §§ 10821, 10933, 11029 and 10509-170, 10509-176.

§ 2109.32 Hearing on account; notice. (GC §§ 10506-36, 10506-39)

Every fiduciary's account required by section 2109.30 of the Revised Code shall be set for hearing before the probate court. Within one month after an account is filed, the court shall cause notice of the filing of such account and the time and place of the hearing thereon to be published once in some newspaper of general circulation in the county. The hearing on the account shall be set not earlier than thirty days after the publication of such notice. The costs of such notice, if more than one account is specified in the same notice, shall be paid in equal proportions by the fiduciaries.

At the hearing upon an account, the court shall inquire into, consider, and determine all matters relative to such account and the manner in which the fiduciary has executed his trust, including the investment of trust funds, and may order the account approved and settled or make such other order as the court deems proper. If, at the hearing upon an account, the court finds that the fiduciary has fully and lawfully administered the estate or trust and has distributed the assets thereof in accordance with the law or the instrument governing distribution, as shown in such account, the court shall order the account approved and settled and may order the fiduciary discharged.

HISTORY: GC §§ 10506-36, 10506-39; 114 v 320 (371, 372); 120 v 649 (651, 653); 121 v 270 (274, 275), § 1; 125 v 903 (966). Eff 10-1-53. GC § 10509-39 analogous to former GC § 11031; analogous in part to former GC § 10509-188.

§ 2113.03 Release from administration.

Upon the application of any interested party, after notice of the filing thereof has been given to the surviving spouse and heirs at law in such manner and for such length of time as the probate court directs, and after three weeks' notice to all interested parties by publication thereof once each week in a newspaper of general circulation in the county, unless such notices are waived or found unnecessary, the court, when satisfied that the assets of an estate are ten thousand dollars or less in value, and that creditors will not be prejudiced thereby, may make an order relieving such estate from administration and directing delivery of personal property and transfer of real estate to the persons entitled thereto.

For the purposes of this section, the value of an estate which can reasonably be considered to approximate ten thousand dollars, and which is not composed entirely of money, stocks, bonds or other property the value of which is evident, shall be determined by an appraiser selected by the applicant from a list of appraisers on file with the court, the appraiser's valuation of the property shall be reported to the court in the application to relieve the estate from administration. The appraiser shall be paid in accordance with section 2115.06 of the Revised Code.

For such purpose the court shall fix the amount of property to be delivered or transferred to the surviving spouse or minor children of the deceased in lieu of the claim of such spouse or minor children to property not deemed assets and to an allowance for a year's support.

When a delivery or transfer of property has been ordered without administration, the court shall appoint a commissioner to execute instruments of conveyance when necessary.

The application provided for in this section shall be in writing under oath and shall contain the name, date, and place of death of the decedent; the names, ages, and addresses of the persons entitled to the next estate of inheritance under the statutes of descent and distribution and their respective degrees of relationship to the decedent whether the decedent died intestate; a summary statement of the character and value of the property comprising the estate; and a list of all known creditors of the decedent with the amount of their claims.

When the decedent died testate the will shall be presented for probate, and if admitted to probate, the court may relieve the estate from ad-

ministration, and order distribution of the estate under the will.

An order of the court relieving an estate from administration shall have the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of unsecured creditors.

HISTORY: GC § 10509-5; 114 v 320 (402); 116 v 385 (393); 122 v 427; 130 v 615 (Eff 9-24-63); 132 v H 68 (Eff 12-11-67); 134 v S 54 (Eff 12-3-71); 135 v S 25. Eff 11-21-73.

§ 2113.04 Payment of wages of deceased employee without administration. (GC § 10509-5a)

Any employer, including the state or a political subdivision, at any time not less than thirty days after the death of his or its employee, may pay all wages or personal earnings due to such deceased employee to: (A) the surviving spouse (B) any one or more of the children eighteen years of age or older or (C) the father or mother of the deceased employee, preference being given in the order named, without requiring letters testamentary or letters of administration to be issued upon the estate of such deceased employee, where such wages or personal earnings do not exceed three hundred dollars. The payment of such wages or personal earnings is a full discharge and release to the employer from any claim for such wages or personal earnings. If letters testamentary or letters of administration are thereafter issued upon the estate of such deceased employee, any person receiving payment of wages or personal earnings under this section is liable to the executor or administrator for the sum received by him.

HISTORY: GC § 10509-5a; 119 v 394 (423); 124 v 27, § 1. Eff 10-1-53.

§ 2113.05 Letters testamentary shall issue.

When a will is approved and allowed, the probate court shall issue letters testamentary thereon to the executor named in such will, if he is suitable, competent, accepts the trust, and gives bond if that is required.

If no executor is named in a will, or if the executor named therein dies, fails to accept the trust, resigns, or is otherwise disqualified, letters of administration with the will annexed shall be granted to such suitable person or persons, named as devisees or legatees in the will, who would have been entitled to administer the estate if such decedent had died intestate, unless the will indicates an intention that such person or persons shall not be granted letters of administration. Otherwise, the court shall grant letters

of administration with the will annexed to some other suitable person.

HISTORY: GC § 10509-2; 114 v 320 (401); 116 v 385 (392); 125 v 903 (974) (Eff 10-1-53); 133 v S 134. Eff 6-12-70.

§ 2113.06 To whom letters of administration shall be granted. (GC § 10509-3)

Administration of the estate of an intestate shall be granted to persons mentioned in this section, in the following order:

(A) To the surviving spouse of the deceased, if resident of the state;

(B) To one of the next of kin of the deceased, resident of the county;

(C) To one of the next of kin of the deceased, resident of the state;

If the persons entitled to administer the estate fail to take or renounce such administration voluntarily, they shall be cited by the probate court for that purpose, if resident within the county.

If there are no persons entitled to administration, or if they are for any reason unsuitable for the discharge of the trust, or if without sufficient cause they neglect to apply within a reasonable time for the administration of the estate, their right to priority shall be lost and the court shall commit the administration to some suitable person who is a resident of the county. Such person may be a creditor of the estate.

This section applies to the appointment of an administrator de bonis non.

HISTORY: GC § 10509-3; 114 v 320 (401); 116 v 385 (393), § 1. Eff 10-1-53. Analogous to former GC § 10617.

§ 2113.07 Application for appointment as executor or administrator. (GC § 10509-4)

Before being appointed executor or administrator, every person shall make and file an application under oath, which must contain the names of the surviving spouse and all the next of kin of the deceased known to such person, their post-office addresses if known, a statement in general terms as to what the estate consists of and its probable value, and a statement of any indebtedness the deceased had against such person making said application.

The application may be accompanied by a waiver signed by the persons resident of the county entitled to administer the estate, and in the absence of such waiver such persons shall be cited by the probate court for the purpose of ascertaining whether they desire to take or renounce such administration.

Letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not to his knowledge a last will and testament of such intestate.

HISTORY: GC § 10509-4; 114 v 320 (401); 116 v 307, § 1; 116 v PtII 28, § 1. Eff 10-1-53.

§ 2113.08 Notice of appointment. (GC §§ 10509-6, 10509-7)

Within one month after appointment of an executor or administrator, the probate judge shall cause notice of the appointment to be published in some newspaper of general circulation in the county in which the letters were issued for three consecutive weeks, but such notice shall not be necessary when there is no estate except a right of action for wrongful death.

An affidavit of the publisher or agent of the newspaper making such publication which is filed and recorded, together with a copy of the notice, in the probate court within six months after the appointment shall be admitted as evidence of the time, place, and manner in which notice was given.

HISTORY: GC §§ 10509-6, 10509-7; 114 v 320 (402); 116 v 307, § 1; 116 v PtII 28, § 1. Eff 10-1-53.

§ 2113.38 Purchase of property by surviving spouse.

A surviving spouse even though acting as executor or administrator, may purchase the following property, if left by the decedent and if not specifically devised or bequeathed:

(A) The mansion house, including the parcel of land on which such house is situated and lots or farm land adjacent thereto and used in conjunction therewith as the home of the decedent, and the household goods contained therein, at the appraised value as fixed by the appraisers;

(B) Securities listed on an approved stock exchange, as defined in division (E) of section 1707.02 of the Revised Code, at the market price at the time of purchase;

(C) Any other real or personal property of the decedent not exceeding, with the mansion house and land used in conjunction therewith and such household goods as the spouse elects to purchase, one third of the gross appraised value of the estate, at the appraised value as fixed by the appraisers.

A spouse desiring to exercise such right of purchase with respect to personal property shall file in the probate court an application setting forth an accurate description of such personal property and the election of such spouse to purchase it at the appraised or market value, as the case may be. No notice is required for the court to hear such application insofar as it appertains to household goods contained in the mansion house or securities listed on an approved stock exchange. If such application includes other personal property the court shall cause a notice of

the time and place of the hearing of such application with respect to such other personal property to be given to the executor or administrator, the heirs or beneficiaries interested in the estate, and to such other interested persons as the court determines, in the manner provided by section 2101.26 of the Revised Code.

A spouse desiring to exercise such right of purchase with respect to an interest in real estate shall file in the court a petition containing an accurate description of such real estate and naming as parties defendant the executor or administrator, the persons to whom such real estate passes by inheritance or residuary devise, and all mortgagees and other lien holders whose claims affect such real estate or any part thereof. Spouses of parties defendant need not be made parties defendant. Such petition shall set forth the election of the surviving spouse to purchase said interest in real estate at the appraised value and shall contain a prayer accordingly. A summons shall thereupon be issued and served on said defendants, in the same manner as provided for service of summons in actions to sell real estate to pay debts. No hearing on the application or petition shall be held until the inventory is approved.

On the hearing of the application or petition, the finding of the court shall be in favor of such surviving spouse unless it appears that the appraisal was made as a result of collusion or fraud or that it is so manifestly inadequate that a sale at such price would unconscionably prejudice the rights of the parties in interest or creditors. The action of the court shall not be held to prejudice the rights of lien holders.

Upon a finding in favor of said surviving spouse, the court shall make an entry fixing the terms of payment to the executor or administrator for such property, having regard for the rights of creditors of the estate, and ordering the executor or administrator, or a commissioner who may be appointed and authorized for the purpose, to transfer and convey such property to such spouse upon compliance with the terms fixed by the court. If the court, having regard for the amount of property to be purchased, its appraised value, and the distribution to be made of the proceeds arising from the sale, finds that the original bond given by the executor or administrator is sufficient, such court may dispense with the giving of additional bonds. If the court finds that such original bond is insufficient, as a condition to transfer and conveyance such court shall require the executor or administrator to execute an additional bond in such amount as the court may fix, with proper surety, conditioned and payable as provided in section 2127.27 of the Revised

Code. This section does not prevent the court from ordering transfer and conveyance without bond in cases where the will of a testator provides that the executor need not give bond. The executor or administrator, or such commissioner, shall thereupon execute and deliver to the spouse a proper bill of sale or deed, as the case may be, for such property, and make a return thereof to the court.

The death of the surviving spouse prior to the filing of the court's entry fixing the terms of payment for property elected to be purchased shall nullify the election with respect thereto. Such property, whether real or personal, shall thereafter be free of the right granted in this section.

The application or petition provided for in this section shall not be filed prior to filing the inventory nor later than one month after the approval of the inventory required by section 2115.02 of the Revised Code. Failure to file such application or petition within such time nullifies the election with respect to the property required to be included therein and such property, whether real or personal, shall thereafter be free of the right granted in this section.

HISTORY: GC § 10509-89; 114 v 320 (420); 116 v 385 (396), § 1; 119 v 394 (406); 123 v 460 (461), § 1; 125 v 903 (975) (EF 10-1-53); 132 v S 398, § 1. EF 4-29-68.

Analogous to former GC § 10697.

§ 2113.49 Court may order alteration or cancellation of contract. (GC § 10509-225)

When a person who has entered into a written contract for the sale and conveyance of an interest in real estate dies before its completion, his executor or administrator, when not required to otherwise dispose of such contract, may file a petition for the alteration or cancellation of such contract, in the court of common pleas or in the probate court of the county in which he was appointed, or in which the real estate or any part thereof is situated. If the decedent died intestate, the surviving spouse and heirs, and if the decedent died testate, the surviving spouse, and devisees or legatees having an interest in such contract, when not plaintiffs, must, together with the purchaser, be made parties defendant.

If, upon hearing, the court is satisfied that it is for the best interests of the estate, it may, with the consent of the purchaser, authorize the executor or administrator to agree to the alteration or cancellation of such contract, and to execute and deliver such instruments to the purchaser as are required to make the order of the court effective. Before making such order, the court shall cause to be secured to and for the

benefit of the estate of the deceased its just part of the consideration of the contract. Such instruments as are executed and delivered pursuant to such order shall recite the order and be as binding on the heirs and other parties in interest, as if made by the deceased in his lifetime.

HISTORY: GC § 10509-225; 114 v 320 (450); 123 v 460 (465), § 1. Eff 10-1-53. Analogous to former GC § 11923.

§ 2113.53 Payment of legacies and distributions.

Except as provided in section 2113.532 [2113.53.2] of the Revised Code, when six months have expired after the appointment of an executor or administrator and one month has expired after approval of the inventory required by section 2115.02 of the Revised Code, and the surviving spouse has made an election, and when all debts are paid, except debts not due and payable, and claims rejected within two months or in suit, and when provision has been made as prescribed in section 2117.28 of the Revised Code for any debts which are not due and payable, the executor or administrator may provide for the payment of such rejected claims and claims in suit by setting aside enough assets for that purpose, to the satisfaction of and in the manner directed by the probate court. Having done so, such executor or administrator may distribute to the legatees entitled thereto under the will, if there is no action pending to set aside the will, or to the distributees entitled thereto by law, in cash or in kind, any part or all of the assets of the estate not set apart as provided in this section and not required for any other purpose. Each legatee or distributee is liable to return such assets, or the proceeds therefrom, should they be necessary to pay any such rejected claims or claims in suit.

If the executor or administrator proposes to set aside assets for the payment of any claim, each claimant for whom assets are to be set aside shall be given notice, in such manner as the court shall order, of the hearing upon the application to set aside assets and shall have the right to be fully heard as to the nature and amount of the assets to be set aside for payment of his claim and as to all other conditions in connection therewith. In any case where the executor or administrator may set aside assets as provided in this section, the court, upon its own motion or upon application of the executor or administrator, as a condition precedent to any distribution, may require any legatee or distributee to give a bond to the state with surety approved and in an amount fixed by the court, conditioned to secure the return of the assets to be distributed, or the proceeds therefrom or as much thereof as may be necessary to satisfy the claims that may be recovered against the estate, and to indemnify the executor or ad-

ministrator against loss and damage on account of such distribution. Such bond may be in addition to the assets to be set aside or partially or wholly in lieu thereof, as the court shall determine.

HISTORY: GC § 10509-181; 114 v 320 (441); 119 v 394 (414); 133 v S 185. Eff 1-1-71.

GC § 10509-181 (119 v 394 [414]) not analogous to GC § 10509-181 (114 v 320 [441]). For a section analogous to 114 v 320 [441] see RC § 2113.55. See former GC § 10841.

[§ 2113.53.2] § 2113.532 [Transfer of automobile title.]

The executor or administrator, with the approval of the probate court, may transfer title to an automobile owned by the decedent:

(A) To the surviving spouse, when such automobile is set off and allowed for support of the widow pursuant to section 2117.20 of the Revised Code, or is selected as property exempt from administration pursuant to section 2115.13 of the Revised Code, or is purchased by such surviving spouse pursuant to section 2113.38 of the Revised Code;

(B) To a legatee entitled to such automobile under the terms of the will;

(C) To a distributee, when such distributee is entitled to such automobile by law or when the distribution is a distribution in kind authorized under the terms of the will or by law;

(D) To a purchaser.

HISTORY: 133 v S 185. Eff 1-1-71.

§ 2113.54 Distribution upon application of legatee or distributee.

When seven months have expired after the appointment of an executor or administrator and the surviving spouse has made an election, a legatee or distributee may apply to the probate court for an order requiring the executor or administrator to distribute the assets of the estate, either in whole or in part, in cash or in kind. Upon notice to the executor or administrator, the court shall inquire into the condition of the estate, and if all ♦ claims have either been paid or adequate provision has been or can be made for their payment, the court shall make such order with reference to distribution of the estate as the condition of the estate and the protection of all parties interested therein may demand. The order of the court shall provide that assets be set aside for the payment of claims rejected within two months or in suit and each claimant for whom assets are to be set aside shall be entitled to be fully heard as to the nature and amount of the assets to be set aside for payment of his claim, and as to all other conditions in connection therewith. Each legatee or distributee receiving distribution from the estate shall be liable to return the assets distributed to him, or the proceeds therefrom, should they be necessary to pay such claims. The court, upon its own

motion or upon application of the executor or administrator, as a condition precedent to any distribution, may require any legatee or distributee to give bond to the state with surety approved and in an amount fixed by the court, conditioned as provided in section 2113.53 of the Revised Code or as may be directed by the court. Such bond may be in addition to the assets to be set aside or partially or wholly in lieu thereof, as the court shall determine.

HISTORY: GC § 10509-182; 114 v 320 (441); 119 v 394 (415); 125 v 903 (977) (Eff 10-1-53); 133 v S 185. Eff 1-1-71.

GC § 10509-182 (119 v 394 [415]) not analogous to GC § 10509-182 (114 v 320 [441]).

§ 2115.02 Inventory; separate schedule.

Within one month after the date of his appointment, unless the probate court grants an extension of time for good cause shown, every executor or administrator shall make and return on oath into court a true inventory of the real estate of the deceased located in Ohio and the chattels, moneys, rights, and credits of the deceased which are to be administered and which have come to his possession or knowledge. Such inventory is to be based on values as of the date of death of the decedent, except that if the decedent left no surviving spouse or minor children and the probable value of the personal property is less than five hundred dollars, or except that if the personal property consists wholly of automobiles, moneys, deposits, stocks, bonds, or other securities, or other personal property of readily ascertainable value, the court may direct that an inventory and appraisement be omitted and an inventory without appraisement be filed in lieu thereof. If his predecessors have done so, a fiduciary need not return and file an inventory, unless, in the opinion of the court, it is necessary.

At the time of filing the inventory, the executor or administrator shall file therewith a separate schedule describing any legal or equitable interest in the real estate owned by the decedent located outside of the state which has come to his knowledge.

HISTORY: GC § 10509-41; 114 v 320 (411); 116 v 385 (394); 133 v S 185. Eff 1-1-71.

Analogous to former GC §§ 10638, 10641.

§ 2115.06 Appraisers; compensation; fees may be charged against the estate.

The real estate and personal property comprised in the inventory required by section 2115.02 of the Revised Code, unless an appraisement thereof has been dispensed with by an order of the probate court, shall be appraised by one suitable disinterested person appointed by the court

and sworn to a faithful discharge of his trust. The court on its own motion may, and upon motion of the executor, administrator, or any interested person, shall appoint not more than two additional appraisers. The court may appoint separate appraisers of property located in any other county.

If appraisers fail to attend to the performance of their duty, the probate judge may appoint others to supply the place of such delinquents.

Each appraiser shall be paid such amount as the probate judge may allow for his services, taking into consideration his training, qualifications, experience, time reasonably required, and the value of the property appraised. The amount of such fees may be charged against the estate as part of the costs of the proceeding.

HISTORY: GC §§ 10509-42, 10509-43, 10509-58; 114 v 320 (412); 125 v 52 (Eff 10-2-53); 133 v S 185. Eff 1-1-71.

Analogous to former GC §§ 10644, 10645, 10666, 10668.

§ 2115.13 Property exempt from administration. (GC §§ 10509-54, 10509-55)

When a person dies leaving a surviving spouse or minor children, certain properties, if selected as provided in this section, are not assets or administered as such, but must be included and stated in the inventory of the estate. Such property includes only household goods, livestock, grain, feed, hay, tools, implements, automobiles, utensils, wearing apparel of the deceased, relics and heirlooms of the family and of the deceased, ornaments, and pictures and books. Such property is to be selected by such surviving spouse, or if there is no surviving spouse by the guardian or next friend of such minor children. Such property shall not exceed in value twenty per cent of the appraised value of the property, real and personal, comprised in the inventory, but in no event is the value of the property not deemed assets to be more than twenty-five hundred dollars if there is a surviving spouse, or more than one thousand dollars if there is no surviving spouse, but surviving minor children, or less than five hundred dollars in either case if there is so much comprised in the inventory and selected as provided in this section. If the personal property selected is of less value than the total amount which may be selected as provided in this section, then such surviving spouse, guardian, or next friend shall receive such sum of money as shall equal the difference between the value of the personal property selected and such amount, and such sum of money shall be a charge on all property, real and personal, belonging to the

estate, prior to the claims of all unsecured creditors of the deceased or of the estate.

Except money and the wearing apparel of the deceased, the property exempted from administration shall remain in the possession of the surviving spouse during the time such surviving spouse lives with and provides for such minor children. When such surviving spouse ceases to do so, he or she must be allowed to retain his or her wearing apparel, ornaments, and one bed, bedstead, and the bedding for it. The other articles exempted and not consumed shall then belong to such minor children. If there is a surviving spouse and no minor children, then such articles shall belong to the surviving spouse. Such exempted sum of money as is received by a surviving spouse shall belong to such surviving spouse.

HISTORY: GC §§ 10509-54, 10509-55; 114 v 320 (413, 414); 119 v 394 (405), § 1. 125 v 903 (978). Eff 10-1-53. Analogous to former GC §§ 10654, 10655.

§ 2115.14 Allowance shall be stated in separate schedule. (GC § 10509-76)

The appraisers of a decedent's estate shall not include in the inventory required by section 2115.02 of the Revised Code the provisions, property, or money set off and allowed by them to the widow or children, but these must be stated in a separate schedule and returned with the inventory to the probate court by the executor or administrator.

HISTORY: GC § 10509-76; 114 v 320 (418). Eff 10-1-53. Analogous to former GC § 10658.

§ 2117.02 Presentation of claim to probate court.

An executor or administrator within four months after the date of his appointment shall present any claim which he has against the estate to the probate court for allowance. Such claim shall not be paid unless allowed by the court. When an executor or administrator presents such claim, amounting to five hundred dollars or more, the court must fix a day not less than four nor more than six weeks from its presentation, when the testimony touching it shall be heard. The court forthwith shall issue an order directed to the executor or administrator requiring him to give notice in writing to all the heirs, legatees, or devisees of the decedent interested in the estate, and to such creditors as are therein named. Such notice must contain a statement of the amount claimed, designate the time fixed for hearing the testimony, and be served upon the persons named in the order at least twenty days before the time for hearing. If any persons mentioned in the order are not residents of the county, service of notice may be made upon them by publication for three consecutive weeks in a newspaper published or cir-

culating in the county, or in such other manner as the court may direct. All the persons named in the order shall be parties to the proceeding, and any other person having an interest in the estate may come in and be made a party thereto.

HISTORY: GC § 10509-106; 114 v 320 (425); 129 v 7 (Eff 10-5-61); 135 v H 566. Eff 11-22-73.

Analogous to former GC § 10728.

§ 2117.06 Presentation and allowance of creditor's claims; property tax assessments; statements and notices required.

All creditors having claims against an estate shall present their claims to the executor or administrator in writing, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated. All claims shall be presented within four months after the date of the appointment of the executor or administrator except that claims for assessments for personal and intangible property taxes and penalties for which the decedent was personally liable shall be presented by the tax commissioner or his agent within ninety days after the receipt by the clerk of the probate division of the county where the estate is being administered or receipt by the commissioner of the preliminary notice prescribed by section 5731.20 of the Revised Code. Every claim presented shall set forth the claimant's address. In the absence of any prior demand for allowance, the executor or administrator shall allow or reject all claims except tax assessment claims within thirty days after their presentation; provided that failure of the executor or administrator to allow or reject within said time shall not prevent him from doing so thereafter nor shall it prejudice the rights of any claimant. Upon the allowance of a claim the executor or the administrator, on demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date of such allowance. In the event the executor or administrator has actual knowledge of a pending action commenced against the decedent prior to his death in a court of record in this state, such executor or administrator shall file a notice of his appointment in such pending action within ten days after acquiring such knowledge. Where the administrator or executor is other than a natural person, actual knowledge of a pending suit against said decedent shall be limited to the actual knowledge of that person charged with the responsibility of administering said estate. Any person whose claim has been presented, and not thereafter rejected, is a creditor as said term is used in Chapters 2113. to 2125., inclusive, of the Revised Code. Claims

which are contingent need not be presented except as provided in sections 2117.37 to 2117.42, inclusive, of the Revised Code.

HISTORY: GC § 10509-112; 114 v 320 (426); 119 v 394 (407); 127 v 701 (Eff 9-14-57); 131 v 629 (Eff 11-5-65); 133 v H 363. Eff 9-12-69. Analogous to former GC § 10741.

§ 2117.07 Presentation of claims after three months.

Anyone having a claim against an estate who fails to present his claim to the executor or administrator within the time prescribed by law may file a petition in the probate court for authority to present his claim after the expiration of such time. Such petition forthwith shall be assigned for hearing and at least five days before the date of the hearing the claimant shall give written notice thereof to the executor or administrator and to such other parties as the court may designate. The court may authorize such claimant to present his claim to the executor or administrator if, on the hearing, the court finds as follows:

(A) That the claimant did not have actual notice of the decedent's death or of the appointment of the executor or administrator in sufficient time to present his claim within the period prescribed by section 2117.06 of the Revised Code;

(B) That the claimant's failure to present his claim was due to the absence of the executor or administrator from his usual place of residence or business during a substantial part of such period or was due to any wrongful act or statement on the part of the executor or administrator or his attorney;

(C) That the claimant was subject to any legal disability during such period or any part thereof.

A claim which is not presented within six months from the appointment of the executor or administrator shall be forever barred as to all parties, including devisees, legatees, and distributees and no payment shall be made nor any action maintained thereon, except as otherwise provided in sections 2117.37 to 2117.42, inclusive, of the Revised Code, with reference to contingent claims.

The executor or administrator is not accountable to any such claimant for any assets of the estate which he may lawfully have paid out or distributed prior to service upon him of notice of the hearing on such petition, nor for any other action which he may lawfully have taken prior to such time; and such claim shall not prevail against creditors, legatees, and distributees who have received payment or distribution from the assets of the estate prior to the service of such notice, or against a surviving spouse who

has made her election to take under the will or under sections 2105.01 to 2105.21, inclusive, of the Revised Code, prior to such time, or against bona fide purchasers and other persons who have dealt with the executor or administrator in good faith.

This section applies to any person who is required to give written notice to the executor or administrator of a motion or application to revive an action pending against the decedent at the date of death.

Nothing in this section or in section 2117.06 of the Revised Code shall reduce the time mentioned in sections 2125.02, 2305.09, 2305.10, 2305.11, or 2305.12 of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to such sections shall come from the assets of an estate unless such claim has been presented against the estate in accordance with Chapter 2117. of the Revised Code.

HISTORY: GC § 10509-134; 114 v 320 (431); 119 v 394 (412); 125 v 903 (979); 130 v 617 (Eff 8-9-63); 133 v S 103 (Eff 11-21-69); 133 v S 185. Eff 1-1-71.

§ 2117.15 Payment of debts after four months. (CG § 10509-127)

After four months from the appointment of an executor or administrator, he may proceed to pay the debts due from the estate in accordance with Chapters 2113. to 2125., inclusive, of the Revised Code. If it appears at any time that the estate is insolvent, the executor or administrator may report that fact to the court and apply for any order that he deems necessary in connection therewith. In case of insolvency, a creditor who has been paid according to law shall not be required to make any refund.

HISTORY: GC § 10509-127; 114 v 320 (429); 119 v 394 (411), § 1. Eff 10-1-53. Analogous to former GC § 10741.

§ 2117.16 Schedule of debts.

The probate court may by rule require that every executor or administrator, after four and not later than five months following the date of his appointment, shall make ~~and~~ and return into the probate court a schedule of all claims against the estate he represents which have then been presented to him and ~~any~~ any other valid debts of the estate of which he has knowledge. Such schedule shall state the name and address of the claimant as it appears on his claim, the amount claimed, the date of presentation of the claim, the class into which it falls for payment, the security held therefor, the date of maturity if not yet due, whether allowed or rejected by the

executor or administrator, and the date of such allowance or rejection.

HISTORY: GC § 10509-118; 114 v 320 (427); 119 v 394 (408); 130 v 619 (Eff 9-24-63); 133 v S 185. Eff 1-1-71.

§ 2117.20 [Surviving spouse or children to receive allowance.]

The appraisers of a decedent's estate shall set off and allow to the widow and to the children under the age of eighteen years, or if there is no widow then to such children, sufficient provisions or other property to support them for twelve months from the decedent's death, but such allowance shall be set off to such children only when necessary for their support, taking into consideration the father's primary duty to care for his children. The probate judge may fix the year's allowance if the appraisers fail to do so, or if for any reason there is no appraisal, and shall fix the year's allowance upon motion of the executor or administrator. If the widow or such children, after the decedent's death and previous to such allowance, have consumed any part of the estate for their support, the appraisers shall take that into consideration in determining the amount of the allowance. Any allowance granted to children shall be held by the surviving parent or by the guardian, with power to use it for the children's support.

HISTORY: GC § 10509-74; 114 v 320 (417); 116 v 385; 133 v S 185. Eff 1-1-71.

Analogous to former GC § 10656.

§ 2117.21 Money allowance; interest. (GC § 10509-75)

When there is not sufficient personal property, or property of a suitable kind, to set off to the widow or children, as provided in section 2117.20 of the Revised Code, the appraisers of a decedent's estate must certify what sum or further sum in money is necessary for the support of such widow or children. When money is allowed for the support of such widow or children, it shall be paid upon approval of the inventory required by section 2115.02 of the Revised Code, or as soon thereafter as money is available for that purpose. Such allowance in money shall bear interest at the legal rate from the date of death of the decedent until paid, if demanded.

HISTORY: GC § 10509-75; 114 v 320 (418); 116 v 385 (396), § 1. Eff 10-1-53. Analogous to former GC § 10657.

§ 2117.22 Court may increase or diminish allowance.

On the petition of an interested person, or on its own motion, the probate court may review the allowance made to the widow or children as

provided by section 2117.20 of the Revised Code, increase or diminish it, and make such order in the premises as it deems right.

HISTORY: GC § 10509-77; 114 v 320 (418); 133 v S 185. Eff 1-1-71.

Analogous to former GC § 10659.

The effective date is set by section 3 of the act. (See below.)

SECTION 3. (133 v S 185) Sections 1 and 2 of this act shall take effect on January 1, 1971. This act does not affect the administration of the estates of persons who die before January 1, 1971, and the estates of such persons shall be administered as if this act had not been passed and approved.

§ 2117.23 Year's allowance when decedent is nonresident. (GC § 10509-78)

When a nonresident decedent dies leaving property in Ohio and the will of such decedent has been admitted to probate in Ohio as provided by sections 2107.11 and 2107.18 of the Revised Code, the person granted letters testamentary or of administration shall, at any time prior to the approval of the inventory and appraisement, notify the widow and a child or children of the decedent under the age of eighteen, that each or all of them have sixty days after the approval of the inventory and appraisement to apply for a year's allowance to be set off out of the Ohio property of the decedent. The probate court may set off a year's allowance to such widow and child or children or apportion the same among them as it seems just and reasonable, having due regard for the laws of the state of decedent's residence as to its provisions for widows and children, the assets of the estate which are subject to administration in the state of decedent's residence, the amount the widow and children may be expected to receive in the state of decedent's residence, and any other facts and circumstances which may have a bearing on the case. No allowance shall be made which will exceed the amount usually allowed widows and children under the laws of this state relating to the administration of estates of resident decedents. Any allowance granted to a child or children shall be held by the widow if living with and supporting such child or children, or a resident or foreign guardian, with power to use it for the support of such child or children. Notice of the hearing on an application for such allowance may be given to any person as the court may require in the manner provided by sections 2101.26, 2101.27 and 2101.28 of the Revised Code. The year's allowance so set off shall acquire no greater charge against the Ohio property than in estates of resident decedents.

HISTORY: GC § 10509-78; 114 v 320 (418); 125 v S 40. Eff 10-16-53. Analogous to former GC § 10656.

§ 2117.25 Order in which debts to be paid.

Every executor or administrator shall proceed with diligence to pay the debts of the deceased and shall apply the assets in the following order:

- (A) Costs and expenses of administration;
- (B) Bill of funeral director not exceeding eight hundred dollars and such funeral expenses other than the bill of the funeral director as are approved by the probate court;
- (C) The allowance made to the widow and children for their support for twelve months;
- (D) Debts entitled to a preference under the laws of the United States;

(E) Expenses of the last sickness of the decedent;

(F) Personal property taxes and obligations for which the decedent was personally liable to the state or any subdivision thereof;

(G) Debts for manual labor performed for the deceased within twelve months preceding decedent's death, not exceeding one hundred fifty dollars to any one person;

(H) Other debts as to which claims have been presented within four months after the appointment of the executor or administrator;

(I) All other debts for which claims have been presented after four months from the appointment of the executor or administrator.

Such part of the bill of the funeral director as exceeds eight hundred dollars and such part of a claim included in division (G) of this section as exceeds one hundred fifty dollars shall be included as a debt under divisions (H) or (I) of this section, depending upon the time when the claim for such additional amount is presented.

Chapters 2113. to 2125. of the Revised Code relating to the manner in which and the time within which claims shall be presented shall apply to claims set forth in divisions (B) and (G) of this section. Claims for an expense of administration or for the allowance for support for twelve months need not be presented. The executor or administrator shall pay debts included in divisions (D) and (F) of this section, of which he has knowledge, regardless of presentation.

The giving of written notice to an executor or administrator of a motion or application to revive an action pending against the decedent at the date of death shall be equivalent to the presentation of a claim to such executor or administrator for the purpose of determining the order of payment of any judgment rendered or decree entered in such action.

No payments shall be made to creditors of one class until all those of the preceding class

are fully paid or provided for. In the event of an insufficiency of assets to pay all the claims of one class, the creditors of such class shall be paid ratably.

If it appears at any time that the assets have been exhausted in paying prior or preferred charges, allowances, or claims, such payments shall be a bar to an action on any claim not entitled to such priority or preference.

HISTORY: GC §§ 10509-121; 10509-122; 114 v 320 (428); 116 v 385 (399); 119 v 394 (410); 121 v 115; 128 v 320 (Eff 10-14-59); 135 v S 318 (Eff 1-1-74); 135 v H 162. Eff 5-30-74.

See former GC §§ 10714, 10715.

§ 2117.30 Suits against executor or administrator.

No suit shall be brought against an executor or administrator by a creditor of the decedent or by any other party interested in the estate until after seven months from the time of the appointment of such executor or administrator or the expiration of the further time allowed by the probate court for the collection of the assets of the estate, except in the following cases:

- (A) On claims rejected in whole or in part;
- (B) For the enforcement of a lien against or involving title to specific property;
- (C) For the recovery of a claim that would not be affected by the insolvency of the estate;
- (D) On account of fraud, conversion, or concealment of assets;

(E) Any other action as to which a different rule is prescribed by statute.

When an executor or administrator dies, resigns, or is removed without having fully administered the estate of the deceased, the time between such death, resignation, or removal and the appointment of a successor shall be excluded in computing the seven months or longer period provided in this section. In any event, his successor shall not be held to answer such suit until after the expiration of four months from the date of such successor's appointment or such further time allowed him by the court for the collection of the assets of the estate.

HISTORY: GC § 10509-138; 114 v 320 (432); 116 v 385 (400); 119 v 394 (413); 133 v S 135. Eff 1-1-71.

Analogous to former GC § 10740.

§ 2117.37 Presentation of contingent claims. (GC § 10509-216)

If a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues thereon, such claim must be presented to the executor or administrator, in the same manner as other claims, before the expiration of

four months after the appointment of the executor or administrator or before the expiration of two months after the cause of action accrues, whichever is later, except as provided in section 2117.39 of the Revised Code. The executor or administrator shall allow or reject such claim in the same manner as other claims are allowed or rejected. If the claim is allowed, the executor or administrator shall proceed to pay such claim. If the claim is rejected, the claimant shall commence an action thereon within two months after such rejection or be forever barred from maintaining an action thereon.

HISTORY: GC § 10509-216; 114 v 320 (448); 119 v 394 (417), § 1. **EF** 10-1-53. Analogous to former GC § 10876.

§ 2127.02 Payment of debts. (GC § 10510-2)

As soon as an executor or administrator ascertains that the personal property in his hands is insufficient to pay all the debts of the deceased, together with the allowance to the widow and children for twelve months, and the costs of administering the estate, he shall commence a civil action in the probate court or the court of common pleas for authority to sell the decedent's real estate.

HISTORY: GC § 10510-2; 114 v 320 (451). **EF** 10-1-53. Analogous to former GC §§ 10774, 10775.

§ 2127.03 Payment of legacies. (GC § 10510-3, 10510-4)

When by operation of law or the provisions of a will a legacy is effectual to charge real estate, and the personal property is insufficient to pay such legacy, together with all the debts, the allowance to the widow and children for twelve months, and the costs of administering the estate, the executor or administrator with will annexed shall commence a civil action in the probate court or the court of common pleas for authority to sell the real estate so charged.

If the executor, administrator, or administrator with the will annexed fails to commence the action mentioned in this section or section 2127.02 of the Revised Code, the probate court wherein letters testamentary have been granted, upon its own motion or upon motion by a creditor or legatee, shall order such executor, administrator, or administrator with the will annexed to commence such an action and proceed therein in the manner prescribed by sections 2127.04 to 2127.43, inclusive, of the Revised Code.

HISTORY: GC §§ 10510-3, 10510-4; 114 v 320 (451); 125 v 903 (981). **EF** 10-1-53. Analogous to former GC § 10817.

§ 2127.04 Action commenced with consent or upon demand of beneficiaries. (GC § 10510-5)

With the consent of all persons entitled to share in an estate upon distribution, the executor, administrator, or administrator with the will annexed may, and upon the request of such persons shall, commence an action in the probate court or the court of common pleas for authority to sell any part or all of the decedent's real estate even though not required to be sold to pay debts or legacies. In any such proceeding a guardian may make such request or give such consent in behalf of his ward.

HISTORY: GC § 10510-5; 114 v 320 (452). **EF** 10-1-53.

§ 2127.10 Action to sell real estate. (GC § 10510-12, 10510-13)

An action to obtain authority to sell real estate shall be commenced by the executor, administrator, or guardian by filing with the probate court or the clerk of the court of common pleas a verified petition.

Such petition shall contain a statement of the plaintiff's capacity to sue, a description of the real estate proposed to be sold and its value as near as can be ascertained, a statement of the nature of the interest of the decedent or ward in such real estate, a recital of all mortgages and liens upon and adverse interests in such real estate, the facts showing the reason or necessity for the sale, and such additional facts as are necessary to constitute the cause of action under the section of the Revised Code on which the action is predicated.

HISTORY: GC §§ 10510-12, 10510-13; 114 v 320 (453). **EF** 10-1-53. See former GC §§ 10779, 10946, 10994.

§ 2127.11 Summary proceeding if value of land less than one thousand dollars.

When the actual market value of a decedent's or ward's real estate which is to be sold is less than one thousand dollars and the court so finds, it may by summary order authorize the sale and conveyance of the land at private sale, on such terms as it deems proper, and in such proceeding all requirements of sections 2127.01 to 2127.43, inclusive, of the Revised Code, as to service of summons, appraisal, and additional bond shall be waived.

HISTORY: GC § 10510-14; 114 v 320 (454); 128 v 154, § 1. **EF** 11-9-59.

§ 2127.15 Pleadings and procedure. (GC § 10510-18)

All pleadings, rule days, and proceedings in

an action to obtain authority to sell real estate of a decedent or a ward in the probate court or the court of common pleas shall be the same as in other civil actions, except as otherwise provided in sections 2127.01 to 2127.43, inclusive, of the Revised Code.

HISTORY: GC § 10510-18; 114 v 320 (455). **EFF** 10-1-53. See former GC § 10781.

§ 2127.17 Costs when there are objections to granting order for sale. (GC § 10510-20)

In an action to obtain authority to sell real estate, if a party in his answer objects to an order for the sale of real estate by an executor, administrator, or guardian, and, on hearing, it appears to the court that either the petition or the objection thereto is unreasonable, it may award costs to the party prevailing on that issue.

HISTORY: GC § 10510-20; 114 v 320 (455). **EFF** 10-1-53. Analogous to former GC § 10792.

§ 2127.18 Equities and priorities. (GC § 10510-21)

Upon the hearing of an action to obtain authority to sell real estate by an executor, administrator, or guardian, if satisfied that all necessary parties defendant are properly before the court and that the prayer of the petition ought to be granted, the court may determine the equities among the parties and the priorities of lien of the several lien holders on such real estate, and order a distribution of the money arising from the sale in accordance therewith. The court may in the same cause order contributions among all parties in interest.

HISTORY: GC § 10510-21; 114 v 320 (455). **EFF** 10-1-53. Analogous to former GC §§ 10783, 10784.

§ 2127.22 Appraisement may be dispensed with; new appraisement; appraisers.

If an appraisement of the real estate is contained in the inventory required of an executor or administrator by section 2115.02 of the Revised Code, and of a guardian by section 2111.14 of the Revised Code, the probate court or the court of common pleas may order a sale in accordance therewith or order a new appraisement. If a new appraisement is not ordered, the value set forth in the inventory shall be the appraised value of the real estate. If the court orders a new appraisement the value returned shall be the appraised value of the real estate.

If the interest of the deceased or ward in the

real estate is fractional and undivided, and if a party prays for and the court orders the entire interest in the real estate to be sold, a new appraisement of the entire interest in the real estate shall be ordered.

If the prayer of the petition is granted and new appraisement is ordered, the court shall appoint one or more, but not exceeding three judicious and disinterested persons of the vicinity not next of kin of the petitioner to appraise the real estate in whole and in parcels at its true value in money. Where the real estate lies in two or more counties the court may appoint appraisers in any or all of the counties in which the real estate or a part thereof is situated.

HISTORY: GC §§ 10510-25, 10510-26; 114 v 320 (456); 119 v 394 (418); 133 v S 185. **EFF** 1-1-71.

Analogous in part to former GC §§ 10793, 10948.

§ 2127.28 Expense of sale. (GC §§ 10510-32, 10510-33)

The probate court or the court of common pleas may, after notice to all parties in interest, allow a real estate commission in an action to sell real estate by an executor, administrator, or guardian, but such allowance shall be passed upon by the court prior to the sale.

The court may allow payment for certificate or abstract of title or policy of title insurance in connection with the sale of any land by an executor, administrator, or guardian.

HISTORY: GC §§ 10510-32, 10510-33; 114 v 320 (457). **EFF** 10-1-53.

§ 2127.29 Order of sale. (GC § 10510-34)

When the bond required by section 2127.27 of the Revised Code is filed and approved by the court, it shall order the sale of the real estate included in the petition set forth in section 2127.10 of the Revised Code, or such part thereof as it deems necessary for the interest of all parties therein concerned. If the petition alleges that it is necessary to sell part of the real estate and that by such partial sale the residue of the estate, or specific part thereof, would be greatly injured, the court, if it so finds, may order a sale of the whole estate.

HISTORY: GC § 10510-34; 114 v 320 (458); 125 v 903 (982). **EFF** 10-1-53. See former GC §§ 10786, 10787, 10788, 10951.

§ 2127.31 Persons interested may give bond to prevent sale. (GC § 10510-36)

An order to sell the real estate of a deceased person shall not be granted in an action by an executor or administrator, if, after the action is

commenced and before the order of sale is granted, any person interested in the estate gives bond to the executor or administrator in a sum with sureties approved by the probate court or the court of common pleas, conditioned to pay all debts and legacies found due from the estate, the charges of administration, and the allowance in money to the widow, so far as the personal estate of the deceased is insufficient therefor. If such bond is not given until after the order of sale is granted, and the executor or administrator in reliance thereon abates the action, such bond shall be binding upon the obligors and may be enforced as though given prior to the granting of the order of sale.

HISTORY: GC § 10510-36; 114 v 320 (458). Eff 10-1-53. Analogous to former GC § 10785.

§ 2127.32 Public or private sale. (GC §§ 10510-37, 10510-38)

The real estate included in the court's order of sale, as provided in section 2127.29 of the Revised Code, shall be sold either in whole or in parcels at public auction at the door of the courthouse in the county in which the order of sale was granted or at such other place as the court may direct, and such order shall fix the place, day, and hour of sale. If it appears to be more for the interest of the ward or the estate to sell such real estate at private sale, the court may authorize the petitioner so to sell it either in whole or in parcels. If such order for private sale is issued it shall be returned by the petitioner. Upon motion and showing of a person interested in the proceeds of the sale, filed after thirty days from the date of such order, the court may require the petitioner to return the order if the premises have not been sold. Thereupon the court may order the real estate to be sold at public sale.

If upon showing of any person interested the court finds that it will be to the interest of the ward or the estate, it may order a reappraisal and sale thereof in parcels.

If the sale is to be public, the executor, administrator, or guardian must give notice of the time and place of such sale by advertisement at least four weeks successively in some newspaper printed in the county where the lands are situated.

HISTORY: GC §§ 10510-37, 10510-38; 114 v 320 (458). Eff 10-1-53. Analogous to former GC §§ 10803, 10951, 10800.

§ 2127.34 Terms of sale. (GC § 10510-40)

The order for the sale of real estate, granted by the probate court or the court of common pleas in an action by an executor, administrator,

or guardian, shall prescribe the terms of the sale and payment of the purchase money either in whole or in part for cash or on deferred payments. In the sales by executors or administrators, deferred payments shall not exceed two years with interest.

HISTORY: GC § 10510-40; 114 v 320 (459). Eff 10-1-53. Analogous to former GC §§ 10786, 10803, 10951.

§ 2127.35 Confirmation of sale; deed. (GC §§ 10510-41, 10510-44)

An executor, administrator, or guardian shall make return of his proceedings under the order for the sale of real estate granted by the probate court or the court of common pleas. The court after careful examination thereof, if satisfied that the sale has in all respects been legally made, shall confirm such sale and order such executor, administrator, or guardian to make a deed to the purchaser.

Such deed shall be received in all courts as prima facie evidence that such executor, administrator, or guardian in all respects observed the direction of the court and complied with the requirements of the law, and shall convey the interest in the real estate which is directed to be sold by the court, and shall vest title to such interest in the purchaser in like manner as if conveyed by the deceased in his lifetime, or by the ward free from disability, and by the owners of the remaining interests therein.

HISTORY: GC §§ 10510-41, 10510-44; 114 v 320 (459, 460); 119 v 394 (419). Eff 10-1-53. Analogous to former GC §§ 10804, 10952, 10807.

§ 2127.36 Security for deferred payments. (GC §§ 10510-42, 10510-43)

The order for the sale of real estate granted in an action by an executor, administrator, or guardian shall require that before the delivery of the deed the deferred installments of the purchase money be secured by mortgage on the real estate sold and mortgage notes bearing interest at such rate as the probate court or the court of common pleas may approve. If after the sale is made and before delivery of such deed the purchaser offers to pay the full amount of the purchase money in cash, the court may order that it be accepted, if for the best interest of the estate or the ward, and direct its distribution.

The court in such order may also direct the sale, without recourse, of any or all of the notes taken for deferred payments, if for the best interest of the estate or the ward, at not less than their face value with accrued interest, and direct the distribution of the proceeds.

HISTORY: GC §§ 10510-42, 10510-43; 114 v 320 (459); 122 v 495 (496), § 1. Eff 10-1-53. Analogous to former GC §§ 10805, 10951.

§ 2127.38 Distribution of money received.

The sale price of real estate sold following an action by an executor, administrator, or guardian shall be applied and distributed as follows:

(A) To discharge the costs and expenses of the sale, including reasonable fees to be fixed by the probate court or the court of common pleas for services performed by attorneys for the fiduciary in connection with the sale, and such compensation, if any, to the fiduciary for his services in connection with the sale as the court may fix, which costs, expenses, fees, and compensation shall be paid prior to any liens upon the real estate sold and notwithstanding the purchase of such real estate by a lien holder;

(B) To the payment of taxes, penalties, and assessments then due against such real estate and to the payment of mortgages and judgments against the ward or deceased person, according to their respective priorities of lien, so far as they operated as a lien on the real estate of the deceased at the time of the sale or on the estate of the ward at the time of the sale, which shall be apportioned and determined by the court, or on reference to a master, or otherwise;

(C) In the case of an executor or administrator, the remaining proceeds of sale shall be applied as follows:

(1) To the payment of legacies with which the real estate of the deceased was charged, if the action is to sell real estate to pay legacies;

(2) To discharge the claims and debts of the estate in the order provided by law.

Whether such executor or administrator was appointed in this state or elsewhere, the surplus of the proceeds of sale must be considered for all purposes as real estate and be disposed of accordingly.

(D) In the case of a guardian of the person and estate, or of the estate only, of a mentally incompetent person, the remaining proceeds of sale must be considered for all purposes as real estate until such mental incompetency is removed, and on the death of any such mentally incompetent ward before such mental incompetency is removed, such remaining proceeds shall pass and devolve to the same person or persons and in the same manner and to the same extent as the real estate sold would have passed and devolved had there been no sale. In the case of a guardian of the person and estate, or of the estate only, of an adult person who is not mentally incompetent, the remaining proceeds of sale shall be applied in the manner and upon the terms approved by the court which appointed such guardian. Division (D) of this section ap-

plies whether such guardian was appointed in this state or elsewhere.

HISTORY: GC § 10510-46; 114 v 320 (460); 116 v 385 (402), § 1; 131 v 630. **EFF** 8-10-65.

See former GC §§ 10809, 10816.

§ 2127.39 When proceeds of sale marshaled in conformity with will. (GC § 10510-47)

When an action to sell real estate is brought by an executor or administrator with the will annexed, if in the last will of the deceased there is a disposition of his estate for the payment of debts, or a provision that may require or induce the probate court or the court of common pleas to marshal the assets differently from the way the law otherwise would prescribe, such devises, or parts of the will, must be set forth in the petition and a copy of the will exhibited to the court, whereupon the court shall marshal the proceeds of the sale accordingly, so far as it can be done consistently with the rights of creditors.

HISTORY: GC § 10510-47; 114 v 320 (461). **EFF** 10-1-53. Analogous to former GC § 10791.

§ 2127.40 Sale by executor or administrator of real estate fraudulently conveyed by decedent. (GC §§ 10510-49, 10510-50)

When an action is brought by an executor or administrator to sell real estate to pay debts, the real estate subject to sale shall include all rights and interests in lands, tenements, and hereditaments conveyed by the deceased in his lifetime with intent to defraud his creditors; except that lands fraudulently conveyed cannot be taken from any who purchased them for a valuable consideration, in good faith, and without knowledge of the fraud. No claim to such lands shall be made unless within four years next after the decease of the grantor.

If real estate fraudulently conveyed is to be included in such action, the executor or administrator, either before or at the same time, may bring a suit in the court of common pleas in the county wherein the real estate is situated to recover possession of it; or, in his action for its sale, he may allege the fraud and have the fraudulent conveyance avoided therein. But when such real estate is included in the petition before the recovery of possession by the executor or administrator, the action shall be brought in the court of common pleas in the county wherein such real estate is situated.

HISTORY: GC §§ 10510-49, 10510-50; 114 v 320 (461). **EFF** 10-1-53. Analogous to former GC §§ 10777, 10778.

§ 2127.41 Proceeds arising from partition of real estate may be reached by the executor or administrator. (GC §§ 10510-51, 10510-52)

If after the institution of proceedings for the partition of the real estate of a deceased person it is found that the assets in the hands of his executor or administrator are probably insufficient to pay the debts of the estate, together with the allowance for the support of the widow and children for twelve months, the expenses of administration, and the legacies which are a charge upon such real estate, the executor or administrator shall make a written statement to the probate court of such assets, indebtedness, expenses, and legacies and the court forthwith shall ascertain the amount necessary to pay such debts, expenses, and legacies and give a certificate thereof to the

executor or administrator.

The executor or administrator thereupon shall present such certificate to the court in which the proceedings for partition are or have been pending, and on his motion the court shall order the amount named in the certificate to be paid over to the executor or administrator out of the proceeds of the sale of the premises, if thereafter they are sold or have already been sold. This section does not prohibit an executor or administrator from proceeding to sell real estate belonging to the estate for the payment of debts or legacies, although it has been sold on partition or otherwise or the proceeds of such sale fully distributed.

HISTORY: GC §§ 10510-51, 10510-52; 114 v 320 (462). Eff 10-1-53. Analogous to former GC §§ 10818, 10819.

APPENDIX B

Statutes affected by both SB 466 (136 v —) and SB 145 (136 v —), thus applicable to estates of decedents dying between 1-1-76 and 5-25-76.

§ 2101.16 Fees.

(A) The fees enumerated in this section shall be charged and collected, if possible, by the probate judge and shall be in full for all services rendered in the respective proceedings:

- | | | | |
|---|---------|---|-------------------|
| (1) Account, in addition to advertising charges | \$ 7.00 | (29) Distribution under section 2109.36 of the Revised Code, application for an order of | \$ 6.00 |
| Waivers and proof of notice of hearing on account, per page, minimum seventy-five cents | \$.75 | (30) Exceptions to any proceeding named in this section, contest of appointment or | \$ 5.00 |
| (2) Account of distribution, in addition to advertising charges | \$ 4.00 | (31) Election of surviving partner to purchase assets of partnership, proceedings relating to | \$ 7.50 |
| (3) Adoption of child, petition for | \$10.00 | (32) Election of surviving spouse under will | \$ 3.00 |
| (4) Alter or cancel contract for sale or purchase of real estate, petition to | \$12.00 | (33) Fiduciary, including assignee or trustee of an insolvent debtor or any guardian accountable to probate court, appointment of | \$10.00 |
| (5) Application and order not otherwise provided for in this section | \$ 3.00 | All proceedings where guardian of person is appointed for the purpose of giving consent | \$ 5.00 |
| (6) Appropriation suit, per day, heading in | \$15.00 | (34) Foreign will, application to record ... Record of such will, additional, per page | \$ 5.00
\$.75 |
| (7) Birth, application for registration of | \$ 5.00 | (35) Forms used for the complete administration, when supplied by probate court, not to exceed | \$ 5.00 |
| (8) Birth record, application to correct | \$ 3.00 | (36) Heirship, petition to determine | \$15.00 |
| (9) Bond, application for new or additional | \$ 3.00 | (37) Injunction proceedings | \$15.00 |
| (10) Bond, application for release of surety or reduction of | \$ 3.00 | (38) Improve real estate, petition to | \$15.00 |
| (11) Bond, receipt for securities deposited in lieu of | \$ 2.00 | (39) Inventory with appraisement | \$ 7.00 |
| (12) Certified copy of journal entry, record, or proceeding, per page, minimum fee seventy-five cents | \$.75 | (40) Inventory without appraisement | \$ 5.00 |
| (13) Citation and issuing citation, application for | \$ 4.00 | (41) Investment or expenditure of funds, application for | \$ 5.00 |
| (14) Change of name, petition for | \$10.00 | (42) Invest in real estate, application to | \$ 7.50 |
| (15) Claim, application of administrator or executor for allowance of his own ... | \$ 5.00 | (43) Lease for oil, gas, coal, or other mineral, petition to | \$15.00 |
| (16) Claim, application to compromise or settle | \$ 5.00 | (44) Lease or lease and improve real estate, petition to | \$15.00 |
| (17) Claim, petition for authority to present | \$ 5.00 | (45) Marriage license | \$ 8.00 |
| (18) Commissioner, appointment of | \$ 4.00 | Certified abstract of each marriage ... | \$ 1.00 |
| (19) Compensation for extraordinary services and attorney fees for fiduciary, application for | \$ 3.00 | (46) Minister's license to solemnize marriages | \$ 8.00 |
| (20) Competency, application to procure adjudication of | \$ 7.50 | (47) Minor or mentally ill person, etc., disposal of estate under three thousand dollars of | \$ 5.00 |
| (21) Complete contract, application to ... | \$ 5.00 | (48) Mortgage or mortgage and repair or improve real estate, petition to | \$15.00 |
| (22) Concealment of assets, citation for ... | \$ 7.00 | (49) Newly discovered assets, report of ... | \$ 5.00 |
| (23) Construction of will, petition for ... | \$15.00 | (50) Nonresident executor or administrator to bar creditors' claims, proceedings by | \$15.00 |
| (24) Continue decedent's business, application to | \$ 5.00 | (51) Physician's certificate, recording | \$ 5.00 |
| Monthly reports of operation | \$ 2.50 | (52) Power of attorney or revocation of power, bonding company | \$ 5.00 |
| (25) Declaratory judgment, petition for ... | \$15.00 | (53) Presumption of death, petition to establish | \$15.00 |
| (26) Deposit of will | \$ 2.00 | (54) Probating will | \$10.00 |
| (27) Designation of heir | \$10.00 | Proof of notice to beneficiaries | \$ 2.00 |
| (28) Distribution in kind, application, assessment, and order for | \$ 4.00 | | |

- (55) Purchase personal property, application of surviving spouse to \$ 6.00
- (56) Purchase real estate at appraised value, petition of surviving spouse to \$15.00
- (57) Receipts in addition to advertising charges, application and order to record \$ 3.00
Record of such receipts, additional, per page \$.75
- (58) Record in excess of fifteen hundred words in any proceeding in the probate court, per page \$.75
- (59) Release of estate by mortgagee or other lien holder \$ 3.00
- (60) Relieving estate from administration \$10.00
- (61) Removal of fiduciary, application for \$ 6.00
- (62) Requalification of executor or administrator \$ 5.00
- (63) Resignation of fiduciary \$ 3.00
- (64) Sale bill, public sale of personal property \$ 7.50
- (65) Sale of personal property and report, application for \$ 5.00
- (66) Sale of real estate, petition for \$20.00
- (67) Schedule of debts \$ 5.00
- (68) Schedule of debts, motion by fiduciary for hearing on \$ 5.00
- (69) Terminate guardianship, petition to \$ 6.00
- (70) Transfer of real estate, application, entry, and certificate for \$ 5.00
- (71) Unclaimed money, application to invest \$ 5.00
- (72) Vacate approval of account or order of distribution, motion to \$ 5.00
- (73) Writ of execution \$ 2.50
- (74) Writ of possession \$ 4.00
- (75) Wrongful death, application and settlement of claim for \$10.00
- (76) Year's allowance, petition to review \$ 5.00
- (77) In estates of deceased persons, the assets of which do not exceed fifteen thousand dollars in value, the total fees of the probate judge chargeable against such estate, including the admission of the will to probate, shall not exceed \$15.00

(B) The fees of witnesses, jurors, sheriffs, coroners, and constables, for services rendered in the probate court, or by order of the probate judge, shall be the same as provided for like services in the court of common pleas.

(C) The probate court may by rule require an advance deposit for cost, not to exceed seventy-five dollars, at the time application is made for appointment as executor or administrator or at the time the will is presented for probate.

HISTORY: GC §§ 10501-20, 10501-42; 114 v 320; 115 v 393; 119 v 297; 126 v 607 (Eff 8-5-55); 136 v H 1 (Eff 6-13-75); 136 v S 145. Eff 1-1-76.

For former analogous sections see former GC §§ 11204, 1601

§ 2101.24 Jurisdiction of probate court.

Except as otherwise provided by law, the probate court has jurisdiction:

(A) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country; in case of the unavoidable absence of the probate judge, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of such acts must be preserved in the usual records of the probate court;

(B) To grant and revoke letters testamentary and of administration;

(C) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(D) To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;

(E) To grant marriage licenses and licenses to ministers of the gospel to solemnize marriages;

(F) To make inquests respecting persons who are unable to manage their property and affairs effectively for reasons such as mental illness, mental deficiency, or physical illness or disability, subject to guardianship;

(G) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(H) To authorize the sale of lands, equitable estates, or interests therein, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(I) To authorize the completion of real contracts on petition of executors and administrators;

(J) To issue writs of habeas corpus, and determine the validity of the caption and detention of the persons brought before it on such writs; the probate court may refer the petition to the court of common pleas when the petitioner is detained on a charge, indictment, or conviction of having committed a felony or misdemeanor under the laws of the United States, this state, or under an ordinance of any political subdivision of this state;

(K) To construe wills;

(L) To render declaratory judgments;

(M) To direct and control the conduct of fiduciaries and settle their accounts;

(N) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by trustee;

(O) To terminate a testamentary trust in any case in which a court of equity may do so.

Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law.

The probate court shall have plenary power at law and in equity fully to dispose of any matter

properly before the court, unless the power is expressly otherwise limited or denied by statute.

The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

HISTORY: GC §§ 10501-53, 10501-55; 114 v 320; 125 v 903 (960); 127 v 27 (Eff 9-9-57); 129 v 7 (Eff 10-5-61); 130 v 611 (Eff 10-14-63); 136 v S 145. Eff 1-1-76.

For analogous sections, see former GC §§ 10492, 10493, 10498.

§ 2105.06 Statute of descent and distribution.

When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one child or his lineal descendants surviving, the first thirty thousand dollars if the spouse is the natural or adoptive parent of the child, or the first ten thousand dollars if the spouse is not the natural or adoptive parent of the child, plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or his lineal descendants, per stirpes;

(C) If there is a spouse and more than one child or their lineal descendants surviving, the first thirty thousand dollars, if the spouse is the natural or adoptive parent of one of the children, or the first ten thousand dollars if the spouse is not the natural or adoptive parent of one of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

(D) If there are no children or their lineal descendants, then the whole to the surviving spouse;

(E) If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;

(F) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(G) If there are no brothers or sisters or their lineal descendants, one half to the paternal grandparents of the intestate equally, or to the survivor of them, and one half to the maternal grandparents of the intestate equally, or to the survivor of them;

(H) If there is no paternal grandparent or no maternal grandparent, one half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;

(I) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(J) If there are no stepchildren or their lineal descendants, escheat to the state.

HISTORY: GC § 10503-4; 114 v 320 (339); 116 v 385; 128 v 155 (Eff 11-9-59); 136 v S 145. Eff 1-1-76.

[§ 2105.06.2] § 2105.062 [Election to receive mansion house.]

(A) The surviving spouse may elect to receive, as part of his share of the intestate estate under section 2105.06 of the Revised Code, the entire interest of the decedent spouse in the mansion house. The interest of the decedent spouse in the mansion house is valued at the appraised value with all liens deducted.

(B) The election pursuant to division (A) of this section shall be made at or before the time a final account is rendered.

(C) If the spouse makes an election pursuant to division (A) of this section, the administrator or executor shall file an application for a certificate of transfer as provided for in section 2113.61 of the Revised Code. The application shall also contain an inventory of the property that the spouse is entitled to receive under section 2105.06 of the Revised Code. If the value of the property the spouse is entitled to receive is equal to or greater than the value of the mansion house, the court shall issue the certificate of transfer.

(D) As used in this section, the mansion house includes the parcel of land on which the house is situated, all household goods contained within the house, and at the option of the surviving spouse, the lots or farm land adjacent to the house and used in conjunction with it as the home of the decedent.

HISTORY: 136 v S 145. Eff 1-1-76.

§ 2107.13 Notice of probate.

No will shall be admitted to probate without notice to the surviving spouse known to the applicant, and to the persons known to the applicant to be residents of the state who would be entitled to inherit from the testator under sections 2105.01 to 2105.21 of the Revised Code, if he had died intestate. Notice need not be given to any person who would be entitled to inherit from the testator

solely by reason of relationship to a deceased spouse of the testator.

HISTORY: GC § 10504-17; 114 v 320 (348); 121 v 270; 127 v 36 (Eff 9-4-57); 136 v S 145. Eff 1-1-76.

See former GC § 10507.

§ 2107.23 Contest of will within four months; exceptions.

If within four months after a will is admitted to probate, no person files an action to contest the validity of the will, the probate shall be forever binding, except to persons under any legal disability, or to such persons for six months after such disability is removed. The rights saved shall not affect the rights of a purchaser for value in good faith, a lessee for value in good faith, or an encumbrancer for value in good faith, nor impose any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not the purchaser, lessee, encumbrancer, fiduciary, or other person had notice, actual or constructive, of the legal disability.

HISTORY: GC § 10504-32; 114 v 320 (351); 121 v 270; 136 v S 145. Eff 1-1-76.

See former GC § 10531.

§ 2107.25 Contest of later wills.

Sections 2107.23 and 2107.24 of the Revised Code apply in all respects to later wills admitted to probate.

HISTORY: GC § 10504-34; 114 v 320 (352); 136 v S 145. Eff 1-1-76.

Analogous to former GC § 10524.

[§ 2107.39.1] § 2107.391 [Citation to make the election.]

(A) The citation to make the election referred to in section 2107.39 of the Revised Code shall be sent to the spouse by certified mail. Notice that the citation has been issued by the court shall be given to the administrator or executor.

(B) The citation shall be accompanied by a general description of the effect of the election and the general rights of the spouse. The description shall include a specific reference to the procedures available to the spouse under section 2107.40 of the Revised Code and to the presumption that arises if the spouse does not make the election within the two-month period. The description of the effect of the election and of the rights of the spouse need not relate to the nature of any particular estate.

(C) The surviving spouse electing to take under the will may manifest the election in writing.

HISTORY: 136 v S 145. Eff 1-1-76.

§ 2107.43 Election made in person.

The election of a surviving spouse to take under

section 2105.16 † of the Revised Code and thereby refusing to take under the will shall be made in person before the probate judge, or a deputy clerk who has been appointed to act as a referee under the provisions of section 2315.37 of the Revised Code, except as provided in sections 2107.44 and 2107.45 of the Revised Code.

When the election is made in person before such judge or referee, the judge or referee shall explain the will, the rights under such will, and by law, in the event of a refusal to take under the will.

HISTORY: GC §§ 10504-56, 10504-59; 114 v 320 (357); 122 v 498; 125 v 411 (Eff 10-16-53); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10570, 10571.

† Apparently, 2105.06 was intended.

§ 2107.73 [Parties to will contest.]

Notice of any will contest shall be given to all devisees, legatees, heirs of the testator, and all other interested parties.

Persons who are necessary parties to a will contest are as follows:

(A) Any person designated in a will to receive a testamentary disposition of real or personal property;

(B) Heirs who would take property pursuant to section 2105.06 of the Revised Code had the testator died intestate;

(C) The executor.

HISTORY: 136 v S 145. Eff 1-1-76.

[§ 2109.02.1] § 2109.021 [Filings by mail or in person.]

After letters of appointment are issued to a fiduciary, the court shall accept filings by mail in matters of estates, guardianships, or trusts, but not accounts, unless the court in writing notifies the fiduciary or attorney of record that a personal appearance is necessary, or a personal appearance is otherwise required by law. An improper or incomplete filing shall be rejected, and the court shall return it to the sender, with a cost of two dollars and fifty cents per envelope, chargeable against the estate.

HISTORY: 136 v S 145. Eff 1-1-76.

§ 2113.03 Release from administration.

(A) Upon the application of any interested party, after notice of the filing thereof has been given to the surviving spouse and heirs at law in the manner and for the length of time the probate court directs, and after three weeks' notice to all interested parties by publication once each week in a newspaper of general circulation in the county, unless the notices are waived or found unnecessary, the court, when satisfied that the assets of an estate are fifteen thousand dollars or

less in value, and that creditors will not be prejudiced, may make an order relieving the estate from administration and directing delivery of personal property and transfer of real estate to the persons entitled to them.

For the purposes of this section, the value of an estate that can reasonably be considered to approximate fifteen thousand dollars, and that is not composed entirely of money, stocks, bonds, or other property the value of which is evident, shall be determined by an appraiser selected by the applicant, subject to the approval of the court. The appraiser's valuation of the property shall be reported to the court in the application to relieve the estate from administration. The appraiser shall be paid in accordance with section 2115.06 of the Revised Code.

For the purposes of this section, the court shall fix the amount of property to be delivered or transferred to the surviving spouse or minor children of the deceased in lieu of the claim of the spouse or minor children to property under section 2117.20 of the Revised Code.

When a delivery or transfer of property has been ordered without administration, the court shall appoint a commissioner to execute instruments of conveyance when necessary.

When the decedent died testate the will shall be presented for probate, and if admitted to probate, the court may relieve the estate from administration, and order distribution of the estate under the will.

An order of the court relieving an estate from administration shall have the same effect as administration proceedings in freeing land in the hands of an innocent purchaser for value from possible claims of unsecured creditors.

(B). An application to relieve an estate from administration shall be in writing under oath, and shall contain the following information:

- (1) The name, date, and place of death of the decedent;
- (2) The names, ages, and addresses of the persons entitled to the next estate of inheritance under the statutes of descent and distribution, and their respective degrees of relationship to the decedent;
- (3) A summary statement of the character and value of the property comprising the estate;
- (4) A list of all known creditors of the decedent, and the amount of their claims;
- (5) If the decedent died intestate, a statement to that effect;
- (6) If the decedent died testate, a copy of the will attached to the application.

(C) The application shall be in the following form, and this form shall be used exclusively by the probate courts in this state:

“Application For Release Of Estate From
Administration
Revised Code, Sec. 2113.03

No. ... Doc. ... Page ... Filed ..., 19...

Common Pleas Court, Probate Division, ...
County, Ohio

In the matter of)
the Estate of) No.
.....), 19...
Deceased)

....., being first duly sworn, says
that late a resident of the
..... of, County, Ohio,
died on the

(Testate or Intestate)

Day of, 19, leaving
..... surviving spouse, and the following
persons entitled to the next estate of inheritance
under the statutes of descent and distribution
whose names, ages, their respective degrees of
relationship to the decedent and addresses are as
follows:

Name	Age	Relationship	Address
------	-----	--------------	---------

The applicant selects to act
when required, as appraiser of the real and personal
property of the decedent, the value of which
is readily ascertainable.

The following is a summary statement of the
character and value of the property comprising
the estate.

Appraiser's Report:
I certify that the foregoing is a true and correct
appraisement of the property exhibited to me.

Dated, 19
Appraiser

Recapitulation of Assets

Personal Property of the value of \$.....
Real Estate of the value of \$.....
Total Estate \$.....

That the debts owing by the decedent and to
whom owing are as follows:

Name	Address	For What	Amount
------	---------	----------	--------

of their duty, the executor or administrator, subject to the approval of the probate judge may appoint others to supply the place of such delinquents.

Each appraiser shall be paid such amount for his services as determined by the executor or administrator, subject to the approval of the probate judge, taking into consideration his training, qualifications, experience, time reasonably required, and the value of the property appraised. The amount of such fees may be charged against the estate as part of the costs of the proceeding.

HISTORY: GC §§ 10509-42, 10509-43, 10509-58; 114 v 320 (412); 125 v 52 (Eff 10-2-53); 133 v S 185 (Eff 1-1-71); 136 v S 145. Eff 1-1-76.

Analogous to former GC §§ 10644, 10645, 10666, 10668.

[§ 2127.01.1] § 2127.011 [Conditions for disposal of real estate.]

(A) Except as restricted by the will or otherwise provided by law, an executor or administrator may sell at public or private sale, grant options to sell, exchange, re-exchange, or otherwise dispose

of any real estate belonging to the estate at any time at prices and upon terms as are consistent with this section and may execute and deliver deeds and other instruments of conveyance if all of the following conditions are met:

(1) The surviving spouse, all of the legatees and devisees in the case of testacy, and all of the heirs in the case of intestacy, give written consent to the general power of sale. The consent shall be filed in the probate court.

(2) Any sale under an authorized general power of sale must be made at a price of at least eighty per cent of the appraised value, as set forth in an approved inventory.

(3) No general power of sale provided for in this section is effective if the surviving spouse, any legatee, devisee, or heir is a minor. No person may give the consent of the minor that is required by this section.

(B) A surviving spouse who is the executor or administrator may sell real estate to himself pursuant to this section.

HISTORY: 136 v S 145. Eff 1-1-76.

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TITLE 21: COURTS—PROBATE—JUVENILE Ohio Rules of Juvenile Procedure

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TITLE 21: COURTS—PROBATE—JUVENILE

§ 2101.01 Probate division; location; equipment; employees.

A probate division of the court of common pleas shall be held at the county seat in each county in an office furnished by the board of county commissioners, in which the books, records, and papers pertaining to the probate division shall be deposited and safely kept by the probate judge. The board shall provide suitable cases or other necessary items for the safekeeping and preservation of the books, records, and papers of the court, and shall furnish any blankbooks, blanks, and stationery, and any machines, equipment, and materials for the keeping or examining of records, that the probate judge requires in the discharge of official duties. The board shall also authorize expenditures for accountants, financial consultants, and other agents required for auditing or financial consulting by the probate division whenever the probate judge considers these services and expenditures necessary for the efficient performance of the division's duties. The probate judge shall employ and supervise all clerks, deputies, referees, and employees of the probate division.

As used in the Revised Code, "probate court" means the probate division of the court of common pleas, and "probate judge" means the judge of the court of common pleas who is judge of the probate division. All pleadings, forms, journals, and other records filed or used in the probate division shall be entitled "In the Court of Common Pleas, Probate Division," but are not defective if entitled "In the Probate Court."

*HISTORY: 141 v H 419. Eff 3-13-86.

§ 2101.02 Judge of probate division; election; qualifications; term.

Cross-References to Related Sections

Charitable trust, annual financial report filed with probate court, RC § 1719.05.

§ 2101.04 Rules of practice submitted to supreme court.

Ohio Rules

Hours of the court, CPSupR 18.

§ 2101.08 Stenographic reporter.

Cross-References to Related Sections

Compensation and fees for court reporter's transcript, RC § 5122.43.

§ 2101.11 [Custody of files; clerks and appointees; annual request for appropriation.]

(A) Each probate judge shall have the care and

custody of the files, papers, books, and records belonging to the probate office. He is authorized to perform the duties of clerk of his own court. He may appoint deputy clerks, stenographers, a bailiff, and any other necessary employees, each of whom shall take an oath of office before entering upon the duties of his appointment, and when so qualified, may perform the duties appertaining to the office of clerk of the court. Each appointee may administer oaths in all cases when necessary, in the discharge of his duties.

(B) Subject to the appropriation made by the board of county commissioners pursuant to this division, each appointee shall receive such compensation and expenses as the judge determines. Each appointee shall serve during the pleasure of the judge. The compensation of each appointee shall be paid in semi-monthly installments by the county treasurer from the county treasury, upon the warrants of the county auditor, certified to by the judge. The judge shall annually submit a written request for an appropriation to the board of county commissioners that shall set forth estimated administrative expenses of the court, including the salaries of appointees as determined by the judge and any other costs, fees, and expenses including those enumerated in section 5123.96 of the Revised Code, that the judge considers reasonably necessary for the operation of the court. The board shall conduct a public hearing with respect to the written request submitted by the judge and shall appropriate such sum of money each year as it determines, after conducting the public hearing and considering the written request of the judge, is reasonably necessary to meet all the administrative expenses of the court, including the salaries of appointees as determined by the judge and any other costs, fees, and expenses including the costs, fees, and expenses enumerated in section 5123.96 of the Revised Code. The total compensation paid to the appointees in any calendar year shall not exceed the total fees earned by the court during the preceding calendar year, unless approved by the board.

If the judge considers the appropriation made by the board pursuant to this division insufficient to meet all the administrative expenses of the court, he shall commence an action under Chapter 2731. of the Revised Code in the court of appeals for the judicial district for a determination of the duty of the board of county commissioners to appropriate the amount of money in dispute. The court of appeals shall give priority to the action filed by the probate judge over all cases pending on its docket. The burden shall be on the probate judge to prove that the appropriation requested is reasonably necessary to meet all administrative expenses of the court. If, prior to the filing of an action under Chapter 2731. of the Revised Code or during the pendency of the action, the judge exercises his con-

tempt power in order to obtain the sum of money in dispute, he shall not order the imprisonment of any member of the board of county commissioners notwithstanding sections 2705.02 to 2705.06 of the Revised Code.

(C) The judge may require any of his appointees to give bond in the sum of not less than one thousand dollars conditioned for the honest and faithful performance of his duties. The sureties on the bonds shall be approved in the manner provided in section 2101.03 of the Revised Code.

The judge shall be personally liable for the default, malfeasance, or nonfeasance of such appointee, but if a bond is required of such appointee, the liability of the judge shall be limited to the amount by which the loss resulting from such default, malfeasance, or nonfeasance exceeds the amount of the bond.

All bonds required to be given in the probate court, on being accepted and approved by the probate judge, shall be filed in his office.

*HISTORY: 137 v H 164 (Eff 2-21-77); 138 v S 63. Eff 7-26-79.

Cross-References to Related Sections

Time limit for submitting costs, fees and expenses, RC § 5122.43.

Ohio Rules

Examination of probate files, records, and other documents, CPSupR 20.

CASE NOTES AND OAG

1. (1981) When a judge undertakes to enforce his ex parte order, directing a board of county commissioners to purchase furnishings and equipment reasonably necessary for the proper and efficient operation of the court, by proceedings in contempt, the board has remedy by way of appeal only from the finding and order in the contempt proceedings: *In re Furnishings for Courtroom Two*, 66 OS2d 427, 20 OO3d 367, 423 NE2d 86.

2. (1983) The statutory limitation on appointee compensation, set forth in RC § 2101.11, may not validly be applied to the judge of the probate division of the court of common pleas when there has been no showing that the judge abused his discretion in establishing either the size or compensation ranges of his staff: *State ex rel. Slaby v. Summit County Council*, 7 OApp3d 199, 7 OBR 258, 454 NE2d 1379.

3. (1983) That portion of RC § 2101.11(B), containing language substantially identical to that in RC § 2151.10, effective July 26, 1979, is unconstitutional: *State ex rel. Slaby v. Summit County Council*, 7 OApp3d 199, 7 OBR 258, 454 NE2d 1379.

4. (1983) Regardless of statutory authorization, the judges of the courts of common pleas and their divisions have the inherent authority to determine in the first instance, in the exercise of sound discretion, the sum of money reasonable for the efficient operation of the court, and absent an abuse of discretion in the determination of such sum, may proceed either in contempt or mandamus to receive the necessary funding from their respective counties: *State ex rel. Slaby v. Summit County Council*, 7

OApp3d 199, 7 OBR 258, 454 NE2d 1379.

5. (1984) A court may modify its budget request at any time if such modification is otherwise reasonable and necessary: *State ex rel. Arbaugh v. Richland Cty. Bd. of Comrs.*, 14 OS3d 5, 14 OBR 311, 470 NE2d 880.

6. (1984) Mandamus will issue where the county commissioners fail to meet their burden of proving that the budget requests submitted for the probate and juvenile divisions of the court of common pleas were unreasonable and unnecessary: *State ex rel. Rudes v. Rofkar*, 15 OS3d 69, 15 OBR 163, 472 NE2d 354.

7. (1985) Mandamus action by court officials to secure the requested funding appropriation will be denied where the requested salary increases for court employees constitute an abuse of discretion: *State ex rel. Britt v. Bd. of Franklin Cty. Comms.*, 18 OS3d 1, 18 OBR 1, 480 NE2d 77.

§ 2101.12 [Records to be kept; indexes.]

The following records shall be kept by the probate court:

(A) An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties in the bond, and the date of filing and a brief note of each order or proceeding relating to the estate with reference to the journal or other record in which the order or proceeding is found;

(B) A guardian's docket, showing the name of each ward, and, if an infant, his age, the name of his parents, the amount of bond and names of sureties in the bond, and the date of filing and a brief note of the orders and proceedings as in division (A) of this section;

(C) A civil docket, in which shall be noted the names of parties to actions and proceedings, the date of the commencement of the actions and proceedings, and of the filing of the papers relating to the actions and proceedings, a brief note of the orders made in the actions and proceedings, and the date of entering the orders;

(D) A journal, in which shall be kept minutes of official business transacted in the probate court, or by the probate judge, in civil actions and proceedings;

(E) A record of wills, in which the wills proved in the court shall be recorded with a certificate of the probate of the will, and wills proved elsewhere with the certificate of probate, authenticated copies of which have been admitted to record by the court;

(F) A final record that shall contain a complete record of each cause or matter and shall be completed within ninety days after the final order or judgment has been made in the cause or matter;

(G) An execution docket, in which shall be entered a memorandum of executions issued by the probate judge stating the names of the parties, the name of the person to whom delivered, his return

thereon, the date of issuing the execution, the amount ordered to be collected, stating the costs separately from the fine or damages, the payments thereon, and the satisfaction thereof when it is satisfied;

(H) A marriage record, in which shall be entered licenses, the names of the parties to whom issued, the names of the persons applying for a license, a brief statement of the facts sworn to by persons applying for a license, and the returns of the person solemnizing the marriage;

(I) A naturalization record, in which shall be entered the declaration of intention of the person seeking to be naturalized, the oath of the person naturalized, and the affidavit or oath of witnesses who testify in his behalf, in which affidavit shall be stated the place of residence of the witnesses;

(J) A permanent record of all births and deaths occurring within the county, reported as provided by law, which record shall be kept in the form and manner that may be designated by the director of health;

(K) A separate record and index of adoptions, in accordance with section 3107.17 of the Revised Code.

For each record required by this section, an index shall be maintained. Each index shall be kept current with the entries in the record and shall refer to the entries alphabetically by the names of the persons as they were originally entered, indexing the page of the record where the entry is made. On the order of the judge, blankbooks, other record forms, or other record-keeping materials approved by the probate judge for such records and indexes shall be furnished by the board of county commissioners at the expense of the county.

*HISTORY: 137 v H 817 (Eff 1-1-79); 141 v H 419. Eff 3-13-86.

Ohio Rules

Examination of probate files, records, and other documents, CPSupR 20.

CASE NOTES AND OAG

1. (1982) Birth and death records kept by a probate court pursuant to RC § 2101.12 are public records which must be made available to any member of the general public as required by RC § 149.43, regardless of the motive which such member of the public has for inspecting such records. (1974 Op. Att'y Gen. No.74-097, approved and followed in part): OAG No.82-104.

[§ 2101.12.1] § 2101.121 [Record-keeping methods.]

(A) A probate court may keep and maintain records that are required by section 2101.12 or another section of the Revised Code by record-keeping methods other than bound volumes of paper pages. These record-keeping methods include, but are not limited to, photography, microphotography, photostatic process, electrostatic process, facsimile reproduction, perforated tape, magnetic tape or

other electromagnetic methods, electronic data processing, machine-readable media, and graphic or video display.

(B) If a probate court keeps records by record-keeping methods other than bound volumes of paper pages, it shall possess, and make readily available to the public, machines or equipment necessary for an examination of the records. The machines or equipment shall present the records in a format that is readable without difficulty.

(C) If a probate court keeps records by record-keeping methods other than bound volumes of paper pages, it shall keep and maintain indexes to the records that permit the records to be retrieved readily.

HISTORY: 141 v H 419. Eff 3-13-86.

§ 2101.13 Probate judge shall make entries omitted by his predecessor.

When a probate judge, whether elected or appointed, enters upon the discharge of his duties, he shall make, in the books and other record-keeping materials of his office, the proper records, entries, and indexes omitted by his predecessors in office. When made, the entries shall have the same validity and effect as though they had been made at the proper time and by the officer whose duty it was to make them, and the judge shall sign all entries and records made by him as though the entries, proceedings, and records had been commenced, prosecuted, determined, and made by or before him.

*HISTORY: 141 v H 419. Eff 3-13-86.

§ 2101.14 Care and preservation of papers; time stamp.

All pleadings, accounts, vouchers, and other papers in each estate, trust, assignment, guardianship, or other proceeding, ex parte or adversary, which are filed in the probate court shall be kept together, and upon the final termination or settlement of the case, cause, or proceeding shall be preserved for future reference and examination. The papers shall be properly jacketed, and otherwise tied, fastened, or held together, numbered, lettered, or otherwise marked in such manner that they may be readily found by reference to proper memoranda upon the docket, record, or index entries thereof, which memoranda shall be made by the probate judge, or the papers may be kept, maintained, and indexed as described in section 2101.121 [2101.12.1] of the Revised Code. Certificates of marriage, reports of births and deaths, and similar papers not part of a case or proceeding, shall be arranged and preserved separately in the order of their dates or in which they were filed. As used in this section "case" or "cause" includes all proceedings in the settlement of any estate, guardianship, or assignment, except as provided in section 2101.141 [2101.14.1] of the Revised Code.

The probate court shall provide a time stamp and shall stamp on all papers filed in that court the day, month, and year of the filing.

*HISTORY: 141 v H 419. Eff 3-13-86.

§ 2101.16 Fees.

(A) The fees enumerated in this section shall be charged and collected, if possible, by the probate judge and shall be in full for all services rendered in the respective proceedings:

- (1) Account, in addition to advertising charges \$10.00
Waivers and proof of notice of hearing on account, per page, minimum one dollar \$ 1.00
- (2) Account of distribution, in addition to advertising charges \$ 7.00
- (3) Adoption of child, petition for \$20.00
- (4) Alter or cancel contract for sale or purchase of real estate, petition to \$20.00
- (5) Application and order not otherwise provided for in this section or by rule adopted pursuant to division (D) of this section \$ 5.00
- (6) Appropriation suit, per day, hearing in \$20.00
- (7) Birth, application for registration of... \$ 7.00
- (8) Birth record, application to correct ... \$ 5.00
- (9) Bond, application for new or additional \$ 5.00
- (10) Bond, application for release of surety or reduction of \$ 5.00
- (11) Bond, receipt for securities deposited in lieu of \$ 5.00
- (12) Certified copy of journal entry, record, or proceeding, per page, minimum fee one dollar \$ 1.00
- (13) Citation and issuing citation, application for \$ 5.00
- (14) Change of name, petition for \$20.00
- (15) Claim, application of administrator or executor for allowance of his own \$10.00
- (16) Claim, application to compromise or settle \$10.00
- (17) Claim, petition for authority to present \$10.00
- (18) Commissioner, appointment of \$ 5.00
- (19) Compensation for extraordinary services and attorney fees for fiduciary, application for \$ 5.00
- (20) Competency, application to procure adjudication of \$20.00
- (21) Complete contract, application to ... \$10.00
- (22) Concealment of assets, citation for ... \$10.00
- (23) Construction of will, petition for ... \$20.00
- (24) Continue decedent's business, application to \$10.00
Monthly reports of operation \$ 5.00
- (25) Declaratory judgment, petition for ... \$20.00
- (26) Deposit of will \$ 5.00
- (27) Designation of heir \$20.00
- (28) Distribution in kind, application, assent, and order for \$ 5.00
- (29) Distribution under section 2109.36 of the Revised Code, application for an order of \$ 7.00
- (30) Docketing and indexing proceedings, including the filing and noting of all necessary documents, maximum fee, fifteen dollars \$15.00
- (31) Exceptions to any proceeding named in this section, contest of appointment or \$10.00
- (32) Election of surviving partner to purchase assets of partnership, proceedings relating to \$10.00
- (33) Election of surviving spouse under will \$ 5.00
- (34) Fiduciary, including assignee or trustee of an insolvent debtor or any guardian accountable to probate court, appointment of \$15.00
All proceedings where guardian of person is appointed for the purpose of giving consent \$10.00
- (35) Foreign will, application to record ... \$10.00
Record of such will, additional, per page \$ 1.00
- (36) Forms used for the complete administration, when supplied by probate court, not to exceed \$10.00
- (37) Heirship, petition to determine \$20.00
- (38) Injunction proceedings \$20.00
- (39) Improve real estate, petition to \$20.00
- (40) Inventory with appraisal \$10.00
- (41) Inventory without appraisal \$ 7.00
- (42) Investment or expenditure of funds, application for \$10.00
- (43) Invest in real estate, application to ... \$10.00
- (44) Lease for oil, gas, coal, or other mineral, petition to \$20.00
- (45) Lease or lease and improve real estate, petition to \$20.00
- (46) Marriage license \$10.00
Certified abstract of each marriage ... \$ 2.00
- (47) Minor or mentally ill person, etc., disposal of estate under three thousand dollars of \$10.00
- (48) Mortgage or mortgage and repair or improve real estate, petition to \$20.00
- (49) Newly discovered assets, report of \$ 7.00
- (50) Nonresident executor or administrator to bar creditors' claims, proceedings by \$20.00
- (51) Power of attorney or revocation of power, bonding company \$10.00
- (52) Presumption of death, petition to establish \$20.00
- (53) Probating will \$15.00
Proof of notice to beneficiaries \$ 5.00
- (54) Purchase personal property, application of surviving spouse to \$10.00
- (55) Purchase real estate at appraised value, petition of surviving spouse to \$20.00

(56) Receipts in addition to advertising charges, application and order to record	\$ 5.00
Record of such receipts, additional, per page	\$ 1.00
(57) Record in excess of fifteen hundred words in any proceeding in the probate court, per page	\$ 1.00
(58) Release of estate by mortgagee or other lienholder	\$ 5.00
(59) Relieving estate from administration ..	\$20.00
(60) Removal of fiduciary, application for ..	\$10.00
(61) Requalification of executor or administrator	\$10.00
(62) Resignation of fiduciary	\$ 5.00
(63) Sale bill, public sale of personal property	\$10.00
(64) Sale of personal property and report, application for	\$10.00
(65) Sale of real estate, petition for	\$25.00
(66) Terminate guardianship, petition to ...	\$10.00
(67) Transfer of real estate, application, entry, and certificate for	\$ 7.00
(68) Unclaimed money, application to invest	\$ 7.00
(69) Vacate approval of account or order of distribution, motion to	\$10.00
(70) Writ of execution	\$ 5.00
(71) Writ of possession	\$ 5.00
(72) Wrongful death, application and settlement of claim for	\$20.00
(73) Year's allowance, petition to review ...	\$ 7.00
(74) In estates of deceased persons that are relieved from administration, the total fees of the probate judge chargeable against such estate, including the admission of the will to probate, shall not exceed	\$30.00

(B) The fees of witnesses, jurors, sheriffs, coroners, and constables, for services rendered in the probate court, or by order of the probate judge, shall be the same as provided for like services in the court of common pleas.

(C) The probate court may require, by rule, an advance deposit for costs, not to exceed one hundred twenty-five dollars, at the time application is made for an appointment as executor or administrator or at the time a will is presented for probate.

(D) The probate court shall, by rule, establish a reasonable fee, not to exceed fifty dollars, for the filing of a petition for the release of information regarding an adopted person's name by birth and the identity of his biological parents and biological siblings pursuant to section 3107.41 of the Revised Code, all proceedings relative to the petition, the entry of an order relative to the petition, and all services required to be performed in connection with the petition. The probate court may use a reasonable portion of a fee charged under authority of

this division to reimburse any agency, as defined in section 3107.39 of the Revised Code, for any services it renders in performing a task described in section 3107.41 of the Revised Code relative to or in connection with the petition for which the fee was charged.

*HISTORY: 137 v H 1 (Eff 8-26-77); 139 v H 317 (Eff 8-27-82); 140 v H 84 (Eff 3-19-85); 141 v H 419. Eff 3-13-86.

Ohio Rules

Deposits required upon filing, CPSupR 25.

ALR

Validity of statutes imposing a graduated probate fee based upon value of estate. 76 ALR3d 1117.

CASE NOTES AND OAG

1. (1982) A probate judge may not invest prepaid and unearned costs in United States Treasury Bills; rather, such costs must be held by the court or deposited as provided in RC § 2335.25. Where such funds are deposited or invested any interest earned thereon should be paid into the county treasury to the credit of the general fund (1965 Op. Att'y Gen. No.65-190 and 1961 Op. Att'y Gen. No.2720, p.748, overruled in part): OAG No.82-054.

2. (1982) Interest earned on the deposit or investment of prepaid and unearned costs by a probate court is "public money" as defined in RC § 117.10 for purposes of examination by the Bureau of Inspection and Supervision of Public Offices: OAG No.82-054.

[§ 2101.16.1] § 2101.161 [Deposit of prepaid and unearned costs.]

The probate court may order that prepaid and unearned costs be deposited with a bank, savings and loan association, or trust company incorporated under the laws of this state or of the United States. The order shall be entered on the journal of the court and may specify that deposited costs are to be held in an account, or invested in an investment, supervised by the bank, association, or company. Interest earned on deposited costs shall be paid into the county treasury by the end of the calendar year in which it is received.

HISTORY: 141 v H 419. Eff 3-13-86.

§ 2101.19 [Limitation of charges by probate judge; probate court conduct of business fund.]

(A) No probate judge or his deputy clerk shall sell or offer for sale for more than one dollar any merchandise to be used in connection with any license, order, or document issued by the probate court, or make any charge in connection with the issuance of any license, order, or document except that specifically provided by law.

(B) All moneys obtained from the sale of merchandise to be used in connection with any license, order, or document issued by a probate court shall be paid by the probate judge or the deputy clerk of the court into the county treasury. The moneys

shall be credited to a fund to be known as the probate court conduct of business fund. The moneys so credited shall be used solely for the conduct of the business of the probate court.

Upon receipt of an order of the probate judge for the payment of moneys from the fund for the conduct of the business of the court, the county auditor shall draw a warrant on the county treasurer for the amount of money specified in the order, but not exceeding the balance of the moneys in the fund, which warrant shall be made payable to the probate judge or another person designated in the order.

*HISTORY: 141 v H 419. Eff 3-13-86.

§ 2101.23 Contempt.

Ohio Rules

Conduct in the court, CPSupR 19.

Unauthorized examination of probate files, records, and other documents as contempt, CPSupR 20(D).

ALR

Contempt for violation of compromise and settlement the terms of which were approved by court but not incorporated in court order, decree, or judgment. 84 ALR3d 1047.

CASE NOTES AND OAG

1. (1976) Where the basic function of a court is impeded by a failure or refusal of the body responsible to provide a necessary appropriation, that court possesses the inherent power to order such appropriation and to enforce its order by contempt proceedings: *State ex rel. Edwards v. Murray*, 48 OS2d 303, 2 OO3d 446, 358 NE2d 577.

§ 2101.24 Jurisdiction of probate court.

(A) Except as otherwise provided by law, the probate court has exclusive jurisdiction:

(1) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country. If the probate judge is unavoidably absent, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of these acts shall be preserved in the usual records of the probate court.

(2) To grant and revoke letters testamentary and of administration;

(3) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(4) To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;

(5) To grant marriage licenses;

(6) To make inquests respecting persons who are unable to manage their property and affairs effectively for reasons such as mental illness, mental deficiency, or physical illness or disability, subject to guardianship;

(7) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(8) To authorize the sale of lands, equitable estates, or interests therein, and the assignments of inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(9) To authorize the completion of real contracts on petition of executors and administrators;

(10) To issue writs of habeas corpus, and determine the validity of the caption and detention of the persons brought before it on the writs. The probate court may refer a petition for a writ of habeas corpus to the court of common pleas if the petitioner is detained on a charge, indictment, or conviction of having committed a felony or misdemeanor under the laws of the United States or this state, or under an ordinance of any political subdivision of this state.

(11) To construe wills;

(12) To render declaratory judgments, including, but not limited to, those rendered pursuant to section 2107.084 [2107.08.4] of the Revised Code;

(13) To direct and control the conduct of fiduciaries and settle their accounts;

(14) To authorize the sale or lease of any estate created by will if the estate is held in trust, on petition by the trustee;

(15) To terminate a testamentary trust in any case in which a court of equity may do so;

(16) To hear and determine actions to contest the validity of wills;

(17) To make a determination of the presumption of death of missing persons and to adjudicate the property rights and obligations of all parties affected thereby;

(18) To hear and determine an action commenced pursuant to section 3107.41 of the Revised Code to obtain the release of information pertaining to the birth name of the adopted person and the identity of his biological parents and biological siblings.

(B) The probate court has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to hear and determine actions involving inter vivos trusts.

(C) The probate court has plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by statute.

(D) The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law.

*HISTORY: 137 v H 1 (Eff 8-26-77); 137 v S 112 (Eff 11-1-77); 137 v H 505 (Eff 1-1-79); 140 v H 84 (Eff 3-19-85); 141 v S 135. Eff 3-13-86.

Cross-References to Related Sections

Loss of certificate of shares, RC § 1701.27.

Law Review

Constitutional law—right to privacy—removal of life support systems. *Leach v. Akron Gen'l Med. Center*, 68 OMisc 1 (CP 1980). Case note. 16 AkronLRev 162 (1982).

CASE NOTES AND OAC

1. (1976) The probate division of the court of common pleas is without jurisdiction either to reform a deed executed prior to an owner's death or to order a series of conveyances to correct alleged defects in that deed: *Oncu v. Bell*, 49 OApp2d 109, 3 OO3d 175, 359 NE2d 712.

2. (1976) While the powers of the probate division of the court of common pleas are plenary, they are so only with respect to matters "properly before the court." RC § 2101.24(O): *Oncu v. Bell*, 49 OApp2d 109, 3 OO3d 175, 359 NE2d 712.

3. (1978) Probate courts have no jurisdiction over claims for money damages resulting from fraud: *Alexander v. Compton*, 57 OApp2d 89, 11 OO3d 81, 385 NE2d 638.

4. (1982) The juvenile court acts beyond the scope of its jurisdiction when it orders the Ohio Department of Mental Health to pay the cost of care of a child placed in a private, non-public psychiatric hospital: *In re Hamil*, 69 OS2d 97, 23 OO3d 151, 431 NE2d 317.

5. (1982) A court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction on the issue raised, and a party challenging its jurisdiction has a remedy at law in appeal from an adverse holding of the court that it has such jurisdiction, and may not maintain a proceeding in prohibition to prevent the prosecution of such action: *State ex rel. Smith v. Court*, 70 OS2d 213, 24 OO3d 320, 436 NE2d 1005.

6. (1984) In a hearing on exceptions to the inventory, the court lacks jurisdiction to impose a constructive trust on savings bonds which it finds are not in fact estate assets: *In re Estate of Etzensperger*, 9 OS3d 19, 9 OBR 112, 457 NE2d 1161.

7. (1983) Civil Rule 17(B) clearly authorizes a court other than the probate court to appoint a guardian ad litem for the protection of an individual the court believes to be an incompetent. Probate courts do not possess exclusive jurisdiction in these matters: *Dailey v. Dailey*, 11 OApp3d 121, 11 OBR 176, 463 NE2d 427.

§ 2101.31 Determination of questions of fact.**CASE NOTES AND OAC**

1. (1981) A party to a will contest action does not have the right to a jury trial; instead, a probate court has discretion to determine whether to sit as the trier of fact in a will contest action, or to impanel a jury: *State ex rel. Kear v. Court of Common Pleas*, 67 OS2d 189, 21 OO3d 118, 423 NE2d 427.

§ 2101.33 Vacation and modification of judgments.**CASE NOTES AND OAC**

1. (1978) Probate Courts have no jurisdiction over claims for money damages resulting from fraud: *Alexan-*

der v. Compton, 57 OApp2d 89, 11 OO3d 81, 385 NE2d 638.

§ 2101.39 Disqualification of probate judge for prejudice; replacement.

When a probate judge has a prejudice, either for or against a party or his counsel in a matter or cause pending before him, or is otherwise interested in such a cause or matter, or disqualified to sit in the cause or matter, but the prejudice, interest, or disqualification is not such as to permit or require certification of the proceedings to the court of common pleas as provided by section 2101.38 of the Revised Code, any party to the cause or matter, or the counsel of any such party, may file an affidavit with the clerk of the supreme court setting forth the prejudice, interest, or disqualification. The clerk of the supreme court forthwith shall notify the probate court of the filing of such an affidavit, and the fact of the filing of the affidavit shall be entered upon the record of the probate court. The judge may upon his own motion make an entry setting forth the prejudice, interest, or disqualification, a copy of which shall be filed with the clerk of the supreme court.

Forthwith upon the filing of such an affidavit or entry, the clerk of the supreme court shall forward the affidavit or entry to the chief justice of the supreme court who, if satisfied that the prejudice, interest, or disqualification exists, shall assign a probate judge or a judge of the court of common pleas to hear the cause or matter in place of such probate judge. The judge assigned shall proceed and try the cause or matter. The affidavit referred to in this section shall be filed not less than three days prior to the time set for the hearing of the cause or matter.

*HISTORY: 140 v H 426. Eff 4-4-85.

§ 2101.41 Prohibition.

No probate judge shall practice law, be associated with another as partner in the practice of law in a court or tribunal of this state, prepare a complaint or answer, make out an account required for the settlement of an estate committed to the care or management of another, or appear as attorney before a court or judicial tribunal. Whoever violates this section shall forfeit his office.

The deputy clerk of a probate court may engage in the practice of law if his practice is not related in any way to probate law or practice. The deputy may engage in the practice of law only with the continued consent and approval of all of the judges of the probate court.

A referee appointed solely to conduct hearings under Chapters 5122. and 5123. of the Revised Code may engage in the practice of law, including probate law, except that he shall not practice law under these chapters other than as a referee and

shall not knowingly accept any business arising out of or otherwise connected with a proceeding in which he served as a referee under these chapters.

The prosecuting attorney shall file his information against a judge or deputy clerk who practices law in violation of this section in the court of common pleas, and proceed as upon indictment.

This section does not prevent a probate judge or deputy clerk from finishing business commenced by him prior to his election or appointment, provided it is not connected with his official duty.

*HISTORY: 137 v H 725. Eff 3-16-78.

§ 2101.43 Petition for submission of question of combining probate court and court of common pleas.

Whenever ten per cent of the number of electors voting for governor at the next preceding election in any county having less than sixty thousand population, as determined by the next preceding federal census, petition a judge of the court of common pleas of such county, not less than seventy-five days before any general election for county officers, for the submission to the electors of such county the question of combining the probate court with the court of common pleas, such judge shall place upon the journal of said court an order requiring the sheriff to make proclamation that at the next ensuing general election there will be submitted to the electors the question of combining the probate court with the court of common pleas. The clerk of the court of common pleas shall, thereupon, make and deliver a certified copy of such order to the sheriff, and the sheriff shall include notice of the submission of such question in his proclamation of election for the ensuing general election.

Each elector joining in a petition for the submission of said question shall sign such petition in his own handwriting, unless he cannot write and his signature is made by mark, and shall add thereto the township, precinct, or ward of which he is a resident. Such petition may consist of as many parts as are convenient. One of the signers to each separate paper shall swear before some officer qualified to administer the oath that the petition is bona fide to the best of his knowledge and belief. Such oath shall be a part of or attached to such paper. The judge upon receipt of such petition shall deposit it with the clerk of the court of common pleas.

No signature shall be taken from or added to such petition after it has been filed with the judge. When deposited such petition shall be preserved and open to public inspection, and if it is in conformity with this section, it shall be valid, unless objection thereto is made in writing by an elector of the county within five days after the filing thereof. Such objections, or any other questions arising in the course of the submission of the ques-

tion of combining said courts, shall be considered and determined by the judge, and his decision shall be final.

*HISTORY: 138 v H 1062. Eff 3-23-81.

[§ 2103.04.1] § 2103.041 [Judicial sale of dower interest.]

In any action involving the judicial sale of real property for the purpose of satisfying the claims of creditors of an owner of an interest in the property, the spouse of the owner may be made a party to the action and the dower interest of the spouse, whether inchoate or otherwise, may be subjected to the sale without the consent of the spouse. The court shall determine the present value and priority of the dower interest, using the American experience table of mortality as the basis for determining the value, and shall award the spouse a sum of money equal to the present value of the dower interest, to be paid out of the proceeds of the sale according to the priority of the interest. To the extent that the owner and his spouse are both liable for the indebtedness, the dower interest of the spouse is subordinate to the claims of their common creditors.

HISTORY: 137 v S 161. Eff 11-16-77.

Cross-References to Related Sections

American experience table of mortality, see Appendix, p. 466 et seq.

§ 2103.05 Adultery a bar to dower. (GC § 10502-5)

A husband or wife who leaves the other and dwells in adultery will be barred from dower in the real property of the other, unless the offense is condoned by the injured consort.

HISTORY: GC § 10502-5; 114 v 320(338); Bureau of Code Revision. Eff 10-1-53.

For an analogous section, see former GC § 8611.

Publisher's Note: Although SB 145 (136 v —), eff 1-1-76, stated as one of its purposes, "to repeal (section) 2103.05," section 2 of SB 145, the actual repealing provision, does not mention RC § 2103.05. Thus section 2103.05 has not been directly repealed.

§ 2105.03 Determination of next of kin.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 324 (1976).

§ 2105.04 Permanent leases to descend same as estates in fee.

Research Aids

Ground rent and permanent leasehold:

O-Jur2d: L&T § 5

[§ 2105.05.1] § 2105.051 [Advancements; time of valuation.]

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 361 (1976).

§ 2105.06 Statute of descent and distribution.

Cross-References to Related Sections

Election to take property, RC § 2107.39.

Forms

Schedule of property to be distributed in kind (consent to distribution in kind). 2 Couse No.25.35

Surviving spouse, next of kin, legatees and devisees. 2 Couse No.25.1

Law Review

Illegitimacy and intestate succession: White v. Randolph [59 OS2d 6 (1979)]. Case note. 41 OSLJ 1037 (1980).

The statutory will: a simple alternative to intestacy. Note. 35 CaseWResLRev 307 (1985).

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 328, 340 (1976).

CASE NOTES AND OAG

1. (1977) The specific mandate of RC § 2105.06 et seq., governing escheats of property to the state, must be strictly followed to create a valid finding and judgment by the Probate Court of the escheat of property to the state where a decedent leaves no heirs. To be valid, such judgment of escheat must be that there are no heirs, not that "to the knowledge of plaintiff there are no known next of kin": Borovskaya v. State, 54 OApp2d 79, 8 OO3d 132, 375 NE2d 57.

2. (1980) A wife's right to inherit from her husband is not forfeited by the fact that both parties thought that a legal divorce had been obtained more than forty years before and both had remarried, although the husband's second wife had predeceased him: Holmes v. Fentress, 19 OO3d 87 (App).

3. (1982) When an intestate dies leaving no spouse, no children or their lineal descendants, or no surviving parent and is preceded in death by two brothers, one of whom leaves one child and one of whom leaves two children surviving at the time of the death of the intestate, the children of such deceased brothers, being in an equal degree of consanguinity to the intestate, inherit per capita pursuant to RC § 2105.12: Washburn v. Scurlock, 5 OApp3d 125, 5 OBR 284, 449 NE2d 797.

4. (1984) Revised Code §§ 2105.06 and 2107.39 concern the devolution of a decedent's property; they are to be read in pari materia and construed together: Winkelfoos v. Mann, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

5. (1984) The first \$30,000 which a surviving spouse is to receive pursuant to RC § 2105.06(C) is a distribution which is to be made from the net estate rather than a charge against and deduction from the gross estate: Winkelfoos v. Mann, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

6. (1984) The "net estate" is that portion of the estate remaining after satisfaction of all the indebtedness of the

decedent and the obligations of the estate. (Weeks v. Vandever, 13 OS2d 15 [42 OO2d 25], followed.): Winkelfoos v. Mann, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

7. (1984) The right to inherit property is neither a natural nor an inherent right. Rather, it is a statutory right created by the legislature and, therefore, subject to the legislature's control: Winkelfoos v. Mann, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

[§ 2105.06.1] § 2105.061 Repealed, 138 v S 317, § 2 [129 v 545]. Eff 3-23-81.

[§ 2105.06.2] § 2105.062 [Election to receive mansion house.]

(A) The surviving spouse may elect to receive, as part of the surviving spouse's share of the intestate estate under section 2105.06 of the Revised Code, the entire interest of the decedent spouse in the mansion house. The interest of the decedent spouse in the mansion house is valued at the appraised value with the deduction of that portion of all liens on the mansion house, existing at the time of death and attributable to the decedent's interest in the mansion house.

(B) The election pursuant to division (A) of this section shall be made at or before the time a final account is rendered.

(C) If the spouse makes an election pursuant to division (A) of this section, the administrator or executor shall, unless the election is one made under division (D) of this section, file an application for a certificate of transfer as provided for in section 2113.61 of the Revised Code. The application shall also contain an inventory of the property that the spouse is entitled to receive under section 2105.06 of the Revised Code. If the value of the property the spouse is entitled to receive is equal to or greater than the value of the mansion house, the court shall issue the certificate of transfer.

(D) The surviving spouse may make an election pursuant to division (A) of this section in an estate relieved from administration under section 2113.03 of the Revised Code. The election shall be made at the time of or prior to the entry of the order relieving the estate from administration. Either the spouse or the applicant for the order relieving the estate from administration shall file the application for certificate of transfer under division (C) of this section.

(E) If the surviving spouse dies prior to making an election pursuant to division (A) of this section, the surviving spouse shall be conclusively presumed not to have made an election pursuant to that division. After the surviving spouse's death, no other person is authorized to make an election pursuant to that division on behalf of the estate of the surviving spouse.

(F) As used in this section, the mansion house includes the parcel of land on which the house is

situated and, at the option of the surviving spouse, the household goods contained within the house and the lots or farm land adjacent to the house and used in conjunction with it as the home of the decedent.

*HISTORY: 137 v H 1003 (Eff 9-25-78); 138 v S 317. Eff 3-23-81.

Cross-References to Related Sections

Election to take property, RC § 2107.39.

Forms

Certificate of transfer (authentication). 2 *Couse* No.25.40

Entry issuing certificate of transfer. 2 *Couse* No.25.41

[§ 2105.06.3] § 2105.063 [Distribution of appraised personal property; certificate of transfer.

Forms

Application to distribute in kind (consent to distribution in kind; entry setting hearing and ordering notice; entry approving distribution in kind). 2 *Couse* No.25.34

Certificate of transfer (authentication). 2 *Couse* No.25.40

Entry issuing certificate of transfer. 2 *Couse* No.25.41

Schedule of property to be distributed in kind (consent to distribution in kind). 2 *Couse* No.25.35

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 327 (1976).

§ 2105.07 Escheat of personal estate.

CASE NOTES AND OAG

1. (1977) Where there is a living heir of a decedent, even though he may be unknown to the administrator at the time of administration of the estate, the state takes no title to the personal property of the estate by escheat: *Borovskaya v. State*, 54 OApp2d 79, 8 OO3d 132, 375 NE2d 57.

2. (1983) Escheat is an incident or attribute of sovereignty. In Ohio, by virtue of RC § 2105.07, the right of the state to escheated funds has been relinquished to the county: *Illes v. State*, 10 OApp3d 111, 10 OBR 135, 460 NE2d 707.

3. (1983) In Ohio there is no statutory or case law which authorizes a rightful heir who appears subsequent to distribution to recover escheated funds: *Illes v. State*, 10 OApp3d 111, 10 OBR 135, 460 NE2d 707.

§ 2105.09 Disposition of escheated lands.

(A) The county auditor, unless he acts pursuant to division (C) of this section, shall take possession of real property escheated to the state that is located in his county and outside the incorporated area of a city. The auditor shall take possession in the name of the state and sell the property at public auction, at the county seat of the county, to the highest bidder, after having given thirty days' no-

tice of the intended sale in a newspaper published within the county.

On the application of the auditor, the court of common pleas shall appoint three disinterested freeholders of the county to appraise the real property. The freeholders shall be governed by the same rule as appraisers in sheriffs' or administrators' sales. The auditor shall sell the property at not less than two thirds of its appraised value and may sell it for cash, or for one-third cash and the balance in equal annual payments, the deferred payments to be amply secured. Upon payment of the whole consideration, the auditor shall execute a deed to the purchaser, in the name and on behalf of the state. The proceeds of the sale shall be paid by the auditor to the county treasurer.

The treasurer shall pay the proceeds, not exceeding six hundred dollars in any case, to the regularly organized agricultural society within the county. The excess of the proceeds, or the whole thereof if there is no regularly organized agricultural society within the county, shall be paid into the state treasury to the credit of the general revenue fund.

(B) The legislative authority of a city within which are lands escheated to the state, unless it acts pursuant to division (C) of this section, shall take possession of the lands for the city, and the title to the lands shall vest in the city. The city shall use the premises primarily for health, welfare, or recreational purposes, or may lease them at such prices and for such purposes as it considers proper. With the approval of the tax commissioner, the city may sell the lands or any undivided interest in the lands, in the same manner as is provided in the sale of land not needed for any municipal purposes; provided, that the net proceeds from the rent or sale of the premises shall be devoted to health, welfare, or recreational purposes.

(C) As an alternative to the procedure prescribed in divisions (A) and (B) of this section, the county auditor, or if the real property is located within the incorporated area of a city, the legislative authority of that city by an affirmative vote of at least a majority of its members, may request the probate court to direct the administrator or executor of the estate that contains the escheated property to commence an action in the probate court for authority to sell the real property in the manner provided in Chapter 2127. of the Revised Code. The proceeds from the sale of real property that is located outside the incorporated area of a city shall be distributed by the court in the same manner as the proceeds are distributed under division (A) of this section. The proceeds from the sale of real property that is located within the incorporated area of a city shall be distributed by the court in the same manner as the proceeds are distributed under division (B) of this section.

*HISTORY: 137 v H 42 (Eff 10-7-77); 140 v H 260 (Eff 9-27-83); 141 v H 201. Eff 7-1-85.

§ 2105.11 Estate to descend equally to children of intestate.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 328 (1976).

§ 2105.12 Descent when all descendants of equal degree of consanguinity.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 329 (1976).

CASE NOTES AND OAG

1. (1982) When an intestate dies leaving no spouse, no children or their lineal descendants, or no surviving parent and is preceded in death by two brothers, one of whom leaves one child and one of whom leaves two children surviving at the time of the death of the intestate, the children of such deceased brothers, being in an equal degree of consanguinity to the intestate, inherit per capita pursuant to RC § 2105.12: Washburn v. Scurlock, 5 OApp3d 125, 5 OBR 284, 449 NE2d 797.

§ 2105.14 Posthumous child to inherit.

Law Review

To be or not to be: protecting the unborn's potentiality of life. J.A. Parness & S.K. Pritchard. 51 CinLRev 257 (1982).

§ 2105.15 Designation of heir at law.

Law Review

White v. Randolph [59 OS2d 6 (1979)]: the right of an illegitimate child to inherit from his intestate father. Case note. 7 ONorthLRev 336 (1980).

§ 2105.17 [Children born out of wedlock.]

ALR

Right of illegitimate grandchildren to take under testamentary gift to "grandchildren." 17 ALR4th 1292.

Law Review

Illegitimate Descent and Distribution. 46 CinLRev 415 (1975).

Trimble v. Gordon and Lalli v. Lalli: Shall the Sins of the Fathers be Visited on the Sons? Comment. 48 CinLRev 578 (1979).

CASE NOTES AND OAG

1. (1977) Section 12 of the Illinois Probate Act, which allows illegitimate children to inherit by intestate succession only from their mothers (though under Illinois law

legitimate children may inherit by intestate succession from both their mothers and their fathers), held to violate the Equal Protection Clause of the Fourteenth Amendment: Trimble v. Gordon, 430 US 762, 52 LEd2d 31, 97 SCt 1459, 4 OObd 296.

§ 2105.18 [Application acknowledging paternity.]

The natural father of a child may file an application in the probate court of the county in which he resides, in the county in which the child resides, or the county in which the child was born, acknowledging that the child is his. If such an application is filed, upon consent of the mother, or if she is deceased, incompetent, or has surrendered custody, upon consent of the person or agency having custody of the child or of a court having jurisdiction over the child's custody, the probate court, if satisfied that the applicant is the natural father, and that establishment of the relationship is for the best interest of the child, shall enter the finding of fact upon its journal. Thereafter, the child is the child of the applicant, as though born to him in lawful wedlock.

*HISTORY: 137 v H 1 (Eff 8-26-77); 139 v H 245. Eff 6-29-82.

Cross-References to Related Sections

Application showing natural father to be filed, RC § 3705.15.

ALR

Legitimation by marriage to natural father of child born during mother's marriage to another. 80 ALR3d 219.

Law Review

Father Child Relationship Construed. 48 ClevBJ 101 (1977).

Fathers, biological and anonymous, and other legal strangers: determination of parentage and artificial insemination by donor under Ohio law. Susan G. Eisenman. 45 OSLJ 383 (1984).

Illegitimate Descent and Distribution. 46 CinLRev 415 (1977).

In re Byrd [62 OS2d 334 (1981)]: Child custody rights of unwed fathers. Case note. 11 CapitalULRev 347 (1981).

Lehr v. Robertson [103 SCt 2985 (1983)]: putative fathers revisited. Case note. 11 ONorthLRev 385 (1984).

Trimble v. Gordon and Lalli v. Lalli: Shall the Sins of the Fathers be Visited on the Sons? Comment. 48 CinLRev 578 (1979).

CASE NOTES AND OAG

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1. (1977) The biological father of a child can not be held for its support where the mother, during pregnancy, contracts marriage with another man, who marries her with full knowledge of her condition and thereby consents to stand in loco parentis to such child and to being the father of the child. (*Miller v. Anderson*, 43 OS 473, approved and followed); *Hall v. Rosen*, 50 OS2d 135, 4 OO3d 336, 363 NE2d 725.

2. (1976) A full legal father-child relationship is created when a father acknowledges his child under RC § 2105.18. Thereafter, RC § 3107.06 requires his consent before another may adopt the child, provided that the natural father has not wilfully failed to support the child: *In re Robinette*, 3 OO3d 355 (CP).

3. (1977) There is a distinction between a "putative" father and a father who has been adjudicated as such by his own admission: *In re Wright*, 52 OMisc 4, 6 OO3d 31, 367 NE2d 931 (CP).

4. (1977) A father adjudicated as such by his own admission has legal standing to seek custody of his illegitimate child against the world, including the mother: *In re Wright*, 52 OMisc 4, 6 OO3d 31, 367 NE2d 931 (CP).

5. (1977) In addition, the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Section 2, Article I of the Ohio Constitution mandate that RC § 2105.18, providing for legitimization of illegitimate children, afford every illegitimate child the opportunity to become legitimated by filing an application of legitimization and by proving by clear and convincing evidence the identity of the child's natural father. If the probate court is satisfied that the person named in the application for legitimization is the child's natural father and that establishment of this relationship is for the best interest of the child, the court shall enter that finding of fact upon its journal and thereafter the child is the child of the person named in the application as though born to him in lawful wedlock: *In re Minor of Martin*, 51 OApp2d 21, 5 OO3d 141, 365 NE2d 892.

6. (1977) Juvenile court proceedings under RC § 3111.17 are conducted to determine a "reputed father" for the purpose of obtaining support for a child and payment for medical expenses. A determination of a "reputed father" under RC § 3111.17 does not convert that finding into a finding of a "natural father" under RC § 2105.18. Nor does such a determination give the mother authority either as agent for the father or by operation of law to file an application for legitimization under RC § 2105.18 and acknowledge that the alleged father is the natural father of the child: *In re Minor of Martin*, 51 OApp2d 21, 5 OO3d 141, 365 NE2d 892.

7. (1977) An illegitimate child may be legitimated if the natural father of the child files an application in the appropriate probate court acknowledging that the child is his and the mother of the child consents to the legitimization. If the probate court is satisfied that the applicant is the natural father and that establishment of this relationship is for the best interest of the child, the probate court shall enter the finding of fact upon its journal and thereafter the child is the child of the applicant as though born to him in lawful wedlock: *In re Minor of Martin*, 51 OApp2d 21, 5 OO3d 141, 365 NE2d 892.

8. (1978) Although a man, after marrying a child's mother, signs a declaration of paternity indicating he is the father of such child and a birth certificate is issued reflecting this contention, he obtains no rights to custody or visitation after a decree of divorce has been entered

where it is undisputed that another is the biological father: *Chatman v. Chatman*, 54 OApp2d 6, 8 OO3d 24, 374 NE2d 433.

9. (1979) As applied to appellant, Ohio's intestacy laws do not unconstitutionally discriminate against illegitimates: *White v. Randolph*, 59 OS2d 6, 13 OO3d 3, 391 NE2d 333.

10. (1981) The second paragraph of RC § 2105.18 was not intended to provide an individual with the means for challenging the paternity of an already legitimate child: *In re Mancini*, 2 OApp3d 124, 2 OBR 138, 440 NE2d 1232.

11. (1982) The evidence of the consent by the natural mother to the natural father's legitimization of the child at the time of the hearing which resulted in the order of support and visitation in the domestic relations court is sufficient to constitute consent pursuant to RC § 2105.18: *In re Legitimation of Conn*, 7 OApp3d 241, 7 OBR 303, 455 NE2d 16.

§ 2105.19 [Persons prohibited from benefiting by the death of another.]

(A) Except as provided in division (C) of this section, no person who is convicted of, pleads guilty to, or is found not guilty by reason of insanity of a violation of or complicity in the violation of section 2903.01, 2903.02, or 2903.03 of the Revised Code or of an existing or former law of any other state, the United States, or a foreign nation, substantially equivalent to a violation of or complicity in the violation of any of these sections, no person who is indicted for a violation of or complicity in the violation of any of those sections or laws and subsequently is adjudicated incompetent to stand trial on that charge, and no juvenile who is found to be a delinquent child by reason of committing an act that, if committed by an adult, would be a violation of or complicity in the violation of any of those sections or laws, shall in any way benefit by the death. All property of the decedent, and all money, insurance proceeds, or other property or benefits payable or distributable in respect of the decedent's death, shall pass or be paid or distributed as if the person who caused the death of the decedent had predeceased the decedent.

(B) A person prohibited by division (A) of this section from benefiting by the death of another is a constructive trustee for the benefit of those entitled to any property or benefit that the person has obtained, or over which he has exerted control, because of the decedent's death. A person who purchases any such property or benefit from the constructive trustee, for value, in good faith, and without notice of the constructive trustee's disability under division (A) of this section, acquires good title, but the constructive trustee is accountable to the beneficiaries for the proceeds or value of the property or benefit.

(C) A person who is prohibited from benefiting from a death pursuant to division (A) of this section either because he was adjudicated incompetent to

stand trial or was found not guilty by reason of insanity, or his guardian appointed pursuant to Chapter 2111. of the Revised Code or other legal representative, may file a complaint to declare his right to benefit from the death in the probate court in which the decedent's estate is being administered or which released the estate from administration. The complaint shall be filed no later than sixty days after the person is adjudicated incompetent to stand trial or found not guilty by reason of insanity. The court shall notify each person who is a devisee or legatee under the decedent's will, or if there is no will, each person who is an heir of the decedent pursuant to section 2105.06 of the Revised Code that such a complaint has been filed within ten days after the filing of such a complaint. The person who files the motion, and each person who is required to be notified of the filing of the motion under this division is entitled to a jury trial in the action. To assert the right, the person desiring a jury trial shall demand a jury in the manner prescribed in the civil rules.

A person who files a complaint pursuant to this division shall be restored to his right to benefit from the death unless the court determines, by a preponderance of the evidence, that the person would have been convicted of a violation of, or complicity in the violation of, section 2903.01, 2903.02, or 2903.03 of the Revised Code, or of a law of another state, the United States, or a foreign nation that is substantially similar to any of those sections, if he had been brought to trial in the case in which he was adjudicated incompetent or if he were not insane at the time of the commission of the offense.

*HISTORY: 139 v S 176 (Eff 6-1-82); 141 v S 102. Eff 10-17-85.

ALR

Homicide as precluding taking under will or by intestacy. 25 ALR4th 787.

Law Review

Elmer's case revisited: the problem of the murdering heir. L.J. Maki & A.M. Kaplan. 41 OSLJ 905 (1980).

To be or not to be: protecting the unborn's potentiality of life. J.A. Parness & S.K. Pritchard. 51 CinLRev 257 (1982).

CASE NOTES AND OAG

1. (1984) At common law, the beneficiary of a life insurance policy cannot recover the proceeds if he caused the insured's death by his intentional and felonious act: *Huff v. Union Fidelity Life Ins. Co.*, 14 OApp3d 135, 14 OBR 151, 470 NE2d 236.

2. (1984) Absent the application of RC § 2105.19(A) which bars from recovery those persons convicted of or pleading guilty to certain designated homicide offenses, a person challenging the beneficiary's claim has the burden of proving the intentional and malicious killing: *Huff v. Union Fidelity Life Ins. Co.*, 14 OApp3d 135, 14 OBR 151, 470 NE2d 236.

3. (1984) A minor whose age precludes convictions that statutorily bar recovery for an adult can still forfeit beneficial rights under the common-law rule: *Huff v. Union Fi-*

delity Life Ins. Co., 14 OApp3d 135, 14 OBR 151, 470 NE2d 236.

4. (1984) A justifiable killing in defense of oneself or another will not disqualify a beneficiary from recovering benefits resulting from that death: *Huff v. Union Fidelity Life Ins. Co.*, 14 OApp3d 135, 14 OBR 151, 470 NE2d 236.

5. (1984) Revised Code § 2105.19 provides that all money or other property or benefits payable or distributable in respect to the death of the decedent shall pass or be paid as if the guilty person had predeceased the decedent. Thus, for purposes of RC § 2105.19, where the decedent and the guilty party had a joint and survivorship bank account, the guilty party is considered to have predeceased the decedent and the decedent is to be treated as the survivor: *In re Estate of Fiore*, 16 OApp3d 473, 16 OBR 555, 476 NE2d 1093.

6. (1984) A plea of "no contest" to a charge of murder under RC § 2903.02, followed by a finding of guilty, does not bar the application of RC § 2105.19: *In re Estate of Fiore*, 16 OApp3d 473, 16 OBR 555, 476 NE2d 1093.

7. (1984) Revised Code § 2105.19 does not impair the obligation of contracts as set forth in both the Ohio and United States Constitutions: *In re Estate of Fiore*, 16 OApp3d 473, 16 OBR 555, 476 NE2d 1093.

8. (1983) Revised Code § 2105.19 does not preclude a juvenile adjudicated delinquent by reason of having murdered his father from inheriting from his father's estate: *In re Estate of Birt*, 18 OMisc2d 7, 18 OBR 407, 481 NE2d 1387 (CP).

9. (1985) The identity of a person who intentionally and feloniously causes the death of another can be established in a civil proceeding in order to prevent the wrongdoer from receiving the proceeds of the deceased's life insurance policy: *Shrader v. Equitable Life Assur. Soc.*, 20 OS3d 41, 20 OBR 343, 485 NE2d 1031.

§ 2105.21 Presumption of order of death.

ALR

Validity, construction, and application of statutory requirement that will beneficiary survive testator for specified time. 88 ALR3d 1339.

Law Review

The Ohio Entirety Estate: Alternative Approaches to Anticipated Problems. Comment. 4 UDayLRev 425 (1979).

CASE NOTES AND OAG

1. (1977) The residuary bequest to the testator's wife did not pass to her adopted daughter under RC § 2107.52, the anti-lapse statute, because the wife died within a few hours of the testator, in a common accident, and thus the bequest to the wife failed under RC § 2105.21: *Lyman v. McFerren*, 19 OO3d 116 (CP).

§ 2107.01 Definitions.

Law Review

How the Family Fares: A Comparison of the Uniform Probate Code and the Ohio Probate Reform Act. Donald L. Robertson. 37 OSLJ 321 (1976).

CASE NOTES AND OAG

1. (1982) A document purported to be a will must evidence requisite testamentary intent from the document itself and evidence of statements, circumstances, or events dehors the instrument may be used to clarify or resolve an ambiguity in meaning, but cannot be utilized to add something to the document which is not there: *In re Estate of Ike*, 7 OApp3d 87, 7 OBR 100, 454 NE2d 577.

2. (1982) Though no specific statutory definition of the term "will" exists, case law and statutory language clearly demonstrate that a will must be in writing, executed with certain formalities and by its language illustrate, at the minimum, a testamentary intent, i.e., a disposition of property to take effect only at death: *In re Estate of Ike*, 7 OApp3d 87, 7 OBR 100, 454 NE2d 577.

§ 2107.02 Who may make will.

ALR

Convict's capacity to make will. 84 ALR3d 479.
Existence of illicit or unlawful relation between testator and beneficiary as evidence of undue influence. 76 ALR3d 743.

CASE NOTES AND OAG

1. (1978) The testimony of a physician as to the issue of an individual's competency is not dispositive of that issue as a matter of law: *Vetter v. Hampton*, 54 OS2d 227, 8 OO3d 198, 375 NE2d 804.

2. (1981) Expert opinion testimony is admissible as to an ultimate fact without infringing upon the function of the jury, if the determination of such ultimate fact requires the application of expert knowledge not within the common knowledge of the jury. This rule permits the giving of an expert opinion as to the mental capacity of the decedent and her competency to make a will. (EvR 704 applied): *In re estate of Seelig*, 2 OApp3d 223, 2 OBR 243, 441 NE2d 598.

3. (1983) A testator's treating physician's opinion is competent in an action where the testator's mental strength and weakness are in issue; however, that opinion is not conclusive as a matter of law: *Gannett v. Booker*, 12 OApp3d 49, 12 OBR 190, 465 NE2d 1326.

4. (1983) Because undue influence is usually proved by circumstantial evidence and because a wide range of evidence is to be permitted to establish undue influence, it is error for a trial court to grant a motion in limine limiting the presentation of evidence to those events occurring within a specified time period before and after the execution of the contested will: *Rich v. Quinn*, 13 OApp3d 102, 13 OBR 119, 468 NE2d 365.

5. (1983) In order to sustain allegations of undue influence in a will contest, a plaintiff must prove: (1) that the testator was "susceptible"; (2) another's opportunity to exert the influence; (3) the fact of improper influence exerted or attempted; and (4) the result showing the effect of such influence: *Rich v. Quinn*, 13 OApp3d 102, 13 OBR 119, 468 NE2d 365.

6. (1983) Where a will is attacked on grounds of undue influence, a wide range of inquiry should be permitted to bring before the jury the facts and influences bearing upon the preparation of the will: *Rich v. Quinn*, 13 OApp3d 102, 13 OBR 119, 468 NE2d 365.

§ 2107.03 Method of making will.

Forms

Alternative clauses for trust agreements. 3 *Couse* Nos. 26.22-26.88

Appointment clause applicable to co-executors. 2 *Couse* No. 26.15

Basic simple will form. 2 *Couse* No. 26.1

Bequests of specific items of tangible personal property. 2 *Couse* No. 26.6

Charitable split interest trusts. 2 *Couse* Nos. 26.94-26.97

Clifford trust. 2 *Couse* No. 26.92

Codicil to will. 2 *Couse* No. 26.98

Contribution towards taxes from QTIP trust. 2 *Couse* No. 26.3

Crummey trust. 2 *Couse* No. 26.93

Decisions of co-executors. 2 *Couse* No. 26.16

General disposition of tangible personal property. 2 *Couse* No. 26.4

Legacies of specific sum-various contingencies. 2 *Couse* No. 26.10

Legacy of specific sum by last to die of husband and wife. 2 *Couse* No. 26.11

Liability of co-executors. 2 *Couse* No. 26.17

Marital inter vivos trust. 2 *Couse* No. 26.19

Non-marital generation-skipping inter vivos trust. 2 *Couse* No. 26.20

Pour over will to inter vivos trust agreements. 2 *Couse* No. 26.89

QTIP election. 2 *Couse* No. 26.18

Residential property to a class of multiple beneficiaries. 2 *Couse* No. 26.9

Residential property to named multiple beneficiaries. 2 *Couse* No. 26.8

Residential property to surviving spouse. 2 *Couse* No. 26.7
Separate letter relating to disposition of tangible personal property. 2 *Couse* No. 26.5

Spouse for whom marital deduction trust is created—spouse does not have his/her own trust agreement. 2 *Couse* No. 26.90

Spouse for whom marital deduction trust is created—spouse has his/her own trust agreement. 2 *Couse* No. 26.91

Taxes apportioned against non-probate property. 2 *Couse* No. 26.2

Testamentary trust. 2 *Couse* No. 26.21

ALR

Requirement that holographic will, or its material provisions, be entirely in testator's handwriting as affected by appearance of some printed or written matter not in testator's handwriting. 37 ALR 4th 528.

Law Review

Videotaping wills: a new frontier in estate planning. W.R. Buckley & A.W. Buckley. 11 ONorthLRev 271 (1984).

CASE NOTES AND OAG

1. (1976) Once a will is "made" in the manner provided in RC § 2107.03, it remains a will unless and until it is revoked by one of the means provided in RC § 2107.33: *In re Nash*, 3 OO3d 347, 361 NE2d 558 (CP).

2. (1982) Interested witnesses to a written will are competent witnesses thereto if they otherwise meet the test of competency set forth in RC § 2317.01: *Rogers v. Helmes*, 69 OS2d 323, 23 OO3d 301, 432 NE2d 186.

3. (1982) Though no specific statutory definition of the term "will" exists, case law and statutory language clearly demonstrate that a will must be in writing, executed with certain formalities and by its language illustrate, at the minimum, a testamentary intent, i.e., a disposition of property to take effect only at death: *In re Estate of Ike*, 7 OApp3d 87, 7 OBR 100, 454 NE2d 577.

4. (1982) A document purported to be a will must evidence requisite testamentary intent from the document itself and evidence of statements, circumstances, or events dehors the instrument may be used to clarify or resolve an ambiguity in meaning, but cannot be utilized to add something to the document which is not there: *In re Estate of Ike*, 7 OApp3d 87, 7 OBR 100, 454 NE2d 577.

§ 2107.06 Repealed, 141 v H 59 [GC § 10504-5; 114 v 320 (346); Bureau of Code Revision, 10-1-53; 131 v 617]. Eff 8-1-85.

This section concerned bequests to charitable organizations and governmental units.

§ 2107.07 Deposit of will.

A will may be deposited by the maker, or by some person for the maker, in the office of the judge of the probate court in the county in which the testator lives. Such will shall be safely kept until delivered or disposed of as provided by section 2107.08 of the Revised Code. The judge, on being paid the fee of one dollar, shall receive, keep, and give a certificate of deposit for such will.

Every will which is to be deposited shall be enclosed in a sealed wrapper, which shall be indorsed with the name of the testator. The judge shall indorse thereon the date of delivery and the person by whom such will was delivered. The wrapper may be indorsed with the name of a person to whom it is to be delivered after the death of the testator. Such will shall not be opened or read until delivered to a person entitled to receive it, until the maker petitions the probate court for a declaratory judgment of the validity of the will pursuant to section 2107.081 [2107.08.1] of the Revised Code, or until otherwise disposed of as provided in section 2107.08 of the Revised Code.

*HISTORY: 137 v H 505. Eff 1-1-79.

Law Review

An ethical analysis of common estate planning practices— is good business bad ethics? Gerald P. Johnston. 45 OSLJ 57, 124 (1984).

§ 2107.08 Delivery of will.

During the lifetime of a testator, the testator's will, deposited according to section 2107.07 of the Revised Code, shall be delivered only to him, to some person authorized by him by a written order proved by the oath of a subscribing witness, or to a probate court for a determination of its validity when the testator so requests. After the testator's death, the will shall be delivered to the person

named in the indorsement on the wrapper of the will, if there is a person named who demands it. If the testator has petitioned the court for a judgment declaring the validity of the will pursuant to section 2107.081 [2107.08.1] of the Revised Code and the court has rendered such a judgment, the probate judge with possession shall deliver the will to the proper probate court as determined under section 2107.11 of the Revised Code, upon the death of the testator, for probate.

If no person named in the indorsement demands the will and it is not one that has been declared valid pursuant to section 2107.084 [2107.08.4] of the Revised Code, it shall be publicly opened in the probate court within two months after notice of the testator's death and retained in the office of the probate judge until offered for probate. If the jurisdiction belongs to any other court, such will shall be delivered to the person entitled to its custody, to be presented for probate in the other court. If the judge who opens such will has jurisdiction of it, he shall immediately give notice of its existence to the executor named in the will or, if any, to the persons holding a power to nominate an executor as described in section 2107.65 of the Revised Code, or, if it is the case, to the executor named in the will and to the persons holding a power to nominate a coexecutor as described in section 2107.65 of the Revised Code. If no executor is named and no persons hold a power to nominate an executor as described in section 2107.65 of the Revised Code, the judge shall give notice to other persons immediately interested.

*HISTORY: 137 v H 505 (Eff 1-1-79); 140 v S 115. Eff 10-14-83.

[DECLARATION OF VALIDITY OF WILL]

Section

- [2107.08.1] 2107.081 [Petition for judgment declaring validity of will.]
- [2107.08.2] 2107.082 [Service of process.]
- [2107.08.3] 2107.083 [Hearing on validity of will.]
- [2107.08.4] 2107.084 [Declaration of validity; sealing, filing; procedure for revoking or modifying will.]
- [2107.08.5] 2107.085 [Effect on other proceedings.]

[§ 2107.08.1] § 2107.081 [Petition for judgment declaring validity of will.]

(A) A person who executes a will allegedly in conformity with the laws of this state may petition the probate court of the county in which he is domiciled, if he is domiciled in this state or the probate court of the county in which any of his real property is located, if he is not domiciled in this state, for a judgment declaring the validity of the will.

The petition may be filed in the form determined by the probate court of the county in which it is filed.

The petition shall name as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed.

For the purposes of this section, "domicile" shall be determined at the time of filing the petition with the probate court.

(B) The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed shall not be construed as evidence or an admission that the will was not properly executed pursuant to section 2107.03 of the Revised Code or any prior law of this state in effect at the time of execution or as evidence or an admission that the testator did not have the requisite testamentary capacity and freedom from undue influence under section 2107.02 of the Revised Code.

HISTORY: 137 v H 505. Eff 1-1-79.

Law Review

An ethical analysis of common estate planning practices—is good business bad ethics? Gerald P. Johnston. 45 OSLJ 57, 133 (1984).

Antemortem probate and judicial power to render or refuse declaratory relief. Paul Edwards. 7 ONorthLRev 189 (1980).

Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives. Note. 32 CaseWResLRev 823 (1982).

The antemortem alternative to probate legislation in Ohio. Comment. 9 CapitalULRev 717 (1980).

[§ 2107.08.2] § 2107.082 [Service of process.]

Service of process in an action authorized by section 2107.081 [2107.08.1] of the Revised Code shall be made on every party defendant named in that action by the following methods:

(A) By certified mail, or any other valid personal service permitted by the Rules of Civil Procedure, if the party is an inhabitant of this state or is found within this state;

(B) By certified mail, with a copy of the summons and petition, to the party at his last known address or any other valid personal service permitted by the Rules of Civil Procedure, if the party is not an inhabitant of this state or is not found within this state;

(C) By publication, according to Civil Rule 4.4, in a newspaper of general circulation published in the county where the petition was filed, for three consecutive weeks, if the address of the party is unknown, if all methods of personal service permitted under division (B) of this section were attempted without success, or if the interest of the party under the will or in the estate of the testator should the will be declared invalid is unascertainable at that time.

HISTORY: 137 v H 505. Eff 1-1-79.

Law Review

Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives. Note. 32 CaseWResLRev 823 (1982).

[§ 2107.08.3] § 2107.083 [Hearing on validity of will.]

When a petition is filed pursuant to section 2107.081 [2107.08.1] of the Revised Code, the probate court shall conduct a hearing on the validity of the will. The hearing shall be adversary in nature and shall be conducted pursuant to section 2721.10 of the Revised Code, except as otherwise provided in sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code.

HISTORY: 137 v H 505. Eff 1-1-79.

Law Review

Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives. Note. 32 CaseWResLRev 823 (1982).

[§ 2107.08.4] § 2107.084 [Declaration of validity; sealing, filing; procedure for revoking or modifying will.]

(A) The probate court shall declare the will valid if, after conducting a proper hearing pursuant to section 2107.083 [2107.08.3] of the Revised Code, it finds that the will was properly executed pursuant to section 2107.03 of the Revised Code or under any prior law of this state that was in effect at the time of execution and that the testator had the requisite testamentary capacity and freedom from undue influence pursuant to section 2107.02 of the Revised Code.

Any such judgment declaring a will valid is binding in this state as to the validity of the will on all facts found, unless provided otherwise in this section, section 2107.33, or division (B) of section 2107.71 of the Revised Code, and, if the will remains valid, shall give the will full legal effect as the instrument of disposition of the testator's estate, unless the will has been modified or revoked according to law.

(B) Any declaration of validity issued as a judgment pursuant to this section shall be sealed in an envelope along with the will to which it pertains, and filed by the probate judge or his designated officer in the offices of that probate court. The filed will shall be available during the testator's lifetime only to the testator. If the testator removes a filed will from the possession of the probate judge, the declaration of validity rendered under division (A) of this section no longer has any effect.

(C) A testator may revoke or modify a will declared valid and filed with a probate court pursuant to this section by petitioning the probate court in possession of the will and asking that the will be revoked or modified. The petition shall include a

document executed pursuant to sections 2107.02 and 2107.03 of the Revised Code, and shall name as parties defendant those persons who were parties defendant in any previous action declaring the will valid, those persons who are named in any modification as beneficiaries, and those persons who would be entitled because of the revocation or modification, to inherit from the testator under Chapter 2105. of the Revised Code had the testator died intestate on the date the petition was filed. Service of the petition and process shall be made on these parties by the methods authorized in section 2107.082 [2107.08.2] of the Revised Code.

Unless waived by all parties, the court shall conduct a hearing on the validity of the revocation or modification requested under this division in the same manner as it would on any initial petition for a judgment declaring a will to be valid under this section. If the court finds that the revocation or modification is valid, as defined in division (A) of this section, the revocation or modification shall take full effect and be binding, and revoke the will or modify it to the extent of the valid modification. The revocation or modification, the judgment declaring it valid, and the will itself shall be sealed in an envelope and filed with the probate court, and shall be available during the testator's lifetime only to the testator.

(D) A testator may also modify a will by any later will or codicil executed according to the laws of this state or any other state and may revoke a will by any method permitted under section 2107.33 of the Revised Code.

(E) A declaration of validity of a will, or of a revocation or modification of a will previously determined to be valid, given under division (C) of this section, is not subject to collateral attack, except by a person and in the manner specified in division (B) of section 2107.71 of the Revised Code, but is appealable subject to the terms of Chapter 2721. of the Revised Code.

HISTORY: 137 v H 505. Eff 1-1-79.

Law Review

Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives. Note. 32 CaseWResLRev 823 (1982).

[§ 2107.08.5] § 2107.085 [Effect on other proceedings.]

The finding of facts by a probate court in a proceeding brought under sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code is not admissible as evidence in any proceeding other than one brought to determine the validity of a will.

The determination or judgment rendered in a proceeding under these sections is not binding upon the parties to such a proceeding in any action not brought to determine the validity of a will.

The failure of a testator to file a petition for a judgment declaring the validity of a will he has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.

HISTORY: 137 v H 505. Eff 1-1-79.

Law Review

Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives. Note. 32 CaseWResLRev 823 (1982).

§ 2107.09 Who may enforce production of a will.

(A) If real or personal estate is devised or bequeathed by a last will, the executor, or any interested person, may cause such will to be brought before the probate court of the county in which the decedent was domiciled. By citation, attachment, or warrant or, if circumstances require it, by warrant or attachment in the first instance, such court may compel the person having the custody or control of such will to produce it before the court for the purpose of being proved.

If the person having the custody or control of the will intentionally conceals or withholds it or neglects or refuses to produce it for probate without reasonable cause, he may be committed to the county jail and kept in close custody until he produces the will. This person also shall be liable to any party aggrieved for the damages sustained by such neglect or refusal.

Any citation, attachment, or warrant issued pursuant to this section may be issued into any county in the state and shall be served and returned by the officer to whom it is delivered.

The officer to whom such process is delivered shall be liable for neglect in its service or return in like manner as sheriffs are liable for neglect in not serving or returning a capias issued upon an indictment.

(B) In the case of a will that has been declared valid pursuant to section 2107.084 [2107.08.4] of the Revised Code, the probate judge who made the declaration or who has possession of the will shall cause the will and the judgment declaring validity to be brought before the proper probate court as determined by section 2107.11 of the Revised Code at a time after the death of the testator. If the death of the testator is brought to the attention of the probate judge by an interested party, the judge shall cause the will to be brought before the proper probate court at that time.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.10 Effect of withholding will.

(A) No property or right, testate or intestate, shall pass to a beneficiary named in a will who knows of the existence of the will for three years

and has the power to control it, and, without reasonable cause, intentionally conceals or withholds it or neglects or refuses within the three years to cause it to be offered for or admitted to probate. The estate devised to such devisee shall descend to the heirs of the testator, not including any heir who has concealed or withheld the will.

(B) No property or right, testate or intestate, passes to a beneficiary named in a will when the will was declared valid and filed with a probate judge pursuant to section 2107.084 [2107.08.4] of the Revised Code, the declaration and filing took place in a county different from the county in which the will of the testator would be probated under section 2107.11 of the Revised Code, and the named beneficiary knew of the declaration and filing and of the death of the testator and did not notify the probate judge with whom the will was filed. This division does not preclude a named beneficiary from acquiring property or rights from the estate of the testator for failing to notify a probate judge if it is his reasonable belief that the judge has previously been notified of the testator's death.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.11 Jurisdiction to probate.

A will shall be admitted to probate:

(A) In the county in which the testator was domiciled if, at the time of his death, he was domiciled in this state;

(B) In any county of this state where any real or personal property of such testator is located if, at the time of his death, he was not domiciled in this state, and provided that such will has not previously been admitted to probate in this state or in the state of such testator's domicile;

(C) In the county of this state in which a probate court rendered a judgment declaring that the will was valid and where the will was filed with the probate court.

For the purpose of this section, intangible personal property is located in the place where the instrument evidencing a debt, obligation, stock, or chose in action is located or if there is no such instrument where the debtor resides.

*HISTORY: 137 v H 505. Eff 1-1-79.

Forms

Application to probate will (waiver of notice of hearing; entry setting hearing and ordering notice; entry admitting will to probate.) 2 Couse No. 25.2

CASE NOTES AND OAG

1. (1976) A purported will which upon presentation for probate contains eight separate black ink deletions, apparently made with a felt marking pen, the last blacking completely covering testatrix's signature, is not a spoliated will: *In re Nash*, 3 OO3d 347, 361 NE2d 558 (CP).

2. (1976) Whether such purported will should be admitted to probate is governed by the provisions of RC § 2107.11 et seq., dealing with the probate of an ordinary

will, not by the provisions of RC § 2107.26 et seq., dealing with the probate of a spoliated will, as these sections existed at the time of decedent's death on August 29, 1975: *In re Nash*, 3 OO3d 347, 361 NE2d 558 (CP).

§ 2107.12 Contest of jurisdiction.

When a will is presented for probate or for a declaratory judgment of its validity pursuant to section 2107.081 [2107.08.1] of the Revised Code, persons interested in its outcome may contest the jurisdiction of the court to entertain the application. Preceding a hearing of a contest as to jurisdiction, all parties named in such will as legatees, devisees, trustees, or executors shall have notice thereof in such manner as may be ordered by the court.

When such contest is made, parties may call witnesses and shall be heard upon the question involved. The decision of the court as to its jurisdiction may be reviewed on error.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.13 Notice of probate.

Ohio Rules

Summons and notice in probate court, CPSupR 21.
Time requirements for notice, CPSupR 26(A).

Forms

Application to probate will (waiver of notice of hearing; entry setting hearing and ordering notice; entry admitting will to probate.) 2 Couse No. 25.2

Notice of hearing to probate will. 2 Couse No. 25.4

Surviving spouse, next of kin, legatees and devisees. 2 Couse No. 25.1

Waiver of notice of hearing on probate of will. 2 Couse No. 25.3

§ 2107.14 Examination of witnesses.

Upon demand by an interested party, the probate court shall cause at least two of the witnesses to a will, and other witnesses whom a person interested in having the will admitted to probate may desire to have appear, to come before the court. On request of the interested person, the court shall compel the attendance of any witness by subpoena. Witnesses shall be examined, and may be cross-examined, in open court, and their testimony reduced to writing and filed.

This section does not apply to any will that was declared valid by a probate court pursuant to section 2107.084 [2107.08.4] of the Revised Code if such will was not removed from the possession of the probate judge, and if such will is not subject to an action contesting its validity that is authorized by division (B) of section 2107.71 of the Revised Code.

*HISTORY: 137 v H 505. Eff 1-1-79.

Ohio Rules

Requirements for request for examination of witnesses, CPSupR 26(B).

Forms

Notice of hearing to probate will. 2 Couse No. 25.4

CASE NOTES AND OAG

1. (1976) Where the subscribing witnesses testify to the due and proper execution of a will, and that at the time of execution the instrument did not contain the black ink deletions apparent at the time of the hearing for probate, such will should be admitted to probate and record: In re Nash, 3 OO3d 347, 361 NE2d 558 (CP).

2. (1976) Revised Code § 2107.14, in addition to the witnesses to the purported will, authorizes the probate court to receive only the testimony of such other persons as may be presented by one interested in having the will admitted to probate, and the court may not receive any testimony offered by a person interested in having the paper denied admission to probate: In re Nash, 3 OO3d 347, 361 NE2d 558 (CP).

§ 2107.15 Witness a devisee or legatee.**Law Review**

An ethical analysis of common estate planning practices—is good business bad ethics? Gerald P. Johnston. 45 OSLJ 57, 60 (1984).

CASE NOTES AND OAG

1. (1982) Where a will is executed with three or more competent witnesses, a devise or bequest to a witness is not void: Rogers v. Helmes, 69 OS2d 323, 23 OO3d 301, 432 NE2d 186.

§ 2107.16 Will proved in certain cases.

(A) When offered for probate, a will may be admitted to probate and allowed upon such proof as would be satisfactory, and in like manner as if an absent or incompetent witness were dead:

(1) If it appears to the probate court that a witness to such will has gone to parts unknown;

(2) If the witness was competent at the time of attesting its execution and afterward became incompetent;

(3) If testimony of a witness cannot be obtained within a reasonable time.

(B) When offered for probate, a will shall be admitted to probate and allowed when there has been a prior judgment by a probate court declaring that the will is valid pursuant to section 2107.084 [2107.08.4] of the Revised Code, if the will has not been removed from the possession of the probate judge and has not been modified or revoked under division (C) or (D) of section 2107.084 [2107.08.4] of the Revised Code.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.17 Depositions taken by commission.

When a witness to a will, or other witness com-

petent to testify at a probate or declaratory judgment proceeding, resides out of its jurisdiction, or resides within it but is infirm and unable to attend court, the probate court may issue a commission with the will annexed directed to any suitable person. In lieu of the original will, the probate court, in its discretion, may annex to the commission a copy of the will made by photostatic or any similar process. The person to whom the commission is directed shall take the deposition or authorize the taking of the deposition of the witness as provided by the Rules of Civil Procedure. The testimony, certified and returned, shall be admissible and have the same effect in the proceedings as if taken in open court.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.18 Admission of will to probate.

The probate court shall admit a will to probate if it appears from the face of the will, or if demanded under section 2107.14 of the Revised Code, from the testimony of the witnesses that its execution complies with the law in force at the time of execution in the jurisdiction where executed, or with the law in force in this state at the time of death, or with the law in force in the jurisdiction where the testator was domiciled at the time of his death.

The probate court shall admit a will to probate when there has been a prior judgment by a probate court declaring that the will is valid, rendered pursuant to section 2107.084 [2107.08.4] of the Revised Code, if the will has not been removed from the possession of the probate judge and has not been modified or revoked under division (C) or (D) of section 2107.084 [2107.08.4] of the Revised Code.

*HISTORY: 137 v H 505. Eff 1-1-79.

Forms

Entry admitting will to probate. 2 Couse No. 25.5

CASE NOTES AND OAG

1. (1976) The time frame of RC § 2107.18 concerns the situation at the time the will was "made," not at the time it was presented for probate: In re Nash, 3 OO3d 347, 361 NE2d 558 (CP).

2. (1976) Revised Code § 2107.18 does not require, as does RC § 2107.27, that the will sought to be proved has been "unrevoked at the death of the testator": In re Nash, 3 OO3d 347, 361 NE2d 558 (CP).

3. (1978) Under RC § 2107.18 and RC § 2107.18.1, a will must be admitted to probate when the proponents introduce substantial evidence tending to prove the validity of the will: In re Young, 60 OApp2d 390, 14 OO3d 359, 397 NE2d 1223.

[§ 2107.18.1] § 2107.181 Rehearing for admission to probate.

If it appears that the instrument purporting to be a will is not entitled to admission to probate, the

court shall enter an interlocutory order denying probate of the instrument, and shall continue the matter for further hearing. The court shall order that not less than ten days' notice of the further hearing be given by the applicant, the executor named in the instrument, the persons holding a power to nominate an executor as described in section 2107.65 of the Revised Code, or a commissioner appointed by the court, to all persons named in the instrument as legatees, devisees, beneficiaries of a trust, trustees, executors, or persons holding a power to nominate an executor, coexecutor, successor executor, or successor coexecutor as described in section 2107.65 of the Revised Code. Upon further hearing, witnesses may be called, subpoenaed, examined, and cross-examined in open court or by deposition, and their testimony reduced to writing and filed in the same manner as in hearings for the admission of wills to probate. Thereupon, the court shall revoke its interlocutory order denying probate to the instrument, and admit it to probate, or enter a final order refusing to probate it. A final order refusing to probate the instrument may be reviewed on appeal.

*HISTORY: 140 v S 115. Eff 10-14-83.

§ 2107.19 Notice of admission of will to probate.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

§ 2107.20 Filing and recording of will; certified copy.

When admitted to probate every will shall be filed in the office of the probate judge and recorded, together with any testimony or prior judgment of a probate court declaring the will valid, by him or the clerk of the probate court in a book to be kept for that purpose.

A copy of such recorded will, with a copy of the order of probate annexed thereto, certified by the judge under seal of his court, shall be as effectual in all cases as the original would be, if established by proof.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.21 Recorded in each county where real estate is situated.

If real estate devised by will is situated in any county other than that in which the will is proved, declared valid, or admitted to probate, an authenticated copy of the will and the order of probate or the judgment declaring validity shall be admitted to the record in the office of the probate judge of

each county in which such real estate is situated upon the order of such judge. The authenticated copy shall have the same validity therein as if probate had been had in such county.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.22 Probate of will of later date.

(A) When a will has been admitted to probate by a probate court and another will of later date is presented to the same court for probate, notice thereof shall be given to those persons required to be notified under section 2107.13 of the Revised Code, and to the fiduciaries and beneficiaries under such will of earlier date. Such court may admit the will of later date to probate the same as if no earlier will had been so admitted. In such case, the proceedings shall be the same as if no other will had been admitted.

When an authenticated copy of a will has been admitted to record by a probate court, and an authenticated copy of a will of later date executed and proved as required by law, is presented to the same court for record, it shall be admitted to record in the same manner as if no authenticated copy of the will of earlier date had been so admitted.

If the court admits the later will to probate, or the authenticated copy of a later will to record, its order shall operate as a revocation of the order admitting the will of earlier date to probate, or shall operate as a revocation of the order admitting the authenticated copy of the will of earlier date to record, and the court shall enter on the record of the earlier will a marginal note "later will admitted to probate..." (giving date admitted).

(B) When a will that has been declared valid pursuant to section 2107.084 [2107.08.4] of the Revised Code has been admitted to probate by a probate court, and an authenticated copy of another will of later date that was executed and proved as required by law is presented to the same court for record, the will of later date shall be admitted the same as if no other will had been admitted and the proceedings shall continue as provided in this section.

*HISTORY: 137 v H 505. Eff 1-1-79.

ALR

Right to probate subsequently discovered will as affected by completed prior proceedings in intestate administration. 2 ALR4th 1315.

§ 2107.25 Repealed, 137 v H 1, § 2 [GC § 10504-34; 114 v 320; Bureau of Code Revision, 10-1-53; 136 v S 145; 136 v S 466]. Eff 8-26-77.

§ 2107.26 Lost, spoliated, or destroyed wills may be admitted to probate.

Law Review

An ethical analysis of common estate planning practices— is good business bad ethics? Gerald P. Johnston. 45 OSLJ 57, 124 (1984).

CASE NOTES AND OAG

1. (1976) A purported will which upon presentation for probate contains eight separate black ink deletions, apparently made with a felt marking pen, the last blacking completely covering testatrix's signature, is not a spoliated will: *In re Nash*, 3 OO3d 347, 361 NE2d 558 (CP).

2. (1976) Whether such purported will should be admitted to probate is governed by the provisions of RC § 2107.11 et seq., dealing with the probate of an ordinary will, not by the provisions of RC § 2107.26 et seq., dealing with the probate of a spoliated will, as these sections existed at the time of decedent's death on August 29, 1975: *In re Nash*, 3 OO3d 347, 361 NE2d 558 (CP).

§ 2107.27 Notice of application; testimony; probate.

When application is made to the probate court to admit to probate a will which has been lost, spoliated, or destroyed, the party seeking to prove such will shall give a written notice to the surviving spouse and to the next of kin of the testator known to be residents of the state, and to all persons, known to reside in the county where the testator resided at the time of his death, whose interest it may be to resist the probate. The party seeking to prove such will shall give the written notice not less than five days before the day on which such proof is to be made, or give notice, by publication in a newspaper published in the county, not less than thirty days before the day set for hearing such proof.

In such cases, the court shall cause the witnesses to such will and other witnesses whom a person interested in having such will admitted to probate may desire to have appear, to come before the court. Such witnesses shall be examined by the probate judge and their testimony reduced to writing and filed by him in his court. When witnesses reside out of its jurisdiction, or reside within such jurisdiction but are infirm or unable to attend, the court may order their testimony to be taken and reduced to writing by some competent person, which testimony shall be filed in such court.

If upon such proof, the court is satisfied that such last will and testament was executed in the manner provided by the law in force at the time of its execution, that its contents are substantially proved, that it was unrevoked at the death of the testator, and has been lost, spoliated, or destroyed since his death or since he became incapable of making a will by reason of insanity, or before the

death of the testator if his lack of knowledge of such loss, spoliation, or destruction can be proved by clear and convincing testimony, such court shall find and establish the contents of such will as near as can be ascertained and cause them and the testimony taken in the case to be recorded in such court.

The contents of such a last will and testament shall be as effectual for all purposes, as if the original will has been admitted to probate and record.

*HISTORY: 137 v H 42. Eff 10-7-77.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

CASE NOTES AND OAG

1. (1976) Revised Code § 2107.18 does not require, as does RC § 2107.27, that the will sought to be proved has been "unrevoked at the death of the testator": *In re Nash*, 3 OO3d 347, 361 NE2d 558 (CP).

§ 2107.32 Notice.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

§ 2107.33 Revocation of will.

(A) A will shall be revoked by the testator by tearing, canceling, obliterating, or destroying it with the intention of revoking it, or by some person in the testator's presence, or by the testator's express written direction, or by some other written will or codicil, executed as prescribed by sections 2107.01 to 2107.62 of the Revised Code, or by some other writing that is signed, attested, and subscribed in the manner provided by those sections. A will that has been declared valid and is in the possession of a probate judge may also be revoked according to division (C) of section 2107.084 [2107.08.4] of the Revised Code.

(B) If a testator removes a will that has been declared valid and is in the possession of a probate judge pursuant to section 2107.084 [2107.08.4] of the Revised Code from the possession of the judge, the declaration of validity that was rendered no longer has any effect.

(C) If after executing a will, a testator is divorced, obtains a dissolution of marriage, or has his marriage annulled, or upon actual separation from his spouse, enters into a separation agreement whereby the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, any disposition or appointment of property made by the will to the former spouse, any provision in the will conferring a general or special power of appointment on the former spouse, and any nomination in the will of the former spouse as

executor, trustee, or guardian, shall be revoked unless the will expressly provides otherwise.

(D) Property prevented from passing to a former spouse because of revocation by this section shall pass as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse shall be interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they shall be deemed to be revived by testator's remarriage with the former spouse or upon the termination of a separation agreement executed by them.

(E) A bond, agreement, or covenant made by a testator, for a valuable consideration, to convey property previously devised or bequeathed in a will, does not revoke the devise or bequest. The property passes by the devise or bequest, subject to the remedies on the bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, that might be had by law against the heirs of the testator, or his next of kin, if the property had descended to them.

*HISTORY: 137 v H 505. Eff 1-1-79.

ALR

Devolution of gift over upon spouse predeceasing testator where gift to spouse fails because of divorce. 74 ALR3d 1108.

Establishment and effect, after death of one of the makers of joint, mutual, or reciprocal will, of agreement not to revoke will. 17 ALR4th 167.

Prior institution of annulment proceedings or other attack on validity of one's marriage as barring or estopping one from entitlement to property rights as surviving spouse. 31 ALR4th 1190.

Revival, under doctrine of dependent relative revocation, of charitable bequest in will expressly revoked in later will containing same charitable bequest. 75 ALR3d 877.

Revocation of prior will by revocation clause in lost will or other lost instrument. 31 ALR4th 306.

Law Review

Videotaping wills: a new frontier in estate planning. W. R. Buckley & A. W. Buckley. 11 ONorthLRev 271 (1984).

CASE NOTES AND OAG

1. (1976) Once a will is "made" in the manner provided in RC § 2107.03, it remains a will unless and until it is revoked by one of the means provided in RC § 2107.33: In re Nash, 3 OO3d 347, 361 NE2d 558 (CP).

2. (1979) Revised Code § 2107.33, which became effective January 1, 1976, is applicable to a will which was executed prior to that date: Buehler v. Buehler, 67 OApp2d 7, 21 OO3d 330, 425 NE2d 905.

§ 2107.34 Afterborn or pretermitted heirs.

Law Review

To be or not to be: protecting the unborn's potentiality of life. J.A. Parness & S.K. Pritchard. 51 CinLRev 257 (1982).

§ 2107.39 Election by surviving spouse.

(A) After the probate of a will and the filing of the inventory, the appraisal, and a schedule of debts where ordered, the probate court shall issue a citation to the surviving spouse, if any is living at the time of the issuance of the citation, to elect whether to take under the will or under section 2105.06 of the Revised Code.

(B) If the surviving spouse elects to take under section 2105.06 of the Revised Code and if the value of the property that the surviving spouse is entitled to receive is equal to or greater than the value of the mansion house as determined under section 2105.062 [2105.06.2] of the Revised Code, the surviving spouse is also entitled to make an election pursuant to division (A) of section 2105.062 [2105.06.2] of the Revised Code.

(C) If the surviving spouse elects to take under section 2105.06 of the Revised Code, the spouse shall take not to exceed one half of the net estate unless two or more of the decedent's children or their lineal descendants survive, in which case the spouse shall take not to exceed one-third of the net estate.

(D) Unless the will expressly provides that in case of an election under division (A) of this section there shall be no acceleration of remainder or other interests bequeathed or devised by the will, the balance of the net estate shall be disposed of as though the spouse had predeceased the testator.

(E) The election under division (A) of this section shall be made at any time after the probate of the will, but not later than one month after the service of the citation to elect. On a motion filed before the expiration of the one-month period, and for good cause shown, the court may allow further time for the making of the election. If no action is taken by the surviving spouse within the one-month period, it is conclusively presumed that the surviving spouse elects to take under the will. The election shall be entered on the journal of the court.

When proceedings for advice or to contest the validity of a will are begun within the time allowed by this division for making the election, the election may be made within three months after the final disposition of the proceedings, if the will is not set aside.

(F) When a surviving spouse succeeds to the entire estate of the testator, having been named the sole devisee and legatee, it shall be presumed that the spouse elects to take under the will of the testator. No citation shall be issued to the surviving spouse as provided in division (A) of this section, and no election shall be required, unless the surviving spouse manifests a contrary intention.

*HISTORY: 138 v S 317. Eff 3-23-81.

Forms

Citation to surviving spouse to elect to take under or against will. 2 Couse No. 25.27

Election of surviving spouse to take against will. 2 Cause No. 25.29

Election of surviving spouse to take under will. 2 Cause No. 25.28

ALR

What constitutes transfer outside the will precluding surviving spouse from electing statutory share under uniform probate code § 2-301. 11 ALR4th 1213.

Statutory or constitutional provision allowing widow but not widower to take against will and receive dower interests, allowances, homestead rights, or the like as denial of equal protection of law. 18 ALR4th 910.

Law Review

Estate Tax Allocation. John Minan. 38 OSLJ 538, 556 (1977).

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 330, 344, 359 (1976).

CASE NOTES AND OAG

1. (1966) Where the settlor exercises continued dominion and control over the property in a revocable inter vivos trust and the trustee continually yields to the will of the settlor, a mere agency or custodianship results, which is revoked upon the death of the so-called settlor and the property passes either under a will or pursuant to the intestate laws: *Osborn v. Osborn*, 10 OMisc 171, 39 OO2d 275, 226 NE2d 814 [affirmed 18 OS2d 144, 47 OO2d 310, 248 NE2d 191 (1969)].

2. A surviving spouse taking against a will of a deceased spouse under RC § 2107.39 is entitled to the \$5,000 statutory allowance under RC § 2117.20 unless specifically barred by the will: *In re Green*, 63 OMisc 44, 17 OO3d 388.

3. (1984) If a surviving spouse of a deceased testator elects, pursuant to RC § 2107.39, to take against the deceased spouse's will, the surviving spouse is entitled to that share of the decedent's estate as set forth in RC § 2105.06, to the extent that it does not exceed one-half of the net estate or one-third of the decedent's net estate if there are two or more of decedent's children, or their lineal descendants, surviving: *Winkelfoos v. Mann*, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

4. (1984) Revised Code §§ 2105.06 and 2107.39 concern the devolution of a decedent's property; they are to be read in *parti materia* and construed together: *Winkelfoos v. Mann*, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

5. (1984) The words "net estate," as used in RC § 2107.39, describe the same property as do the words which describe the property to be distributed and to pass and descend according to RC § 2105.06. (*Weeks v. Vandever*, 13 OS2d 15 [42 OO2d 25], and *Campbell v. Lloyd*, 162 Ohio St. 203, followed.): *Winkelfoos v. Mann*, 16 OApp3d 266, 16 OBR 291, 475 NE2d 509.

[§ 2107.39.1] § 2107.391 [Citation to make the election.]

Forms

Citation to surviving spouse to elect to take under or against will. 2 Cause No. 25.27

Election of surviving spouse to take under will. 2 Cause No. 25.28

CASE NOTES AND OAG

1. (1981) Where the Probate Court sends a citation to

the residence of the surviving spouse, by certified mail, so that the surviving spouse may make an election pursuant to RC § 2107.39, and where the facts show, *inter alia*, that the son of the surviving spouse, who did not live at his father's home and who was not authorized to sign for certified mail for his father, signed his father's name on the receipt for the citation, it is error for the Probate Court, upon motion of the surviving spouse, to fail to set aside the father's "waiver" to take under the statute—even though the one-month period for response to the citation had expired: *In re Estate of Jones*, 1 OApp3d 70, 1 OBR 350, 439 NE2d 458.

§ 2107.41 Failure to make election; presumption.

CASE NOTES AND OAG

1. (1979) The right of a surviving spouse to elect against the will, granted pursuant to RC § 2107.39, is personal to such surviving spouse and does not survive his or her death, and that right may not be exercised in favor of the surviving spouse's estate: *In re Estate of LaSpina*, 60 OS2d 101, 14 OO3d 336, 397 NE2d 1196.

§ 2107.42 Election to take under the will; effect.

Forms

Election of surviving spouse to take under will. 2 Cause No. 25.28

ALR

Extent of rights of surviving spouse who elects to take against will in profits of or increase in value of estate accruing after testator's death. 7 ALR4th 989.

§ 2107.43 Election made in person.

Forms

Election of surviving spouse to take against will. 2 Cause No. 25.29

§ 2107.45 Election made by one under legal disability.

CASE NOTES AND OAG

1. (1979) Death is not a "legal disability" within the meaning of RC § 2107.45, which would require the probate court to make an election for the estate of a surviving spouse who dies having failed to elect against the will: *In re Estate of LaSpina*, 60 OS2d 101, 14 OO3d 336, 397 NE2d 1196.

2. (1981) Where the surviving spouse is under a disability and the probate court must make an election to take under or against the will as provided in RC § 2107.45, the probate court's discretion in making the election is limited to considering only the incompetent's interests: *In re Estate of Cromley*, 2 OApp3d 27, 2 OBR 30, 440 NE2d 588.

§ 2107.46 Action by fiduciary.

ALR

Term "money" or "moneys" in will as including real property. 76 ALR3d 1254.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 351 (1976).

CASE NOTES AND OAG

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1. (1977) In the construction of a will, the sole purpose of the court should be to ascertain and carry out the intention of the testator. Such intentions must be ascertained from the words contained in the will: *Carr v. Stradley*, 52 OS2d 220, 6 OO3d 469, 371 NE2d 540.

2. (1977) A testator is never presumed to have died intestate as to any part of his estate to which his attention was seemingly directed, and a court will put such a construction upon equivocal words as to prevent such a result: *Carr v. Stradley*, 52 OS2d 220, 6 OO3d 469, 371 NE2d 540.

3. (1977) Where property is held in a testamentary trust, and the income produced therefrom is in excess of the sums which the trustee is instructed to disburse, such surplus income may be held in the trust and accumulated until it can be paid out at the termination of the trust in accordance with the directions of the testator: *Carr v. Stradley*, 52 OS2d 220, 6 OO3d 469, 371 NE2d 540.

4. (1976) Where a life tenant fails to exercise her power to consume, the executrix of her estate may exercise the power to consume and invade the testator's estate, but only to the extent necessary to pay unpaid debts for the care and maintenance of the life tenant, the expenses of her last illness, and her funeral expenses: *Kurtz v. Brown*, 53 OApp2d 190, 7 OO3d 255, 372 NE2d 1338.

5. (1976) The conversion of real property to personality does not destroy the rights of a life tenant or those of vested remaindermen: *Kurtz v. Brown*, 53 OApp2d 190, 7 OO3d 255, 372 NE2d 1338.

6. (1976) Where a will provides that a life tenant shall have the power to sell and convey the testator's real property as is necessary for her care and maintenance, the life tenant is a quasi-trustee for the remaindermen as to the amount not necessary for her care and maintenance: *Kurtz v. Brown*, 53 OApp2d 190, 7 OO3d 255, 372 NE2d 1338.

7. (1976) Decedent's will ordered that her home, which was subsequently placed in the national Registry of Historical Places for its architectural importance, be razed. There was testimony by her co-executor, and attorney for over forty years, that this direction was a result of her fear that her home would, like the surrounding homes, be converted into a rooming house or commercial premises.

There was also testimony that testatrix would otherwise have wished to have her home preserved. Therefore the executors may be empowered to sell the home to an historical society with the restriction that the home never be converted to commercial purposes: *National City Bank v. Case Western Reserve University*, 7 OO3d 100 (CP).

8. (1977) In the absence of an express provision in a will for the payment of a federal estate tax, an intention is imputed to a testator that a devise to his surviving spouse is not to be reduced in any way by the payment of such tax: *Sawyer v. Sawyer*, 53 OApp2d 323, 7 OO3d 422, 374 NE2d 166.

9. (1978) In the absence of an effective representative of any adverse interest, an administrator may further appeal to the supreme court where the trial court's determination has been reversed by the court of appeals: *Boulger v. Evans*, 54 OS2d 371, 8 OO3d 388, 377 NE2d 753.

10. (1978) The state of Ohio is not a necessary party in an action to construe a will where there has been no prior judicial determination of escheat to the state: *Boulger v. Evans*, 54 OS2d 371, 8 OO3d 388, 377 NE2d 753.

11. (1978) Attorney fees should not be awarded against the estate in an action to construe a will where the action is brought by a beneficiary and the result benefits only a certain class of beneficiaries: *Cowgill v. Faulconer*, 8 OO3d 423 (CP).

12. (1978) A devise in equal shares to the children of a deceased brother, and to the children of another brother is a devise to a class of persons identified by reference as the children of said brothers. All children in such class receive said devise per capita and not per stirpes: *Cowgill v. Faulconer*, 8 OO3d 423 (CP).

13. (1978) A devise in equal shares to the children of a deceased brother and the children of another brother "who survive me, share and share alike" required a per capita distribution, but limits the beneficiaries of the class to those persons who survive testatrix: *Cowgill v. Faulconer*, 8 OO3d 423 (CP).

14. (1978) It is within the sound discretion of the court to determine in each case if the facts and circumstances warrant the expense of attorney fees paid from the assets of the estate: *Cowgill v. Faulconer*, 8 OO3d 423 (CP).

15. (1978) A probate court has jurisdiction under this section to construe irrevocable inter vivos trusts executed by the testator where it is necessary to construe such trust agreements in order to give effect to the decedent's will: *Steman v. Chase Manhattan Bank*, 9 OO3d 395.

16. (1979) A bequest to a class of persons "living at the time of my death" includes in such class a child en ventre sa mere who is a viable unborn child capable of sustaining life outside the mother's womb even though not born until three days after the death of testatrix: *Ebbs v. Smith*, 11 OO3d 355 (CP).

17. (1980) A testator may provide for a bequest of specific property to pass as part of a devisee's share in the residuary estate: *Plyley v. Brown*, 18 OO3d 245 (CP).

18. (1982) Where a term in a will is susceptible to various meanings, the Probate Court may consider the circumstances surrounding the drafting of the instrument, in order to arrive at a construction consistent with the overall intent of the testator so as to uphold all parts of the will: *Wills v. Union Savings & Trust*, 69 OS2d 382, 23 OO3d 350, 433 NE2d 152.

19. (1982) Where a donee of a special testamentary power of appointment expresses his intent to exercise his power by will, and designates various charitable institutions as beneficiaries, the Probate Court may exercise its inherent equitable powers to give effect to the attempted

exercise of such power: *Wills v. Union Savings & Trust*, 69 OS2d 382, 23 OO3d 350, 433 NE2d 152.

20. (1982) The testatrix's intent in a will which bequeaths "all of my personal property and household goods to my niece" can be interpreted as bequeathing all personal property including intangible personal property: *Sandy v. Mouhot*, 1 OS3d 143, 1 OBR 178, 438 NE2d 117.

21. (1982) A will contest action does not constitute such a claim as to be susceptible of pleading as a matter of right as a counterclaim or cross-claim: *Hess v. Sommers*, 4 OApp3d 281, 4 OBR 500, 448 NE2d 494.

22. (1984) In a testamentary gift to persons named and the children of a deceased daughter, share and share alike, the persons entitled will, in the absence of anything to show a contrary intention, take per capita, and not per stirpes: *Johnson v. Johnson*, 13 OMisc2d 15, 13 OBR 302, 468 NE2d 945 (CP).

§ 2107.47 Protection of purchaser against later will.

(A) The title, estate, or interest of a bona fide purchaser, lessee, or encumbrancer, for value, in land situated in this state, that is derived from an heir of a decedent and acquired without knowledge of a will of the decedent that effectively disposes of it to another person, shall not be defeated by the production of a will of the decedent, unless, in the case of a resident decedent, the will is offered for probate within three months after the date of the appointment of the executor or administrator, or unless, in the case of a nonresident decedent, the will is offered for record in this state within three months after the date of the appointment of the executor or administrator.

(B) The title, estate, or interest of a bona fide purchaser, lessee, or encumbrancer, for value, in land situated in this state, that is derived from a beneficiary under a will of a decedent and acquired without knowledge of a later will of the decedent that effectively disposes of it to another person, shall not be defeated by the production of a later will of the decedent, unless, in the case of a resident decedent, the later will is offered for probate within three months after the date of the appointment of the executor or administrator, or unless, in the case of a nonresident decedent, the later will is offered for record in this state within three months after the date of the appointment of the executor or administrator.

*HISTORY: 139 v H 262. Eff 2-2-82.

§ 2107.48 Foreign will cannot be contested here.

There shall be no proceeding in this state to contest a will executed and proved according to the law of another state or of a foreign country, relative to property in this state; but if such will is set aside in the state or country in which it is executed and proved, it shall be invalid in this state as to persons claiming under it who have notice of its being set aside, and invalid as to all other persons from the

time an authenticated copy of the final order or decree setting it aside is filed in the office of the probate judge of the court in which the will is recorded.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.49 Rule in Shelley's case abolished.

CASE NOTES AND OAG

1. (1977) The rule of common law, known as the "rule in Shelley's Case" was abolished as to deeds by a statute effective August 22, 1941, and the abolition thereof cannot be applied retroactively: *Waters v. Monroe Coal Company*, 54 OMisc 37, 8 OO3d 344, 376 NE2d 977.

2. (1977) The rule is that where an ancestor took a freehold for life and, by the same conveyance, was limited either mediately or immediately to his heirs, the word "heirs" was a word of limitation, not of purchase, and the fee vested in the ancestor. It is a rule of property rather than one of construction: *Waters v. Monroe Coal Company*, 54 OMisc 37, 8 OO3d 344, 376 NE2d 977.

[§ 2107.50.1] § 2107.501 Sale or condemnation award.

ALR

Ademption of bequest of debt or balance on debt. 25 ALR4th 88.

§ 2107.52 Death of devisee or legatee.

Law Review

Death Without Issue Devises: The Case for Uniform Statutory Rules of Construction. Note. 49 CinLRev 396 (1980).

CASE NOTES AND OAG

1. (1978) The Anti-Lapse Statute, RC § 2107.52, does not apply to a member of a class who has predeceased testatrix where testatrix has expressly denied its application by limitation of the class of beneficiaries to those "who survive me": *Cowgill v. Faulconer*, 8 OO3d 423 (CP).

2. (1977) The residuary bequest to the testator's wife did not pass to her adopted daughter under RC § 2107.52, the anti-lapse statute, because the wife died within a few hours of the testator, in a common accident, and thus the bequest to the wife failed under RC § 2105.21: *Lyman v. McFerren*, 19 OO3d 116 (CP).

3. (1984) In a testamentary gift to persons named and the children of a deceased daughter, share and share alike, the persons entitled will, in the absence of anything to show a contrary intention, take per capita, and not per stirpes: *Johnson v. Johnson*, 13 OMisc2d 15, 13 OBR 302, 468 NE2d 945 (CP).

[§ 2107.52.1] § 2107.521 [Power of appointment not exercised.]

No provision of a will exercises a power of ap-

pointment held by the testator unless specific reference is made to the power.

*HISTORY: 138 v S 317. Eff 3-23-81.

ALR

Sufficiency of exercise of power specifying that it can be exercised only by specific or direct reference thereto. 15 ALR4th 810.

Validity of testamentary exercise of power of appointment by donee sane when will was executed but in sane thereafter. 19 ALR4th 1002.

CASE NOTES AND OAG

1. (1980) A general residuary clause in a will does not exercise a limited testamentary power of appointment when the clause does not specifically refer to the power: *Natl. Bank & Trust v. First Natl. Bank*, 62 OS2d 90, 16 OO3d 99, 403 NE2d 968.

2. (1982) Where a donee of a special testamentary power of appointment expresses his intent to exercise his power by will, and designates various charitable institutions as beneficiaries, the Probate Court may exercise its inherent equitable powers to give effect to the attempted exercise of such power: *Wills v. Union Savings & Trust*, 69 OS2d 382, 23 OO3d 350, 433 NE2d 152.

§ 2107.54 Contribution; exception.

(A) When real or personal property, devised or bequeathed, is taken from the devisee or legatee for the payment of a debt of the testator, the other devisees and legatees shall contribute their respective proportions of the loss to the person from whom such payment was taken so that the loss will fall equally on all the devisees and legatees according to the value of the property received by each of them.

If, by making a specific devise or bequest, the testator has exempted a devisee or legatee from liability to contribute to the payment of debts, or if the will makes a different provision for the payment of debts than the one prescribed in this section, the estate shall be applied in conformity with the will.

(B) A devisee or legatee shall not be prejudiced by the fact that the holder of a claim secured by lien on the property devised or bequeathed failed to present such claim to the executor or administrator for allowance within the time allowed by sections 2117.06 and 2117.07 of the Revised Code, and the devisee or legatee shall be restored by right of contribution, exoneration, or subrogation, to the position he would have occupied if such claim had been presented and allowed for such sum as is justly owing on it.

(C) A devisee of real estate that is subject to a mortgage lien that exists on the date of the testator's death, who does not have a right of exoneration that extends to that lien because of the operation of division (B) of section 2113.52 of the Revised Code, has a duty to contribute under this section to devisees and legatees who are burdened if the claim secured by the lien is presented and allowed pursu-

ant to Chapter 2117. of the Revised Code.

(D) This section does not affect the liability of the whole estate of the testator for the payment of his debts. This section applies only to the marshaling of the assets as between those who hold or claim under the will.

*HISTORY: 140 v S 115. Eff 10-14-83.

Law Review

S. 115 and H. 288: Steps toward logic and fairness in the Ohio probate law. Note. 10 UDAYLRev 213 (1984).

§ 2107.59 Sale of land by executor's successor.

When a last will and testament is admitted to probate, or a will made out of this state is admitted to record as provided by sections 2129.05 to 2129.07 of the Revised Code, and lands, tenements, or hereditaments are given or devised by such will to the executors named in the will, or nominated pursuant to a power as described in section 2107.65 of the Revised Code, to be sold or conveyed, or such estate thereby is ordered to be sold by such executors and one or more of the executors dies, refuses to act, or neglects to take upon himself the execution of the will, then all sales and conveyances of such estate by the executors who took upon themselves in this state the execution of the will, or the survivor of them, shall be as valid as if the remaining executors had joined in the sale and conveyance. But if none of such executors take upon themselves the execution of the will, or if all the executors who take out letters testamentary die, resign, or are removed before the sale and conveyance of such estate, or die, resign, or are removed after the sale and before the conveyance is made, the sale or conveyance, or both, shall be made by the administrator with the will annexed or, if any, by a successor executor or successor coexecutor nominated pursuant to a power as described in section 2107.65 of the Revised Code.

*HISTORY: 140 v S 115. Eff 10-14-83.

§ 2107.62 Expenses and fees.

The expense of proving and recording wills and of any action for declaratory judgment of validity shall be paid by the party at whose instance this is done. The witnesses and officers shall have the same fees for attendance and services as in other cases. When the executor or administrator is appointed, the expense shall be reimbursed out of the estate.

*HISTORY: 137 v H 505. Eff 1-1-79.

§ 2107.63 Addition to trust estates.

ALR

Exercise by will of trustor's reserved power to revoke or modify inter vivos trust. 81 ALR3d 959.

CASE NOTES AND OAG

1. (1976) The judgment of an out of state court rendered with regard to the validity and functions of a guardianship established by such court is entitled to full faith and credit in Ohio, but the exercise of a personal power of appointment, which had been granted to the beneficiary of an Ohio trust who subsequently becomes incompetent, by the guardian, after authorization by such court, is not binding upon the Ohio court administering the trust where the trustee and the takers-in-default under the trust were never parties in the guardianship proceedings authorizing the exercise of the power: *Toledo Trust Co. v. National Bank of Detroit*, 50 OApp2d 147, 4 OO3d 125, 362 NE2d 273.

2. (1976) A general power of appointment established in a beneficiary under a trust instrument may not be exercised by a guardian appointed after the beneficiary becomes incompetent, where such exercise is not to provide care, maintenance and support, but is to effect a testamentary disposition of property: *Toledo Trust Co. v. National Bank of Detroit*, 50 OApp2d 147, 4 OO3d 125, 362 NE2d 273.

3. (1966) Where the settlor exercises continued dominion and control over the property in a revocable inter vivos trust and the trustee continually yields to the will of the settlor, a mere agency or custodianship results, which is revoked upon the death of the so-called settlor and the property passes either under a will or pursuant to the intestate laws: *Osborn v. Osborn*, 10 OMisc 171, 39 OO2d 275, 226 NE2d 814 [affirmed 18 OS2d 144, 47 OO2d 310, 248 NE2d 191 (1969)].

4. (1961) A valid voluntary trust in praesenti, formally executed by a husband and existing at the time of his death, in which he reserved to himself the income therefrom during life, coupled with an absolute power to revoke the trust in whole or in part, as well as the right to modify the terms of the settlement and to control investments, bars the wife, upon the death of the settlor, from a claimed right to a distributive share of the property in the trust upon her election to take under the statutes of descent and distribution: *Smyth v. Cleveland Trust Co.*, 172 OS 489, 18 OO2d 42, 179 NE2d 60.

§ 2107.64 Trustee as beneficiary.

A policy of life insurance, or an employee or self-employed benefit plan including, but not limited to, an employee trust or annuity plan, a Keogh plan, an individual retirement account or annuity, or a retirement bond, may designate as beneficiary a trustee named by will. Upon qualification and issuance of letters of trusteeship, the proceeds of the insurance or benefit plan shall be payable to the trustee to be held and disposed of under the terms of the will as they exist as of the date of the death of the testator and in the same manner as other testamentary trusts are administered. However, if no qualified trustee makes claim to the proceeds from the insurance company or the trustee of or other person holding funds of the benefit plan within twelve months after the death of the insured or the person covered by the benefit plan, or if satisfactory evidence is furnished to the insurance company or the trustee of or other person holding funds of the benefit plan within that twelve-month period

showing that there is or will be no trustee to receive the proceeds, payment shall be made by the insurance company or the trustee of or other person holding funds of the benefit plan to the executors, administrators, or assigns of the insured or person covered by the benefit plan, unless otherwise provided by agreement with the insurance company or the trustee of or other person holding funds of the benefit plan during the lifetime of the insured or the person covered by the benefit plan.

The proceeds of the insurance or of the benefit plan as received by the trustee shall not be subject to debts of the insured or the person covered by the benefit plan or to estate tax to any greater or lesser extent than if the proceeds were payable to the beneficiary or beneficiaries named in the trust and not to the estate of the insured or the person covered by the benefit plan.

The insurance proceeds, or the proceeds of the benefit plan, so held in trust may be commingled with any other assets that may properly come into the trust.

Nothing in this section shall affect the validity of any life insurance policy beneficiary designation made prior to August 10, 1965, or the validity of any benefit plan beneficiary designation made prior to the effective date of this amendment, naming trustees of a trust established by will.

*HISTORY: 138 v S 317. Eff 3-23-81.

§ 2107.65 [Power to nominate executor.]

A testator may confer in his will, upon one or more persons, the power to nominate, in writing, an executor, coexecutor, successor executor, or successor coexecutor, and also may provide in his will that persons so nominated may serve without bond. If a will confers such a power, the holders of it have the authority to nominate themselves as executor, coexecutor, successor executor, or successor coexecutor unless the will provides to the contrary.

HISTORY: 140 v S 115. Eff 10-14-83.

Cross-References to Related Sections

Appointment and duties, RC § 2109.02.

Delivery of will, RC § 2107.08.

Letters testamentary shall issue, RC § 2113.05.

Procedure if executor renounces, RC § 2113.12.

Sale of land by executor's successor, RC § 2107.59.

Law Review

S. 115 and H. 288: Steps toward logic and fairness in the Ohio probate law. Note. 10 UDayLRev 213 (1984).

§ 2107.71 [Civil action to contest validity of will.]

(A) A person interested in a will or codicil admitted to probate in the probate court, which will or codicil has not been declared valid by judgment of a probate court pursuant to section 2107.084 [2107.08.4] of the Revised Code, or which will or codicil has been declared valid by judgment of a

probate court pursuant to section 2107.084 [2107.08.4] of the Revised Code, but which has been removed from the possession of the probate judge, may contest its validity by a civil action in the probate court in the county in which such will or codicil was admitted to probate.

(B) Except as otherwise provided in this division, no person may contest the validity of any will or codicil as to facts decided if it was submitted to a probate court by its maker during his lifetime and declared valid by judgment of the probate court and filed with the judge of the probate court pursuant to section 2107.084 [2107.08.4] of the Revised Code and if the will was not removed from the possession of the probate judge. A person may contest the validity of such a will, modification, or codicil as to such facts if the person is one who should have been named a party defendant in the action in which the will, modification, or codicil was declared valid, pursuant to section 2107.081 [2107.08.1] or 2107.084 [2107.08.4] of the Revised Code, and if the person was not named a defendant and properly served in such action. Upon the filing of an action contesting the validity of a will or codicil that is authorized by this division, the court shall proceed with the action in the same manner as if the will, modification, or codicil had not been previously declared valid under sections 2107.081 [2107.08.1] to 2107.085 [2107.08.5] of the Revised Code.

(C) No person may introduce, as evidence in an action authorized by this section contesting the validity of a will, the fact that the testator of the will did not file a petition for a judgment declaring its validity under section 2107.081 [2107.08.1] of the Revised Code.

*HISTORY: 137 v H 505. Eff 1-1-79.

ALR

Modern status: inheritability or descendability of right to contest will. 11 ALR4th 907.

Validity and enforceability of provision of will and trust instrument for forfeiture or reduction of share of contesting beneficiary. 23 ALR4th 369.

CASE NOTES AND OAG

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Contingent fees, 9, 10
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1. (1978) Where an action to contest a will is mistakenly docketed in the general division of the court of common pleas rather than the probate division of that court, prejudicial error is committed if the court dismisses the complaint instead of transferring the action to the docket of the probate division, pursuant to a motion of the complainant: *Siebenthal v. Summers*, 56 OApp2d 168, 10 OO3d 186, 381 NE2d 1344.

2. (1981) There is no constitutional or statutory right to a jury trial in a will contest action: *State ex rel. Kear v. Court of Common Pleas*, 67 OS2d 189, 21 OO3d 118, 423 NE2d 427.

3. (1982) A will contest action does not constitute such a claim as to be susceptible of pleading as a matter of right as a counterclaim or cross-claim: *Hess v. Sommers*, 4 OApp3d 281, 4 OBR 500, 448 NE2d 494.

4. (1982) A will contest raises the single and ultimate issue whether the writing produced is the last will or codicil of the testator: *Hess v. Sommers*, 4 OApp3d 281, 4 OBR 500, 448 NE2d 494.

5. (1982) Although legatees, devisees, heirs, executors and other interested parties are necessary parties to a will contest action, it does not follow that by bringing such an action those who contest the will are making claims against any other opposing party: *Hess v. Sommers*, 4 OApp3d 281, 4 OBR 500, 448 NE2d 494.

6. (1983) Where a will is attacked on grounds of undue influence, a wide range of inquiry should be permitted to bring before the jury the facts and influences bearing upon the preparation of the will: *Rich v. Quinn*, 13 OApp3d 102, 13 OBR 119, 468 NE2d 365.

7. (1983) In order to sustain allegations of undue influence in a will contest, a plaintiff must prove: (1) that the testator was "susceptible"; (2) another's opportunity to exert the influence; (3) the fact of improper influence exerted or attempted; and (4) the result showing the effect of such influence: *Rich v. Quinn*, 13 OApp3d 102, 13 OBR 119, 468 NE2d 365.

8. (1983) Because undue influence is usually proved by circumstantial evidence and because a wide range of evidence is to be permitted to establish undue influence, it is error for a trial court to grant a motion in limine limiting the presentation of evidence to those events occurring within a specified time period before and after the execution of the contested will: *Rich v. Quinn*, 13 OApp3d 102, 13 OBR 119, 468 NE2d 365.

9. (1983) A probate court is not bound by the fees provided for in a contingent fee contract. The court must determine the amount of fees which are reasonably necessary for the services rendered to the estate. Such a determination does not, however, preclude the payment by the beneficiaries of the balance of the contracted fee under the terms of the contingent fee contract: *In re Estate of Whitmore*, 13 OApp3d 170, 13 OBR 205, 468 NE2d 769.

10. (1983) Contingent fees are proper in will contest actions: *In re Estate of Whitmore*, 13 OApp3d 170, 13 OBR 205, 468 NE2d 769.

§ 2107.72 [Rules of procedure; jury trial.]

(A) The Rules of Civil Procedure govern all aspects of a will contest action, except as otherwise provided in sections 2107.71 to 2107.77 of the Revised Code.

(B)(1) Each party to a will contest action has the right to a jury trial of the action. To assert the right, a party shall demand a jury trial in the manner prescribed in the Rules of Civil Procedure. Subject to division (B)(2) of this section, if a party demands a jury trial in that manner, the action shall be tried to a jury.

(2) Notwithstanding any provision to the contrary in Civil Rule 38, a demand of a jury trial in a

will contest action may be withdrawn, if either of the following applies:

(a) All parties to the action who are not in default of answer, consent to the withdrawal of the demand prior to the commencement of the trial;

(b) All parties to the action who are not in default of answer and who are present at the time of the commencement of the trial, consent to the withdrawal of the demand.

*HISTORY: 140 v H 70. Eff 3-28-85.

Ohio Rules

Jury trial of right, CivR 38.

CASE NOTES AND OAG

1. (1981) A party to a will contest action does not have the right to a jury trial; instead, a probate court has discretion to determine whether to sit as the trier of fact in a will contest action or to impanel a jury: *State ex rel. Kear v. Court of Common Pleas*, 67 OS2d 189, 21 OO3d 118, 423 NE2d 427.

2. (1982) Due to the enactment of RC § 2107.72, amendments may be made to plaintiff's complaint to join necessary parties in a will contest action. These amendments would, under Civ. R. 15(C), relate back to the date of the original filing: *State ex rel. Smith v. Court*, 70 OS2d 213, 24 OO3d 320, 436 NE2d 1005.

3. (1983) In a will contest action, amendments may be made to a complaint to join necessary parties pursuant to CivR 15. Such amendments, under CivR 15(C), relate back to the date of the original filing: *Smith v. Klem*, 6 OS3d 16, 6 OBR 13, 450 NE2d 1171.

§ 2107.73 [Parties to will contest.]

CASE NOTES AND OAG

1. (1978) Revised Code § 109.25 requires that the attorney general be made a party to a will contest action involving a charitable trust. Failure to join the attorney general as a party to the action within four months after the will is admitted to probate is a jurisdictional defect and the action must be dismissed: *Hagler v. Barger*, 10 OO3d 71 (App).

2. (1979) A party who would take only if the in terrorem clause was enforced was not a necessary party to the will contest: *Bazo v. Siegel*, 58 OS2d 353, 12 OO3d 318, 390 NE2d 807.

3. (1981) One who, at the commencement of a will contest action, has a direct, pecuniary interest in the estate which would be impaired or defeated if the instrument admitted to probate is a valid will is a necessary party to such will contest action: *Trustees of Diocese of Southern Ohio v. Gilchrist*, 3 OApp3d 223, 3 OBR 254, 444 NE2d 451.

§ 2107.74 Order of probate prima-facie evidence of validity.

CASE NOTES AND OAG

1. (1983) A testator's treating physician's opinion is competent in an action where the testator's mental strength and weakness are in issue; however, that opinion is not conclusive as a matter of law: *Gannett v. Booker*, 12

OApp3d 49, 12 OBR 190, 465 NE2d 1326.

2. (1983) In a will contest action, opposing affidavits regarding the testator's mental powers are sufficient to put the testator's mental capacity directly and squarely in issue and thus, summary judgment on that issue would be improper: *Gannett v. Booker*, 12 OApp3d 49, 12 OBR 190, 465 NE2d 1326.

3. (1983) The order admitting a will to probate is prima facie evidence of the validity of the will. The burden of proof in a will contest is upon and never shifts from the contestants of the will. The contestants must produce evidence which furnishes a reasonable basis for sustaining their claim: *Gannett v. Booker*, 12 OApp3d 49, 12 OBR 190, 465 NE2d 1326.

§ 2107.76 [Probate forever binding; exceptions.]

If within four months after a will is admitted to probate, no person files an action permitted by section 2107.71 of the Revised Code to contest the validity of the will, the probate shall be forever binding, except as to persons under any legal disability, or to such persons for four months after such disability is removed. The rights saved shall not affect the rights of a purchaser, lessee, or encumbrancer for value in good faith, nor impose any liability upon a fiduciary who has acted in good faith, or upon a person delivering or transferring property to any other person under authority of a will, whether or not the purchaser, lessee, encumbrancer, fiduciary, or other person had notice, actual or constructive, of the legal disability.

*HISTORY: 137 v H 505. Eff 1-1-79.

CASE NOTES AND OAG

1. (1982) Due to the enactment of RC § 2107.72, amendments may be made to plaintiff's complaint to join necessary parties in a will contest action. These amendments would, under Civ. R. 15(C), relate back to the date of the original filing: *State ex rel. Smith v. Court*, 70 OS2d 213, 24 OO3d 320, 436 NE2d 1005.

2. (1984) The savings clause of RC § 2305.19 for commencing a new action when a suit has failed otherwise than on the merits is not available in regard to a will contest action. (*Alakiotis v. Lancione*, 12 OMisc 257 [41 OO2d 381], followed.): *Barnes v. Anderson*, 17 OApp3d 142, 17 OBR 242, 478 NE2d 248.

3. (1984) Where the plaintiff voluntarily dismisses a will contest action and files a civil suit to adjudicate the same issues, but subsequently discovers that the civil suit is without merit, it is not error for the trial court to overrule plaintiff's motion to vacate judgment, which was made in an effort to revive the will contest action, as the voluntary dismissal did not constitute an adjudication upon the merits under CivR 41(A)(1) and was therefore not a final judgment, order or proceeding within the meaning of CivR 60(B): *Barnes v. Anderson*, 17 OApp3d 142, 17 OBR 242, 478 NE2d 248.

§ 2108.01 [Definitions.]

Cross-References to Related Sections

See RC § 2108.53 which refers to this chapter.

ALR

Tests of death for organ transplant purposes. 76 ALR3d 913.

Law Review

Coerced Donation of Body Tissues: Can We Live With *McFall v. Shimp*? Comment. 40 OSLJ 409 (1979).

The Buying and Selling of Human Organs: Why Not? Comment. 13 AkronLRev 152 (1979).

Organ transplantation crises: should the deficit be eliminated through inter vivos sales? Comment. 17 AkronLRev 283 (1983).

§ 2108.02 [Rights of donor; donee.]

Forms

Gift of body or part of body effective upon death. 3 Couse Nos. 32.27-32.29

§ 2108.03 [Who may become donees.]

Cross-References to Related Sections

See RC § 2108.10 which refers to this section.

§ 2108.04 [Gift made effective upon death.]

(A) A gift of all or part of the body under division (A) of section 2108.02 of the Revised Code may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(B) A gift of all or part of the body under division (A) of section 2108.02 of the Revised Code may also be made by any document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, shall be signed by the donor in the presence of two witnesses who shall sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in the presence of two witnesses, having no affiliation with the donee, who shall sign the document in his presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

(C) A gift of parts of the body under division (A) of section 2108.02 of the Revised Code, may also be made by a statement to be provided for on all Ohio operator's or chauffeur's licenses or motorcycle operator's licenses, or endorsements, and on all identification cards. The gift becomes effective upon the death of the donor. The statement must be signed by the holder of the operator's or chauffeur's license or endorsement, or by the holder of the identification card, in the presence of two witnesses, who must sign the statement in the presence of the do-

nor. Delivery of the license or identification card during the donor's lifetime is not necessary to make the gift valid. The gift shall become invalidated upon expiration or cancellation of the license or endorsement, or identification card. Revocation or suspension of the license or endorsement will not invalidate the gift. The gift must be renewed upon renewal of each license, endorsement, or identification card. If the statement is ambiguous as to whether a general or specific gift is intended by the donor, the statement shall be construed as evidencing the specific gift only. As used in this division, "identification card" means an identification card issued under section 4507.50 of the Revised Code.

(D) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician may accept the gift as donee upon or following death, in the absence of any expressed indication that the donor desired otherwise. The physician who accepts the gift as donee under this division shall not participate in the procedures for removing or transplanting a part.

(E) Notwithstanding division (B) of section 2108.07 of the Revised Code, the donor may designate in his will, card, or other document of gift the surgeon or physician to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any surgeon or physician to carry out the appropriate procedures.

(F) Any gift by a person specified in division (B) of section 2108.02 of the Revised Code shall be made by a document signed by him or made by his telegraphic, recorded telephonic, or other recorded message.

*HISTORY: 137 v S 294 (Eff 6-2-78); 140 v S 302. Eff 10-1-84.

Forms

Gift of body or part of body by next of kin or other authorized person. 3 Couse No. 32.31

Gift of eyes to eye bank. 3 Couse No. 32.32

ALR

Tests of death for organ transplant purposes. 76 ALR3d 913.

[§ 2108.07.1] § 2108.071 Eye enucleation by embalmer.

Cross-References to Related Sections

See RC § 2108.60 which refers to this section.

§ 2108.10 [Forms.]

(A) The document of gift provided for in division

(B) of section 2108.04 of the Revised Code shall conform substantially to the following forms:

UNIFORM DONOR CARD

OF

Print or type name of donor

In the hope that I may help others, I hereby make this anatomical gift, if medically acceptable, to take effect upon my death. The words and marks below indicate my desire.

I give: (A) any needed organs or parts

(B) only the following organs or parts

.....

Specify the organ(s) or part(s)

for the purpose of transplantation, therapy, or medical research or education.

(C) my body for anatomical study, if needed.

Limitations or special wishes, if any:

Signed by the donor and the following two witnesses in the presence of each other:

.....

Signature of Donor

.....

Date of Birth of Donor

.....

Date Signed

.....

Witness

.....

Witness

This is a legal document under the Uniform Anatomical Gift Act or similar laws.

ANATOMICAL GIFT BY NEXT OF KIN OR OTHER AUTHORIZED PERSON

I hereby make this anatomical gift from the body ofwho died onin
(name) (date)

(city and state)

The marks in the appropriate squares and the words filled into the blanks below indicate my relationship to the deceased according to the following order of priority as presented by Ohio law, and indicate my desires respecting the gift.

1. I am the surviving:

1. ☐ spouse;
2. ☐ adult son or daughter;
3. ☐ parent;
4. ☐ adult brother or sister;
5. ☐ guardian;
6. ☐ authorized to dispose of the body;

2. I give:

- ☐ any needed needed organs or parts;
- ☐ the following organs or parts

3. To the following person (or institution):

(insert the name of a physician, hospital, re-

search or educational institution, storage banks, or individual);

4. For the following purposes:

- ☐ any purpose authorized by section 2108.03 of the Revised Code;
- ☐ transplantation;
- ☐ therapy;
- ☐ medical research and education;

5. After the donated organs or parts are removed, the remains of the body shall be disposed of in the following manner:

.....; at the expense of the following person:

Dated City and State

.....

Signature of Survivor

.....

Address of Survivor

(B) The statement of gift provided for in division (C) of section 2108.04 of the Revised Code shall conform substantially to the following form:

I hereby make an anatomical gift, to be effective upon my death, of:

(A) ☐ any needed organs or parts (if you mark this box, go to section (C))

or

(B) ☐ only the following organs or body part(s):
(list)

.....

(C) Donee

Date

Signature of donor

Witness

Witness

*HISTORY: 137 v S 294 (Eff 6-2-78); 139 v H 54. Eff 7-23-81.

§ 2108.11 Transaction involving human tissue not a sale.

Law Review

The Buying and Selling of Human Organs: Why Not? Comment. 13 AkronLRev 152 (1979).

§ 2108.21 [Blood donor.]

Any person seventeen years of age or older may donate blood in a voluntary blood program, which is not operated for profit, without consent of his parent or guardian. Before obtaining blood donations from students at high schools, joint vocational schools, or technical schools, a blood program shall arrange for the dissemination of written donation information to students to be shared with their parents or guardians. This information shall include a statement that the students will be requested to donate blood.

*HISTORY: 140 v H 162. Eff 9-22-83.

§ 2108.30 [Death defined.]

An individual is dead if he has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the brain, including the brain stem, as determined in accordance with accepted medical standards. If the respiratory and circulatory functions of a person are being artificially sustained, under accepted medical standards a determination that death has occurred is made by a physician by observing and conducting a test to determine that the irreversible cessation of all functions of the brain has occurred.

A physician who makes a determination of death in accordance with this section and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts or the acts of others based on that determination.

Any person who acts in good faith in reliance on a determination of death made by a physician in accordance with this section and accepted medical standards is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his actions.

HISTORY: 139 v S 98. Eff 3-15-82.

Law Review

Constitutional law—right to privacy—removal of life-support systems. *Leach v. Akron Gen'l Med. Center*, 58 OMisc 1 (CP 1980). Case note. 16 AkronLRev 162 (1982).

Judicial intervention in the exercise of the incompetent's right to die: bridge or barrier? Comment. 53 CinLRev 1049 (1984).

CASE NOTES AND OAG

1. (1983) In the case of a victim who was revived by chemical means and placed on a life support system, the last element of the offense of aggravated vehicular homicide did not occur until the brain death of the victim as determined by a physician based on accepted medical standards and tests: *State v. Long*, 7 OApp3d 248, 7 OBR 327, 455 NE2d 534.

2. (1984) Subsequent prosecution for aggravated vehicular homicide after a conviction of DUI does not violate double jeopardy where the victim was not declared brain dead until after the first conviction: *State v. Clark*, 20 OApp3d 266, 20 OBR 329, 485 NE2d 810.

§ 2108.50 Post-mortem examination; persons who may give consent.

Forms

Consent to autopsy or post-mortem examination executed by a survivor. 3 Couse No. 32.24, 32.25

Revocation of consent to autopsy. 3 Couse No. 32.26

§ 2108.53 [Removal of pituitary gland.]

(A) A county coroner who performs an autopsy under section 313.13 of the Revised Code may, ex-

cept as provided in divisions (B) and (C) of this section, remove the pituitary gland from the body and give it to the national pituitary agency to use for research and in manufacturing a hormone necessary for the physical growth of persons who are hypopituitary dwarfs, or to any other agency or organization to use for such research and manufacturing.

(B) If the pituitary gland is unnecessary for the successful completion of the autopsy or for evidence, the coroner shall not alter a gift made by the decedent or any other authorized person under Chapter 2108. of the Revised Code to an organization.

(C) If the pituitary gland is unnecessary for the successful completion of the autopsy or for evidence, the coroner shall not remove the pituitary gland under division (A) of this section if the next of kin of the decedent notifies the coroner that he objects to the actions of the coroner on the ground that the actions would violate the tenets of a well-recognized religion.

HISTORY: 137 v S 449. Eff 10-19-78.

§ 2108.60 [Coroner who performs autopsy may remove or authorize removal of eyes.]

(A) As used in this section:

(1) "Cornea" or "corneas" includes corneal tissue.

(2) "Eye bank" means a nonprofit corporation that is organized under the laws of this state, the purposes of which include obtaining, storing, and distributing corneas to be used for corneal transplants or other medical or medical research purposes, and that is exempt from federal taxation under subsection 501(c) of the Internal Revenue Code.

(3) "Eye bank official" means a person authorized by the trustees of an eye bank to make requests for corneas to be used for corneal transplants or other medical or medical research purposes.

(4) "Eye technician" means a person authorized by the medical director of an eye bank to remove the corneas of a decedent.

(5) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as amended.

(B) A county coroner who performs an autopsy, pursuant to section 313.13 of the Revised Code, may remove one or both corneas of the decedent, or a coroner may authorize a deputy coroner, physician or surgeon licensed pursuant to section 4731.14 of the Revised Code, embalmer authorized under section 2108.071 [2108.07.1] of the Revised Code to enucleate eyes, or eye technician to remove one or both corneas of a decedent whose body is the subject of an autopsy performed pursuant to section 313.13 of the Revised Code, if all of the following apply:

(1) The corneas are not necessary for the success-

ful completion of the autopsy or for evidence;

(2) An eye bank official has requested the removal of corneas and certified to the coroner in writing that the corneas will be used only for corneal transplants or other medical or medical research purposes;

(3) The removal of the corneas and gift to the eye bank do not alter a gift made by the decedent or any other person authorized under this chapter to an agency or organization other than the eye bank;

(4) The coroner, at the time he removes or authorizes the removal of the corneas, has no knowledge of an objection to the removal by any of the following:

(a) The decedent, as evidenced in a written document executed during his lifetime;

(b) The decedent's spouse;

(c) If there is no spouse, the decedent's adult children;

(d) If there is no spouse and no adult children, the decedent's parents;

(e) If there is no spouse, no adult children, and no parents, the decedent's brothers or sisters;

(f) If there is no spouse, no adult children, no parents, and no brothers or sisters, the guardian of the person of the decedent at the time of death;

(g) If there is no spouse, no adult children, no parents, no brothers or sisters, no guardian of the person of the decedent at the time of death, any other person authorized or under obligation to dispose of the body.

(C) Any person who acts in good faith under this section and without knowledge of an objection, as described in division (B)(4) of this section, to the removal of corneas is not liable in any civil or criminal action based on the removal.

HISTORY: 138 v H 415 (Eff 3-27-80); 140 v H 239. Eff 3-28-84.

§ 2109.01 Definition.

"Fiduciary" as used in Chapters 2101. to 2131. of the Revised Code, except as provided in section 2109.022 [2109.02.2] of the Revised Code, means any person, association, or corporation, other than an assignee or trustee for an insolvent debtor or a guardian under sections 5905.01 to 5905.19 of the Revised Code, appointed by and accountable to the probate court and acting in a fiduciary capacity for any person, association, or corporation, or charged with duties in relation to any property, interest, trust, or estate for the benefit of another; and includes the department of mental retardation and developmental disabilities or an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code, appointed by and accountable to the probate court as guardian or trustee with respect to mentally retarded and developmentally disabled persons.

HISTORY: 138 v H 900 (Eff 7-1-80); 141 v S 129. Eff 3-13-86.

§ 2109.02 Appointment and duties.

Every fiduciary, before entering upon the execution of a trust, shall receive letters of appointment from a probate court having jurisdiction of the subject matter of the trust.

The duties of a fiduciary shall be those required by law, and such additional duties as the court orders. Letters of appointment shall not issue until a fiduciary has executed a written acceptance of his duties, acknowledging that he is subject to removal for failure to perform his duties, and that he is subject to possible penalties for conversion of property he holds as a fiduciary. The written acceptance may be filed with the application for appointment.

No act or transaction by a fiduciary is valid prior to the issuance of letters of appointment to him. This section does not prevent an executor named in a will, or an executor nominated pursuant to a power as described in section 2107.65 of the Revised Code, from paying funeral expenses, or prevent necessary acts for the preservation of the trust estate prior to the issuance of such letters.

HISTORY: 140 v S 115. Eff 10-14-83.

Ohio Rules

Duty to notify court of current address, CPSupR 24(C).

Trustee's compensation, CPSupR 43.

Forms

Application for authority to administer estate (waiver of right to administer; entry setting hearing and ordering notice). 2 Couse No. 25.7

Fiduciary's bond. 2 Couse No. 25.9

[§ 2109.02.2] § 2109.022 [Limited liability of fiduciary excluded from certain powers.]

(A) As used in this section, "fiduciary" means a trustee under any testamentary or other trust, an executor or administrator, or any other person who is acting in a fiduciary capacity for any person, trust, or estate.

(B) When an instrument under which a fiduciary acts reserves to the grantor, or vests in an advisory or investment committee or in one or more other persons, including one or more fiduciaries, to the exclusion of the fiduciary or of one or more of several fiduciaries, any power, including, but not limited to, the authority to direct or approve the acquisition, disposition, or retention of any investment and the power to authorize any act which an excluded fiduciary may propose, any excluded fiduciary is not liable, either individually or as a fiduciary, for any loss that results from compliance with an authorized direction or approval of the grantor, committee, person, or persons, or for any loss that results from a failure to take any action proposed by an excluded fiduciary that requires a prior authorization of the grantor, committee, person, or persons if that excluded fiduciary timely sought but

failed to obtain that authorization. Any excluded fiduciary is relieved from any obligation to perform investment reviews and make recommendations with respect to any investments to the extent the grantor, and advisory or investment committee, or one or more other persons have authority to direct or approve the acquisition, disposition, or retention of any investment, unless otherwise expressly provided by the instrument under which the excluded fiduciary acts.

HISTORY: 141 v S 129. Eff 3-13-86.

§ 2109.03 Fiduciary's attorney.

Ohio Rules

Counsel fees, CPSupR 40.

Law Review

An ethical analysis of common estate planning practices—is good business bad ethics? Gerald P. Johnston. 45 OSJL 57, 115 (1984).

CASE NOTES AND OAG

1. (1984) A provision of a will which designates an attorney to represent the executor in the administration of the estate may not be considered as a condition precedent to the appointment of the executor, but is merely precautionary and not binding upon the fiduciary: *In re Estate of Dearnorff*, 10 OS3d 108, 10 OBR 434, 461 NE2d 1292.

2. (1984) Where the executrix of an estate appoints an attorney to represent her in the administration of the estate, a claim against the estate presented to the attorney but not to the executrix personally satisfies the presentment requirements of RC § 2117.06: *Peoples Natl. Bank v. Treon*, 16 OApp3d 410, 16 OBR 480, 476 NE2d 372.

§ 2109.04 Bond.

(A)(1) Unless otherwise provided by law, every fiduciary shall, prior to the issuance of his letters as provided by section 2109.02 of the Revised Code, file in the probate court in which the letters are to be issued a bond with a penal sum in such amount as may be fixed by the court, but in no event less than double the probable value of the personal estate and of the annual real estate rentals which will come into such person's hands as a fiduciary. The bond of a fiduciary shall be in a form approved by the court and signed by two or more personal sureties or by one or more corporate sureties approved by the court. It shall be conditioned that the fiduciary will faithfully and honestly discharge the duties devolving upon him as fiduciary, and shall be conditioned further as may be provided by law.

(2) Except as otherwise provided in this division, if the instrument creating the trust dispenses with the giving of a bond, the court shall appoint a fiduciary without bond, unless the court is of the opinion that the interest of the trust demands it. If the court is of that opinion, it may require bond to be

given in any amount it fixes. If a parent nominates a guardian for his child in a will and provides in the will that the guardian may serve without giving bond, the court may, in its discretion, appoint the guardian without bond or require the guardian to give bond in accordance with division (A)(1) of this section.

(3) A guardian of the person only does not have to give bond unless, for good cause shown, the court considers a bond to be necessary. When a bond is required of a guardian of the person only, it shall be determined and filed in accordance with division (A)(1) of this section. This division does not apply to a guardian of the person only nominated in a parent's will if the will provides that the guardian may serve without giving bond.

(B) When an executive secretary who is responsible for the administration of children services in the county is appointed as trustee of the estate of a ward pursuant to section 5153.18 of the Revised Code, and has furnished bond under section 5153.13 of the Revised Code, or when the department of mental retardation and developmental disabilities or an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code is appointed as trustee of the estate of a ward under such sections and any employees of the department or agency having custody or control of funds or property of such a ward have furnished bond under section 5123.59 of the Revised Code, the court may dispense with the giving of a bond.

(C) When letters are granted without bond, at any later period on its own motion or upon the application of any party interested, the court may require bond to be given in such amount as may be fixed by the court. On failure to give such bond, the defaulting fiduciary shall be removed.

No instrument authorizing a fiduciary whom it names to serve without bond shall be construed to relieve a successor fiduciary from the necessity of giving bond, unless the instrument clearly evidences such intention.

The court by which a fiduciary is appointed may reduce the amount of the bond of such fiduciary at any time for good cause shown.

When two or more persons are appointed as joint fiduciaries, the court may take a separate bond from each or a joint bond from all.

*HISTORY: 138 v H 900 (Eff 7-1-80); 140 v H 263. Eff 10-4-84.

Cross-References to Related Sections

Bond of special guardian for estate of hospitalized person, RC §§ 5122.41, 5123.95.

Forms

Application for authority to administer estate (waiver of

right to administer; entry setting hearing and ordering notice). 2 Couse No. 25.7
Fiduciary's bond. 2 Couse No. 25.9

§ 2109.05 Bond; trust created by will.

CASE NOTES AND OAG

1. (1983) In order to vacate an order of the probate court approving the final and distributive account on the basis of fraud [RC § 2109.35(A)], the movant must show fraud by clear and convincing evidence: *Mathe v. Fowler*, 13 OApp3d 273, 13 OBR 337, 469 NE2d 89.

2. (1983) Pursuant to RC § 2109.35(C), "good cause" exists to vacate a settlement order approving the final and distributive account when the probate court approved the final and distributive account under a mistake of fact, e.g., the court approved the account without the knowledge of a pending tort claim, provided the other requirements of RC § 2109.35(C) have been met by the party seeking to vacate the final and distributive account: *Mathe v. Fowler*, 13 OApp3d 273, 13 OBR 337, 469 NE2d 89.

§ 2109.07 Bond conditions, administrators; exception.

Forms

Fiduciary's bond. 2 Couse No. 25.9

§ 2109.08 Bond conditions, special administrator.

Forms

Fiduciary's bond. 2 Couse No. 25.9

§ 2109.09 Bond conditions, executors.

Forms

Fiduciary's bond. 2 Couse No. 25.9

§ 2109.10 Bond when executor or administrator is sole residuary legatee or distributee.

Forms

Bond of executor who is residuary legatee. 1 Couse No. 13.42

Fiduciary's bond. 2 Couse No. 25.9

§ 2109.12 Bond conditions, guardians.

Any bond required by or pursuant to section 2109.04 of the Revised Code of a guardian shall be conditioned as follows:

(A) If applicable, to make and return to the probate court on oath, within the time required by section 2111.14 of the Revised Code, a true inventory of all moneys, chattels, rights, credits, and real

estate belonging to the ward which come to his possession or knowledge;

(B) To administer and distribute according to law all moneys, chattels, rights, credits, and real estate belonging to the ward which come to the possession of the guardian or to the possession of any other person for him;

(C) To render upon oath a just and true account of his administration at any times required by or pursuant to section 2109.30 of the Revised Code.

*HISTORY: 140 v H 263. Eff 10-4-84.

§ 2109.13 [Deposit of personal property in lieu of bond.]

In any case in which a bond is required by the probate court from a fiduciary and the value of the estate or fund is such that the court deems it inexpedient to require security in the full amount prescribed by section 2109.04 of the Revised Code, the court may direct the deposit of any suitable personal property belonging to the estate or fund with a bank, building and loan association, savings and loan association, or trust company incorporated under the laws of this state or of the United States, as may be designated by order of the court.

The deposit shall be made in the name of the fiduciary, and the personal property desposited shall not be withdrawn from the custody of the bank, association, or trust company except upon the special order of the court. No fiduciary shall receive or collect the whole or any part of the principal represented by the personal property without the special order of the court. Such an order can be made in favor of the fiduciary only if the court within its discretion, having regard for the purpose for which the order is requested, the disposition to be made of the assets as may be released, the value of the assets as related to the total value of the estate, and the period of time the assets will remain in the possession of the fiduciary, finds that the original bond previously given and then in force will be sufficient to protect the estate; otherwise, the court, as a condition to the release of the personal property deposited, shall require the fiduciary to execute an additional bond in an amount that the court determines.

After the deposit has been made and after the filing with the court of a receipt for the personal property executed by the designated bank, association, or company, which receipt shall acknowledge that the personal property is held by the bank, association, or company subject to the order of the court, the court may fix or reduce the amount of the bond so that the amount of the penalty of the bond is determined with respect to the value of the remainder only of the estate or fund, without including the value of the personal property deposited. Neither the fiduciary nor his sureties shall be liable for any loss to the trust estate resulting from

the deposit as is authorized and directed by the court pursuant to this section, if the fiduciary has acted in good faith.

This section may be invoked simultaneously with the initial application for appointment of the fiduciary if an interim receipt of the bank, association, or company for which the application for appointment as depository is being made, acknowledging that it already has received temporary deposit of the personal property described in the application for appointment as depository, accompanies the simultaneous applications for appointment of fiduciary and for appointment of the depository.

*HISTORY: 138 v S 317. Eff 3-23-81.

§ 2109.16 One bond for two or more wards.

When a person is appointed guardian of several minors who are children of the same parentage and inherit from the same estate, separate bonds shall not be required. In such cases, only one application for letters of guardianship is necessary, and the letters issued to such guardian shall be in one copy and not one copy for each minor. The probate court approving and recording the bond of the guardian, if any, and issuing such letters shall charge the fees allowed by section 2101.16 of the Revised Code for such services. Such fees shall be charged but once for all the wards and not once for each ward.

*HISTORY: 140 v H 263. Eff 10-4-84.

§ 2109.19 Bond of indemnity to surety.

Forms

Application of surety for bond of indemnity. 1 Couse No. 13.24

Bond of indemnity to surety on bond of fiduciary. 1 Couse No. 13.23

§ 2109.21 Residence qualifications of fiduciary.

(A) An administrator, special administrator, administrator de bonis non, or administrator with the will annexed shall be a resident of this state and shall be removed on proof that he is no longer such resident.

(B) To qualify for appointment as executor or trustee, an executor or a trustee named in a will or nominated in accordance with any power of nomination conferred in a will, may be either a resident of this state or, as provided in this division, a nonresident of this state. To qualify for appointment, a nonresident executor or trustee named in, or nominated pursuant to, a will shall be either an individual who is related to the maker of the will by consanguinity or affinity, or a person who resides in a state that has statutes or rules that authorize the

appointment of a nonresident person who is not related to the maker of a will by consanguinity or affinity, as an executor or trustee when named in, or nominated pursuant to, a will. No such executor or trustee shall be refused appointment or removed solely because he is not a resident of this state.

The court may require that a nonresident executor or trustee named in, or nominated pursuant to, a will assure that all assets of the decedent that are in the county at the time of the death of the decedent remain in the county until distribution or until the court determines that the property may be removed from the county.

(C) A guardian shall be a resident of the county, except that the court may appoint a nonresident of the county who is a resident of the state as guardian of the person, the estate, or both; that a nonresident of the county or of the state may be appointed a guardian, if named in a will by a parent of a minor or if selected by a minor over the age of fourteen years as provided by section 2111.12 of the Revised Code; and that a nonresident of the county or of the state may be appointed a guardian if nominated in or pursuant to a durable power of attorney as described in division (B) of section 1337.09 of the Revised Code or a writing as described in division (A) of section 2111.121 [2111.12.1] of the Revised Code. A guardian, other than a guardian named in a will by a parent of a minor, selected by a minor over the age of fourteen years, or nominated in or pursuant to such a durable power of attorney or writing, may be removed on proof that he is no longer a resident of the county in which he resided at the time of his appointment, and shall be removed on proof that he is no longer a resident of the state.

(D) Any fiduciary, whose residence qualifications are not defined in this section shall be a resident of the state, and shall be removed on proof that he is no longer a resident of the state.

(E) Any fiduciary, in order to assist in the carrying out of his fiduciary duties, may employ agents who are not residents of the county or of the state.

*HISTORY: 139 v S 247 (Eff 3-15-83); 140 v S 115. Eff 10-14-83.

Cross-References to Related Sections

Appointment of guardian, RC § 2111.02.

CASE NOTES AND OAG

1. (1978) A probate court is under no duty to appoint a nonresident corporation, licensed to do business in Ohio, as executor of the estate of a resident testator who designated such corporation to act in that capacity: In re Emery, 59 OApp2d 7, 13 OO3d 44, 391 NE2d 746.

2. (1983) Where a will provides for the selection process of a successor trustee of a testamentary trust, the intention of the testator as it affects the power of the probate court to name a successor trustee is controlling: In re Trust of Selsor, 13 OApp3d 164, 13 OBR 198, 468 NE2d 745.

§ 2109.23 Allowance of compensation.

Ohio Rules

Executor's and administrator's commissions, CPSupR 41.
Guardian's compensation, CPSupR 42.
Trustee's compensation, CPSupR 43.

§ 2109.24 Resignation or removal of fiduciary.

CASE NOTES AND OAC

1. (1980) Revised Code § 2109.24 authorizes the trial court to remove a fiduciary when the "interest of the trust demands it." The removal of a fiduciary pursuant to this statute is within the sound discretion of the trial court, and absent a clear abuse of that discretion, a reviewing court will not reverse an order of a lower court removing a fiduciary: *In re Estate of Jarvis*, 67 OApp2d 94, 21 OO3d 411, 425 NE2d 939.

2. (1983) The removal of an executor of an estate is discretionary with the probate court. The executor's actions need not amount to violations of law or even cause injury to the estate to warrant a finding that the best interests of the estate will be served by his removal. There is no requirement that the court's finding in favor of removal be supported by clear and convincing evidence: *In re Estate of Bost*, 10 OApp3d 147, 10 OBR 199, 460 NE2d 1156.

§ 2109.26 Vacancy before termination of the trust; accounting; successor fiduciary.

CASE NOTES AND OAC

1. (1983) Where a will provides for the selection process of a successor trustee of a testamentary trust, the intention of the testator as it affects the power of the probate court to name a successor trustee is controlling: *In re Trust of Selsor*, 13 OApp3d 164, 13 OBR 198, 468 NE2d 745.

§ 2109.29 Rights as to shares in corporation.

Cross-References to Related Sections

Voting of shares by fiduciary, RC § 1701.46.

§ 2109.30 Accounts of fiduciaries.

(A) Within nine months after his appointment, every executor and administrator shall render an account of his administration. After the initial account is rendered, every executor and administrator shall render further accounts at least once each year. Except as provided in division (C) of this section, every fiduciary, other than an executor, administrator, or guardian of the person only, shall render an account of the administration of his estate or trust at least once in each two years. An account shall be rendered by a guardian of the person only at any time, or by any other fiduciary at any time other than those mentioned in this section, upon the order of the court either at its own

instance, or upon the motion of any person interested in the estate or trust, for good cause shown. Except as provided in division (C) of this section, every fiduciary, other than a guardian of the person only, shall render a final account within thirty days after completing the administration of the estate or the termination of his trust, or within any other period of time that the court may order.

Every account shall include an itemized statement of all receipts of the fiduciary during the accounting period and of all disbursements and distributions made by him during the accounting period. The itemized disbursements and distributions shall be verified by vouchers or proof, except in the case of an account rendered by a corporate fiduciary subject to section 1109.16 of the Revised Code. In addition, the account shall include an itemized statement of all funds, assets, and investments of the estate or trust known to or in the possession of the fiduciary at the end of the accounting period, and shall show any changes in investments since the last previous account. The accounts of testamentary trustees shall, and the accounts of other fiduciaries may, show receipts and disbursements separately identified as to principal and income.

Every account shall be upon the signature and oath of the fiduciary. When an account is rendered by two or more joint fiduciaries, the court may allow the account upon the signature and oath of one of them.

Upon the filing of every account, the fiduciary, except corporate fiduciaries subject to section 1109.16 of the Revised Code, shall exhibit to the court, for its examination, the securities shown in the account as being in the hands of the fiduciary, or the certificate of the person in possession of the securities, if held as collateral or pursuant to section 2109.13 or 2131.21 of the Revised Code, and a passbook or certified bank statement showing as to each depository the fund deposited to the credit of the trust. The court may designate a deputy clerk, an agent of a corporate surety on the bond of the fiduciary, or another suitable person whom the court appoints as commissioner to make the examination and to report his findings to the court. When securities are located outside the county, the court may appoint a commissioner or request another probate court to make the examination and to report its findings to the court. The court may examine the fiduciary under oath concerning the account.

When a fiduciary is authorized by law or by the instrument governing distribution to distribute the assets of the estate or trust, in whole or in part, he may do so and include a report of the distribution in his succeeding account.

An account showing complete administration before distribution of assets shall be designated "final account." An account filed subsequent to the final

account and showing distribution of assets shall be designated "account of distribution." An account showing complete administration and distribution of assets shall be designated "final and distributive account."

(B) In estates of decedents in which the sole legatee or heir is also the executor or administrator, no partial accountings are required.

In estates of decedents in which none of the legatees or heirs is under a legal disability, each partial accounting of the executor or administrator may be waived by the written consent of all the legatees or heirs filed in lieu of a partial accounting otherwise required.

(C)(1) The court may waive, by order, an account that division (A) of this section requires of a guardian of the estate or a guardian of the person and estate, other than an account made pursuant to court order, if any of the following circumstances apply:

(a) The assets of the estate consist entirely of real property;

(b) The assets of the estate consist entirely of personal property, that property is held by a bank, building and loan association, savings and loan association, or trust company in accordance with section 2109.13 of the Revised Code, and the court has authorized expenditures of not more than five thousand dollars annually for the support, maintenance, or, if applicable, education of the ward;

(c) The assets of the estate consist entirely of real property and of personal property that is held by a bank, building and loan association, savings and loan association, or trust company in accordance with section 2109.13 of the Revised Code, and the court has authorized expenditures of not more than five thousand dollars annually for the support, maintenance, or, if applicable, education of the ward.

(2) The order of a court entered pursuant to division (C)(1) of this section is prima-facie evidence that a guardian of the estate or a guardian of the person and estate has authority to make expenditures as described in division (C)(1)(b) or (c) of this section.

*HISTORY: 138 v S 317 (Eff 3-23-81); 140 v S 171 (Eff 6-13-84); 140 v H 263. Eff 10-4-84.

Ohio Rules

Accounts of fiduciaries, CPSupR 32.

Forms

Assets remaining in fiduciary's hands. 2 *Couse* No. 25.44
Fiduciary's account. (entry setting hearing and ordering notice). 2 *Couse* No. 25.42

Receipts and disbursements. 2 *Couse* No. 25.43

Waiver of partial account. 2 *Couse* No. 25.48

ALR

Judgment in guardian's final accounting proceedings as res judicata in ward's subsequent action against guardian. 34 ALR4th 1121.

§ 2109.31 Citation to file account.

Ohio Rules

Citations; extension of time for filing, CPSupR 32(A).

Counsel fees, CPSupR 40.

Guardian's compensation, CPSupR 42.

Trustee's compensation, CPSupR 43.

§ 2109.32 Hearing on account; notice.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

Forms

Entry approving and settling account. 2 *Couse* No. 25.47

Publication of notice (multiple estates) (proof of publication). 2 *Couse* No. 25.46

Publication of notice (single estate) (proof of publication). 2 *Couse* No. 25.45

§ 2109.33 Service of additional notice; exceptions to account.

CASE NOTES AND OAG

1. (1984) A beneficiary of an inter-vivos trust, the res of which is to be comprised of the assets of two probate estates, has a very "real interest" in the administration of the estates and is a "party affected thereby," and is thus entitled to file exceptions to the accounts filed in both estates. (RC §§ 2109.33 and 2109.35, construed.): *Ollick v. Rice*, 16 OApp3d 448, 16 OBR 529, 476 NE2d 1062.

§ 2109.35 Effect of order settling account.

CASE NOTES AND OAG

1. (1978) Probate Courts have no jurisdiction over claims for money damages resulting from fraud: *Alexander v. Compton*, 57 OApp2d 89, 11 OO3d 81, 385 NE2d 638.

2. (1984) A beneficiary of an inter-vivos trust, the res of which is to be comprised of the assets of two probate estates, has a very "real interest" in the administration of the estates and is a "party affected thereby," and is thus entitled to file exceptions to the accounts filed in both estates. (RC §§ 2109.33 and 2109.35, construed.): *Ollick v. Rice*, 16 OApp3d 448, 16 OBR 529, 476 NE2d 1062.

§ 2109.36 Order of distribution.

CASE NOTES AND OAG

1. (1975) Where a testator executes an agreement under which shares of stock he owns are placed in a voting trust, and later executes a will containing a testamentary trust whose res is to be those shares, the exchange of shares for voting trust certificates is not deemed to have divested the testator of his ownership of the stock and the beneficial interest retained by the testator in those shares is sufficient to constitute the res of the testamentary trust: *Roelofs v. Apple*, 49 OApp2d 155, 3 OO3d 202, 359 NE2d 710.

§ 2109.44 Fiduciaries not allowed to have dealings with estate; exception.

CASE NOTES AND OAG

1. (1984) Revised Code § 2109.44, which prohibits self-dealings by an estate fiduciary, is equally applicable to the attorney employed by that fiduciary: *Ollick v. Rice*, 16 OApp3d 448, 16 OBR 529, 476 NE2d 1062.

§ 2109.45 Affidavit before private sale confirmed.

Ohio Rules

Application to sell personalty, CPSupR 31.

§ 2109.50 Proceedings when assets concealed or embezzled.

CASE NOTES AND OAG

1. (1976) Where a decedent, prior to her death, transfers assets from one bank account to another in violation of an injunction, such transfer will not support an action to recover the funds under RC § 2109.50 against either the bank in which the funds reside or against decedent's joint tenant in the new account: *Dodd v. Crowe*, 51 OApp2d 40, 5 OO3d 163, 365 NE2d 1257.

2. (1976) An injunction, granted in a pending divorce proceeding, which restrains both parties from selling and encumbering assets, has no application in an action under RC § 2109.50 to recover concealed assets of the estate of one of the parties so enjoined: *Dodd v. Crowe*, 51 OApp2d 40, 5 OO3d 163, 365 NE2d 1257.

§ 2109.58 Inventory by fiduciary.

ALR

Delay of executor or administrator in filing inventory, account, or other report, or in completing administration and distribution of estate, as ground for removal. 33 ALR4th 708.

§ 2109.59 [Failure of fiduciary to make payment or distribution.]

CASE NOTES AND OAG

1. (1978) The creditor of a decedent who obtains a judgment in a court of common pleas against the estate of a decedent pursuant to RC § 2117.12 may commence a joint action against the fiduciary and the surety on the bond of the fiduciary under RC § 2109.59 in the probate court of the county wherein the fiduciary received his appointment: *In re Grant*, 56 OApp2d 207, 10 OO3d 205, 381 NE2d 1348.

2. (1978) When a joint action is commenced in probate court by a judgment creditor against a fiduciary and the surety on the bond of the fiduciary under RC § 2109.59, the probate court may enter a judgment against the surety in behalf of a judgment creditor whose claim has been wrongfully rejected by the fiduciary where the court finds the fiduciary liable for the claim and the surety is made a

party to the action: *In re Grant*, 56 OApp2d 207, 10 OO3d 205, 381 NE2d 1348.

§ 2111.01 Definitions.

As used in Chapters 2101. to 2131. of the Revised Code:

(A) "Guardian," other than a guardian under sections 5905.01 to 5905.19 of the Revised Code, means any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent or minor, or the department of mental retardation and developmental disabilities, an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code, or the legal rights service created by section 5123.60 of the Revised Code when appointed by the probate court to have the care and management of the person of an incompetent.

(B) "Ward" means any person for whom a guardian as defined in this section is acting.

(C) "Resident guardian" means a guardian appointed by a probate court to have the care and management of property in Ohio belonging to a nonresident ward.

(D) "Incompetent" means any person who by reason of advanced age, improvidence, or mental or physical disability or infirmity, chronic alcoholism, mental retardation, or mental illness, is incapable of taking proper care of himself or his property or fails to provide for his family or other persons for whom he is charged by law to provide, or any person confined to a penal institution within this state.

*HISTORY: 137 v S 415 (Eff 7-20-78); 138 v H 900. Eff 7-1-80.

The effective date of HB 900 is set by section 3 of the act.

Cross-References to Related Sections

Civil liability abolished for seduction of adult who is not incompetent, RC § 2305.29.

Legal rights service may serve as guardian, RC § 5123.94.

§ 2111.02 Appointment of a guardian.

When found necessary, the probate court on its own motion or on application by any interested party shall appoint, subject to section 2109.21 and division (B) of section 2111.121 [2111.12.1] of the Revised Code, a guardian of the person, the estate, or both, of a minor, or incompetent, provided the person for whom the guardian is to be appointed is a resident of the county or has a legal settlement in the county and, except in the case of a minor, has had the opportunity to have the assistance of counsel in the proceeding for the appointment of such guardian. An interested party includes, but is not limited to, a person nominated in a durable power of attorney as described in division (B) of section 1337.09 of the Revised Code or in a writing as de-

scribed in division (A) of section 2111.121 [2111.12.1] of the Revised Code.

If a person is incompetent due to physical disability, the consent of the incompetent must first be obtained before the appointment of a guardian for him, and such person may select a guardian who shall be appointed if a suitable person.

The guardian of an incompetent, by virtue of such appointment shall be the guardian of the minor children of his ward, unless the court appoints some other person as their guardian.

When the primary purpose of the appointment of a guardian is, or was, the collection, disbursement, or administration of moneys awarded by the veterans administration to the ward, or assets derived from such moneys, no court costs shall be charged in the proceeding for the appointment or in any subsequent proceedings made in pursuance of the appointment, unless the value of the estate, including the moneys then due under the veterans administration award, exceeds one thousand five hundred dollars.

*HISTORY: 140 v S 115. Eff 10-14-83.

ALR

Waiver or estoppel in incompetent legal representation cases. 2 ALR4th 807.

Law Review

Judicial intervention in the exercise of the incompetent's right to die: bridge or barrier? Comment. 53 CinLRev 1049 (1984).

CASE NOTES AND OAG

1. (1976) A citizen of Ohio has no lawful claim against the state, the Governor, or the General Assembly for civil wrongs committed against him, by one entrusted with his property, as a result of his commitment in a state institution for the mentally ill: *El v. State*, 48 OApp2d 290, 2 OO3d 241, 357 NE2d 61.

2. (1981) A court should be extremely hesitant to impose an involuntary guardianship. Where an application for appointment is contested, a thorough medical examination should be ordered: *In re Guardianship of Corless*, 2 OApp3d 92, 2 OBR 104, 440 NE2d 1203.

3. (1981) The spirit and purpose of the provision of RC § 2111.02 that "if a person is incompetent due to physical disability, the consent of the incompetent must first be obtained before the appointment of a guardian for him" requires that the "consent" should be in writing or made in open court by the proposed ward who is mentally competent: *In re Guardianship of Gallagher*, 2 OApp3d 218, 2 OBR 238, 441 NE2d 593.

4. (1981) The required degree of proof of mental incompetency is by clear and convincing evidence: *In re Guardianship of Gallagher*, 2 OApp3d 218, 2 OBR 238, 441 NE2d 593.

5. (1983) Civil Rule 17(B) clearly authorizes a court other than the probate court to appoint a guardian ad litem for the protection of an individual the court believes to be an incompetent. Probate courts do not possess exclusive jurisdiction in these matters: *Dailey v. Dailey*, 11 OApp3d 121, 11 OBR 176, 463 NE2d 427.

§ 2111.03 Application for appointment as guardian.

Ohio Rules

Applications for appointment as guardian, CPSupR 34(A), (B).

[§ 2111.03.1] § 2111.031 [Appointment of physicians and other persons to determine need for guardianship.]

In connection with an application for the appointment of a guardian for an alleged incompetent, the court may appoint physicians and other qualified persons to examine, investigate, or represent the alleged incompetent, to assist the court in deciding whether a guardianship is necessary. If the person is determined to be an incompetent and a guardian is appointed for him, the costs, fees, or expenses incurred to so assist the court shall be charged either against the estate of the person or against the applicant, unless the court determines, for good cause shown, that the costs, fees, or expenses are to be recovered from the county, in which case they shall be charged against the county. If the person is not determined to be an incompetent or a guardian is not appointed for him, the costs, fees, or expenses incurred to so assist the court shall be charged against the applicant, unless the court determines, for good cause shown, that the costs, fees, or expenses are to be recovered from the county, in which case they shall be charged against the county.

A court may require the applicant to make an advance deposit of an amount that the court determines is necessary to defray the anticipated costs of examinations of an alleged incompetent and to cover fees or expenses to be incurred to assist it in deciding whether a guardianship is necessary.

HISTORY: 140 v H 263. Eff 10-4-84.

Law Review

Judicial intervention in the exercise of the incompetent's right to die: bridge or barrier? Comment. 53 CinLRev 1049 (1984).

§ 2111.04 Notice of appointment.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

CASE NOTES AND OAG

1. (1981) When an application for appointment of a guardian is made and personal personal service is not perfected on the person for whom appointment is sought pursuant to RC § 2111.04(B)(1), the trial court is without jurisdiction to appoint a guardian for such person and the cause must be dismissed: *In re Guardianship of Corless*, 2 OApp3d 92, 2 OBR 104, 440 NE2d 1203.

§ 2111.05 [Estates not more than ten thousand dollars.]

When the whole estate of a ward, or of several wards jointly, under the same guardianship, does not exceed ten thousand dollars in value, the guardian may apply to the probate court for an order to terminate the guardianship. Upon proof that it would be for the best interest of the ward to terminate the guardianship, the court may order the guardianship terminated, and direct the guardian, if the ward is a minor, to deposit the assets of the guardianship in a depository authorized to receive fiduciary funds, payable to the ward when he attains majority, or the court may authorize the delivery of the assets to the natural guardian of the minor, to the person by whom the minor is maintained, to the executive secretary of children services in the county, or to the minor himself.

If the ward is an incompetent, and the court orders the guardianship terminated, the court may authorize the deposit of the assets of the guardianship in a depository authorized to receive fiduciary funds in the name of a suitable person to be designated by the court, or if the assets do not consist of money, the court may authorize delivery to a suitable person to be designated by the court. The person receiving the assets shall hold and dispose of them in the manner the court directs.

If the court refuses to grant the application to terminate the guardianship, or if no such application is presented to the court, the guardian shall only be required to render account upon the termination of his guardianship, upon order of the probate court made upon its own motion, or upon the order of the court made on the motion of a person interested in the wards or their property, for good cause shown, and set forth upon the journal of the court.

If the estate is ten thousand dollars or less and the ward is a minor, the court may, without the appointment of a guardian by the court, or the giving of bond, authorize the deposit in a depository authorized to receive fiduciary funds, payable to the guardian when appointed, or to the ward when he attains majority, or the court may authorize delivery to the natural guardian of the minor, to the person by whom the minor is maintained, to the executive secretary who is responsible for the administration of children services in the county, to the department of mental retardation and developmental disabilities or to the administrator of an agency under contract with the department for the provision of protective service under sections 5123.55 to 5123.59 of the Revised Code, or to the minor himself.

If the whole estate of a person over eighteen years of age, who has been adjudged mentally ill or mentally retarded, does not exceed ten thousand dollars in value, the court may, without the appointment of a guardian by the court or the giving

of bond, authorize the deposit of the estate in a depository authorized to receive fiduciary funds in the name of a suitable person to be designated by the court, or if the assets do not consist of money, the court may authorize delivery to a suitable person to be designated by the court. The person receiving the assets shall hold and dispose of them in the manner the court directs.

*HISTORY: 137 v H 946 (Eff 8-7-78); 138 v H 900. Eff 7-1-80.

The effective date of HB 900 is set by section 3 of the act.

Ohio Rules

Estates of minors and proposed incompetents of ten thousand dollars or less, CPSupR 35.

§ 2111.06 [Guardian of the person.]

If the powers of the person appointed as guardian of a minor or incompetent are not limited by the order of appointment, such person shall be guardian both of the person and estate of the ward. In every instance the court shall appoint the same person as guardian of the person and estate of any such ward, unless in the opinion of the court the interests of the ward will be promoted by the appointment of different persons as guardians of the person and of the estate.

A guardian of the person of a minor shall be appointed as to a minor having neither father nor mother, or whose parents are unsuitable persons to have the custody and tuition of such minor, or whose interests, in the opinion of the court, will be promoted thereby. A guardian of the person shall have the custody and provide for the maintenance of the ward, and if the ward is a minor, such guardian shall also provide for the education of such ward.

Before exercising its jurisdiction to appoint a guardian of a minor, the court shall comply with the jurisdictional standards of sections 3109.21 to 3109.37 of the Revised Code.

*HISTORY: 137 v S 135. Eff 10-25-77.

Law Review

Family Law: Uniform Child Custody Jurisdiction Act. Ohio Law Survey. 51 CinLRev 192 (1982).

Guardianship of adults with mental retardation: towards a presumption of competence. Comment. 14 AkronLRev 321 (1980).

Judicial intervention in the exercise of the incompetent's right to die: bridge or barrier? Comment. 53 CinLRev 1049 (1984).

CASE NOTES AND OAG

1. (1981) The Uniform Child Custody Jurisdiction Act, as adopted in Ohio, is applicable to and must be complied with in a guardianship termination proceeding: In re Guardianship of Wonderly, 67 OS2d 178, 21 OO3d 111, 423 NE2d 420.

§ 2111.07 Powers of guardian of person and estate.

CASE NOTES AND OAG

1. (1981) The Uniform Child Custody Jurisdiction Act, as adopted in Ohio, is applicable to and must be complied with in a guardianship termination proceeding: *In re Guardianship of Wonderly*, 67 OS2d 178, 21 OO3d 111, 423 NE2d 420.

§ 2111.08 Parents are natural guardians.

Ohio Rules

Application by parent-guardian for allowance of care and support of minor, CPSupR 34(D).

CASE NOTES AND OAG

1. (1980) It is the collective duty of parents to provide for their minor children, as opposed to third parties, irrespective of the legal rights of the parents between themselves: *Children's Hospital v. Johnson*, 68 OApp2d 17, 22 OO3d 11, 426 NE2d 515.

2. (1981) A noncustodial parent is not liable for the costs of an elective abortion performed on his minor child: *Akron City Hospital v. Anderson*, 68 OMisc 14, 22 OO3d 238, 428 NE2d 472 (MC).

3. (1981) Where a husband and wife are divorced, a wife may be required to assume some financial support for her minor children who are in the custody of the husband: *Hacker v. Hacker*, 5 OApp3d 46, 5 OBR 50, 448 NE2d 831.

§ 2111.10 Corporation as guardian.

Any appointment of a corporation as guardian shall apply to the estate only and not to the person, except that a nonprofit corporation organized under the laws of this state and entitled to tax exempt status under section 501(a) of the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as amended, that has a contract with the department of mental retardation and developmental disabilities to provide protective services may be appointed as a guardian of the person of a mentally retarded or other developmentally disabled person, as defined in division (A) of section 5123.55 of the Revised Code, and may serve as guardian pursuant to sections 5123.55 to 5123.59 of the Revised Code.

*HISTORY: 137 v S 415 (Eff 7-20-78); 138 v H 900. Eff 7-1-80.

The effective date of HB 900 is set by section 3 of the act.

Cross-References to Related Sections

Ending general partner status, RC § 1782.23.

Powers of partner exercised by legal representative or administrator, RC § 1782.43.

[§ 2111.12.1] § 2111.121 [Nomination for consideration of appointment as guardian.]

(A) A person may nominate in a writing, as described in this division, another person to be the

guardian of his person, estate, or both. The nomination is for consideration by a court if proceedings for the appointment of a guardian of the person, the estate, or both, for the person making the nomination are commenced at a later time. The person may authorize, in such a writing, the person nominated as guardian to nominate a successor guardian for consideration by a court. He also may direct, in such a writing, that bond be waived for a person nominated as guardian in it or nominated as a successor guardian in accordance with an authorization in it.

To be effective as a nomination, the writing shall be signed by the person making the nomination in the presence of two witnesses; signed by the witnesses; contain, immediately prior to their signatures, an attestation of the witnesses that the person making the nomination signed the writing in their presence; and be acknowledged by the person making the nomination before a notary public.

(B) If a person has nominated, in a writing as described in division (A) of this section or in a durable power of attorney as described in division (B) of section 1337.09 of the Revised Code, another person to be the guardian of his person, estate, or both, and proceedings for the appointment of a guardian for him are commenced at a later time, the court involved shall appoint the person nominated as guardian in the writing or durable power of attorney most recently executed if the person nominated is competent, suitable, and willing to accept the appointment. If the writing or durable power of attorney contains a waiver of bond, the court shall waive bond of the person nominated as guardian unless it is of the opinion that the interest of the trust demands it.

HISTORY: 140 v S 115. Eff 10-14-83.

Cross-References to Related Sections

Appointment of guardian, RC § 2111.02.

Residence qualifications of fiduciary, RC § 2109.21.

Law Review

S. 115 and H. 288: Steps toward logic and fairness in the Ohio probate law. Note. 10 UDayLRev 213 (1984).

§ 2111.13 Duties of guardian of person.

(A) When a guardian is appointed to have the custody and maintenance of a ward, and to have charge of the education of the ward, if he is a minor, the guardian's duties are as follows:

(1) To protect and control the person of his ward;

(2) To provide suitable maintenance for his ward when necessary, which shall be paid out of the estate of such ward upon the order of the guardian of the person;

(3) To provide such maintenance and education for such ward as the amount of his estate justifies when the ward is a minor and has no father or mother, or has a father or mother who fails to

maintain or educate him, which shall be paid out of such ward's estate upon the order of the guardian of the person;

(4) To obey all the orders and judgments of the probate court touching the guardianship.

(B) Except as provided in section 2111.131 [2111.13.1] of the Revised Code, no part of the ward's estate shall be used for the support, maintenance, or education of such ward unless ordered and approved by the court.

(C) A guardian of the minor may authorize or approve the provision to his ward of medical, health, or other professional care, counsel, treatment, or services unless the ward files objections with the probate court.

*HISTORY: 140 v H 263. Eff 10-4-84.

Ohio Rules

Application to determine amount allowed for support, maintenance, or education, CPSupR 34(C), (D).

CASE NOTES AND OAG

1. (1984) A guardian cannot, as a matter of law, revoke an inter vivos trust established by her ward prior to the ward's being declared incompetent without first obtaining court approval for the revocation: *Friedrich v. BancOhio Natl. Bank*, 14 OApp3d 247, 14 OBR 276, 470 NE2d 467.

[§ 2111.13.1] § 2111.131 [Court may order up to \$5,000 due minor to be paid to specified person.]

(A) The probate court may enter an order that authorizes a person under a duty to pay or deliver money or personal property to a minor who does not have a guardian of the person and estate or a guardian of the estate, to perform that duty in amounts not exceeding five thousand dollars annually, by paying or delivering the money or property to any of the following:

(1) The guardian of the person only of the minor;

(2) The minor's natural guardians, if any, as determined pursuant to section 2111.08 of the Revised Code;

(3) The minor himself;

(4) Any person who has the care and custody of the minor and with whom the minor resides, other than a guardian of the person only or a natural guardian;

(5) A financial institution incident to a deposit in a federally insured savings account in the sole name of the minor;

(6) A custodian designated by the court in its order, for the minor under sections 1339.31 to 1339.39 of the Revised Code.

(B) An order entered pursuant to division (A) of this section authorizes the person or entity specified in it, to receive the money or personal property on behalf of the minor from the person under the duty to pay or deliver it, in amounts not exceeding five

thousand dollars annually. Money or personal property so received by guardians of the person only, natural guardians, and custodians as described in division (A)(4) of this section may be used by them only for the support, maintenance, or education of the minor involved. The order of the court is prima-facie evidence that a guardian of the person only, a natural guardian, or a custodian as described in division (A)(4) of this section has the authority to use the money or personal property received.

(C) A person who pays or delivers moneys or personal property in accordance with a court order entered pursuant to division (A) of this section is not responsible for the proper application of the moneys or property by the recipient.

HISTORY: 140 v H 263. Eff 10-4-84.

§ 2111.14 Duties of guardian of estate.

Ohio Rules

Guardian's compensation, CPSupR 42.

ALR

Judgment in guardian's final accounting proceedings as res judicata in ward's subsequent action against guardian. 34 ALR4th 1121.

CASE NOTES AND OAG

1. (1981) The depositor of a payable-on-death (P.O.D.) account retains her rights to ownership and full control of such account during her lifetime. Following a finding of incompetency by the Probate Court, the depositor's ownership rights pass to the legally appointed guardian of her estate, including the right to designate a change in the registration of such account: *Miller v. Peoples Federal S. & L. Assn.*, 68 OS2d 175, 22 OO3d 406, 429 NE2d 439.

2. (1982) Where a guardian sues for divorce on behalf of her ward who has previously been adjudged incompetent, and the suit is opposed by the ward's spouse on the ground that the ward does not want a divorce, and there is testimony that the ward can communicate and express his feelings, the court may not grant a divorce under RC § 3105.01(K) without first determining if the ward is competent to testify, and to express his intentions as to the divorce: *Boyd v. Edwards*, 4 OApp3d 142, 4 OBR 234, 446 NE2d 1151.

3. (1984) Any legal expense incurred by the guardian must directly benefit the estate or the ward in order to be chargeable to the estate: *In re Wonderly*, 10 OS3d 40, 10 OBR 304, 461 NE2d 879.

4. (1984) The appointment by the probate court of a guardian of an incompetent person will not interfere with the jurisdiction of the court of common pleas in a pending divorce action over the assets of the marriage: *Butler v. Butler*, 19 OMisc2d 1, 19 OBR 52, 482 NE2d 998 (CP).

§ 2111.18 Claim for injury to ward or damage to property; settlement.

When personal injury, damage to tangible or intangible property, or damage or loss on account of personal injury or damage to tangible or intangible

property is caused to a ward by wrongful act, neglect, or default that would entitle the ward to maintain an action and recover damages for the injury, damage, or loss, the guardian of the estate of the ward may adjust and settle the claim with the advice, approval, and consent of the probate court. In the settlement, if the ward is a minor, the parent or parents may waive all claim for damages on account of loss of service of the minor, and that claim may be included in the settlement. However, when it is proposed that the claim involved be settled for ten thousand dollars or less, the court may, upon application by any person whom the court may authorize to receive and receipt for the settlement, authorize the settlement without the appointment of a guardian and authorize the delivery of the moneys to the natural guardian of the minor, to the person by whom the minor is maintained, or to the minor himself. The court may authorize the minor or person receiving the moneys to execute a complete release on account of the receipt. The payment shall be a complete and final discharge of any such claim.

*HISTORY: 138 v S 317. Eff 3-23-81.

Ohio Rules

Counsel fees, CPSupR 39, 40.

Settlement of claims for injuries to minors, CPSupR 36.

Settlement of claims for injuries to minors under ten thousand dollars, CPSupR 37.

Settlement of claims for wrongful death, CPSupR 38.

Forms

Application for authority to settle claim of minor for personal injury or property damage without intervention of a guardian. 3 *Couse* No.30.16

[§ 2111.18.1] § 2111.181 Settlement of claim of emancipated minor.

Forms

Application for finding that minor is emancipated and for authority to settle claim without appointment of guardian. 3 *Couse* No.30.17

§ 2111.22 Release of ward's tax title by guardian.

When a ward has title to real estate by tax title only, the guardian, by deed of release and quitclaim, may convey such ward's interest or title to the person entitled to redeem such real estate, upon receiving from such person the amount paid for such tax title with the forfeiture and interest allowed by sections 319.52 and 323.121 [323.12.1] of the Revised Code. If the guardian tenders such deed to the person entitled to redeem such real estate and he refuses to accept and pay for it, he shall not recover costs in any proceeding thereafter instituted to redeem such real estate.

*HISTORY: 139 v H 379. Eff 9-21-82.

§ 2111.23 Guardian ad litem.

Law Review

Judicial intervention in the exercise of the incompetent's right to die: bridge or barrier? *Comment.* 53 *CinLRev* 1049 (1984).

CASE NOTES AND OAG

1. (1983) Neither RC § 2111.23 nor CivR 17(B) requires the appointment of a guardian ad litem for a minor who has no appointed guardian in adoption proceedings: *In re Adoption of Carnes*, 8 OApp3d 435, 8 OBR 560, 457 NE2d 903.

§ 2111.42 Foreign guardians may receive property.

If a guardian is appointed by a court of another state or territory or by a foreign country for a non-resident ward, and the ward is entitled to money or other property in the custody of an executor, administrator, or other person in this state, the executor, administrator, or other person may deliver the money or other property to the guardian of the nonresident ward.

*HISTORY: 140 v H 263. Eff 10-4-84.

§ 2111.47 Wards other than minors.

CASE NOTES AND OAG

1. (1981) If at the hearing upon the motion for termination of a guardianship the ward is not able to be present at the hearing, the decision of the court should be delayed until the court has had the opportunity to observe that person: *In re Guardianship of Gallagher*, 2 OApp3d 218, 2 OBR 238, 441 NE2d 593.

§ 2113.01 What court shall grant letters.

Forms

Entry appointing fiduciary; letters of authority (certificate of appointment and incumbency). 2 *Couse* No.25.12

§ 2113.02 Limitation for granting original administration.

Administration shall not be originally granted as of right after the expiration of twenty years from the death of the testator or intestate. But, within his county, each probate judge may grant letters of original administration upon the estate of a deceased person after the expiration of twenty years upon the petition of interested persons or their agent and on good cause shown therefor. Before allowing the prayer of such petition, such judge may direct notice thereof to be given by publication, for a period not exceeding thirty days, in one or more of the newspapers published in the county where such petition is filed.

*HISTORY: 137 v H 42. Eff 10-7-77.

§ 2113.03 Release from administration.

Cross-References to Related Sections

See RC § 2105.06.2 which refers to this section.

Forms

Application to relieve estate from administration (waiver of notice; entry setting hearing and ordering notice). 2 *Couse* No.25.15

Appointment of appraiser (entry setting hearing; entry approving appraiser). 2 *Couse* No.25.6

Assets and liabilities of estate to be relieved from administration (certification). 2 *Couse* 25.16

Entry relieving estate from administration. 2 *Couse* No.25.21

Notice of application to relieve estate from administration. 2 *Couse* No.25.18

Publication of notice (multiple estates) (proof of publication). 2 *Couse* No.25.20

Publication of notice (single estate) (proof of publication). 2 *Couse* No.25.19

Waiver of notice of application to relieve estate from administration. 2 *Couse* No.25.17

§ 2113.04 Payment of wages of deceased employee without administration.

Any employer, including the state or a political subdivision, at any time after the death of his or its employee, may pay all wages or personal earnings due to the deceased employee to: (A) the surviving spouse; (B) any one or more of the children eighteen years of age or older; or (C) the father or mother of the deceased employee, preference being given in the order named, without requiring letters testamentary or letters of administration to be issued upon the estate of the deceased employee, and without requiring an Ohio estate tax release where the wages or personal earnings do not exceed two thousand five hundred dollars. The payment of wages or personal earnings is a full discharge and release to the employer from any claim for the wages or personal earnings. If letters testamentary or letters of administration are thereafter issued upon the estate of the deceased employee, any person receiving payment of wages or personal earnings under this section is liable to the executor or administrator for the sum received by him.

*HISTORY: 137 v H 901. Eff 2-28-79.

Cross-References to Related Sections

Death of school administrators, payment of unused vacation leave, RC § 3319.02

Unused sick leave, in case of death, to be paid to estate, RC § 124.39

§ 2113.05 Letters testamentary shall issue.

When a will is approved and allowed, the probate court shall issue letters testamentary to the executor named in the will or to the executor nominated by holders of a power as described in section 2107.65 of the Revised Code, or to the executor

named in the will and to a coexecutor nominated by holders of such a power, if he is suitable, competent, accepts the appointment, and gives bond if that is required.

If no executor is named in a will and no power as described in section 2107.65 of the Revised Code is conferred in the will, or if the executor named in a will or nominated pursuant to such a power dies, fails to accept the appointment, resigns, or is otherwise disqualified and the holders of such a power do not have authority to nominate another executor or no such power is conferred in the will, or if such a power is conferred in a will but the power cannot be exercised because of the death of a holder of the power, letters of administration with the will annexed shall be granted to a suitable person or persons, named as devisees or legatees in the will, who would have been entitled to administer the estate if the decedent had died intestate, unless the will indicates an intention that the person or persons shall not be granted letters of administration. Otherwise, the court shall grant letters of administration with the will annexed to some other suitable person.

*HISTORY: 139 v S 247 (Eff 3-15-83); 140 v S 115. Eff 10-14-83.

ALR

Who is resident within meaning of statute prohibiting appointment of nonresident executor or administrator. 9 ALR4th 1223.

Law Review

An ethical analysis of common estate planning practices—is good business bad ethics? Gerald P. Johnston. 45 OSLJ 57, 86 (1984).

S. 115 and H. 288: Steps toward logic and fairness in the Ohio probate law. Note. 10 UDayLRev 213 (1984).

CASE NOTES AND OAG

1. (1978) A probate court is under no duty to appoint a nonresident corporation, licensed to do business in Ohio, as executor of the estate of a resident testator who designated such corporation to act in that capacity: In re Emery, 59 OApp2d 7, 13 OO3d 44, 391 NE2d 746.

2. (1981) While acknowledging deference to the testator's nomination of an executor, the court, in determining the limits of a reasonably disinterested applicant, may consider factors including, but not limited to: (1) the nature and extent of the hostility and distrust among the parties; (2) the degree of conflicting interests and obligations, both personal and financial; and (3) the underlying and aggregate complexities of the conflict: In re Estate of Henne, 66 OS2d 232, 20 OO3d 228, 421 NE2d 506.

3. (1981) In accordance with RC § 2113.05, a "suitable" person qualified for appointment as executor is an applicant who is reasonably disinterested and in a position to reasonably fulfill the obligations of a fiduciary: In re Estate of Henne, 66 OS2d 232, 20 OO3d 228, 421 NE2d 506.

4. (1981) Revised Code § 2113.05 vests authority in the Probate Court to exercise discretion in determining if an applicant for letters testamentary is a suitable person; an order granting or refusing letters of appointment is reversible only upon a finding of an abuse of discretion: In re

Estate of Henne, 66 OS2d 232, 20 OO3d 228, 421 NE2d 506.

5. (1984) A provision of a will which designates an attorney to represent the executor in the administration of the estate may not be considered as a condition precedent to the appointment of the executor, but is merely precautionary and not binding upon the fiduciary: In re Estate of Deardorff, 10 OS3d 108, 10 OBR 434, 461 NE2d 1292.

6. (1983) The removal of an executor of an estate is discretionary with the probate court. The executor's actions need not amount to violations of law or even cause injury to the estate to warrant a finding that the best interests of the estate will be served by his removal. There is no requirement that the court's finding in favor of removal be supported by clear and convincing evidence: In re Estate of Bost, 10 OApp3d 147, 10 OBR 199, 460 NE2d 1156.

§ 2113.06 To whom letters of administration shall be granted.

ALR

Adverse interest or position as disqualification for appointment of administrator, executor, or other personal representative. 11 ALR4th 638.

§ 2113.07 Application for appointment as executor or administrator.

Ohio Rules

Notice of hearing on appointment, CPSupR 27.

Forms

Application for authority to administer estate (waiver of right to administer; entry setting hearing and ordering notice). 2 *Couse* No.25.7

Notice of hearing on appointment of fiduciary. 2 *Couse* No.25.11

Waiver of right to administer. 2 *Couse* No.25.10

§ 2113.08 Notice of appointment.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

Forms

Notice of appointment of fiduciary (multiple estates) (proof of publication). 2 *Couse* No.25.14

Notice of appointment of fiduciary (single estate) (proof of publication). 2 *Couse* No.25.13

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 *OSLJ* 321, 350 (1976).

§ 2113.12 Procedure if executor renounces.

If a person named as executor in the will of a decedent, or nominated as an executor by holders of a power as described in section 2107.65 of the Revised Code, refuses to accept the trust, or, if after being cited for that purpose, neglects to appear and accept, or if he neglects for twenty days after the probate of the will to give any required bond, the

probate court shall grant letters testamentary to the other executor, if there is one capable and willing to accept the trust, and if there is no such other executor named in the will or nominated by holders of a power as described in section 2107.65 of the Revised Code, the court shall commit administration of the estate, with the will annexed, to some suitable and competent person, pursuant to section 2113.05 of the Revised Code.

*HISTORY: 140 v S 115. Eff 10-14-83.

§ 2113.18 Removal of executor or administrator.

(A) The probate court may remove any executor or administrator if there are unsettled claims existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate or persons interested therein.

(B) The probate court may remove any executor or administrator upon motion of the surviving spouse, children, or other next of kin of the deceased person whose estate is administered by the executor or administrator if both of the following apply:

(1) The executor or administrator refuses to bring an action for wrongful death in the name of the deceased person;

(2) The court determines that a prima-facie case for a wrongful death action can be made from the information available to the executor or administrator.

*HISTORY: 139 v S 176. Eff 6-1-82.

CASE NOTES AND OAG

1. (1983) The removal of an executor of an estate is discretionary with the probate court. The executor's actions need not amount to violations of law or even cause injury to the estate to warrant a finding that the best interests of the estate will be served by his removal. There is no requirement that the court's finding in favor of removal be supported by clear and convincing evidence: In re Estate of Bost, 10 OApp3d 147, 10 OBR 199, 460 NE2d 1156.

§ 2113.31 Responsibility of executor or administrator.

Forms

Fiduciary's account (entry setting hearing and ordering notice). 2 *Couse* No.25.42

[§ 2113.31.1] § 2113.311 Management of real estate by executor or administrator.

CASE NOTES AND OAG

1. (1982) The executor of a decedent's estate has the power to bring an action for forcible detention against a tenant where the decedent's will contains two conflicting provisions regarding the disposition of real property and

where the sale of the property could be necessary to carry out the provisions of the will which provide for cash bequests: *Bilikam v. Bilikam*, 2 OApp3d 300, 2 OBR 332, 441 NE2d 845.

2. (1982) An executor of a will is not required to comply with the procedural requirements of RC § 2113.31.1 where the will specifically directs the executor to sell property: *Bilikam v. Bilikam*, 2 OApp3d 300, 2 OBR 332, 441 NE2d 845.

§ 2113.35 Commissions.

Executors and administrators shall be allowed commissions upon the amount of all the personal estate, including the income from the personal estate, that is received and accounted for by them and upon the proceeds of real estate that is sold under authority contained in a will, as follows:

(A) For the first one hundred thousand dollars, at the rate of four per cent;

(B) All above one hundred thousand dollars and not exceeding four hundred thousand dollars, at the rate of three per cent;

(C) All above four hundred thousand dollars, at the rate of two per cent.

Executors and administrators shall also be allowed a commission of one per cent on the value of real estate that is not sold. Executors and administrators shall also be allowed a commission of one per cent on all property that is not subject to administration and that is includable for purposes of computing the Ohio estate tax, except joint and survivorship property.

The basis of valuation for the allowance of such commissions on property sold shall be the gross proceeds of sale, and for all other property the date of death value of the other property as finally fixed for the purposes of computing the Ohio estate tax. The commissions allowed to executors and administrators in this section shall be received in full compensation for all their ordinary services.

If the probate court finds, after hearing, that an executor or administrator has, in any respect, not faithfully discharged his duties as executor or administrator, the court may deny the executor or administrator any compensation whatsoever or may allow the executor or administrator the reduced compensation that the court thinks proper.

*HISTORY: 138 v S 158. Eff 7-30-80.

Ohio Rules

Executor's and administrator's commissions, CPSupR 41.

§ 2113.36 Further allowance; counsel fees.

Ohio Rules

Counsel fees, CPSupR 40.

Executor's and administrator's commissions, CPSupR 41.

CASE NOTES AND OAG

1. (1977) There is an implied duty on the part of an attorney to keep account of the time involved in a matter

under consideration for the determination of his fee: *In re Wood*, 55 OApp2d 67, 9 OO3d 255, 379 NE2d 256.

2. (1977) Although a judge of a trial court is experienced in probate law, the determination of a reasonable attorney's fee in a matter before him must be based upon evidence adduced in open court and he may not substitute his own knowledge in its stead: *In re Wood*, 55 OApp2d 67, 9 OO3d 255, 379 NE2d 256.

3. (1984) It is incumbent upon a fiduciary attempting to collect both an attorney fee and a broker's commission to demonstrate that he was properly acting in a dual capacity and that he, in fact, performed extraordinary services (as a broker), so as to justify an award of broker's commission in addition to the legal fee: *Ollick v. Rice*, 16 OApp3d 448, 16 OBR 529, 476 NE2d 1062.

4. (1984) Where the attorney for an estate and the executor are one and the same, the value of services performed by the attorney and their reasonableness must be demonstrated on the record by the executor: *In re Estate of Secoy*, 19 OApp3d 269, 19 OBR 430, 484 NE2d 160.

5. (1984) Revised Code § 2113.36 authorizing the payment out of the estate of attorney fees for services rendered in the administration of the estate provides for the payment of reasonable fees. Where a judicial determination is required to fix the amount to be thus paid, the determining factor is the reasonable value of the services. This determination cannot be arrived at in a controverted case solely by the application of a predetermined formula of percentages of inventory values: *In re Estate of Secoy*, 19 OApp3d 269, 19 OBR 430, 484 NE2d 160.

§ 2113.38 Purchase of property by surviving spouse.

ALR

Testamentary option to purchase estate property at surviving optionee's death. 18 ALR4th 578.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 333, 357 (1976).

CASE NOTES AND OAG

1. (1979) When devisees, other than the surviving spouse, have added substantial value to the mansion house after the appraisal, the surviving spouse is not entitled to purchase the property at the appraisal price. Such a sale would unconscionably prejudice the rights of the parties in interest: *Wobser v. Tanner*, 60 OS2d 28, 14 OO3d 195, 396 NE2d 753.

2. (1980) Revised Code § 2113.38, which authorizes the surviving spouse to file a petition to purchase the "mansion house" at the appraised value, contemplates an adversary-type proceeding in which the defendants—the heirs, devisees, legatees, lienholders et al.—are given the opportunity to show the presence of fraud, collusion or the manifest inadequacy of the price fixed in the inventory: *Bratanov v. Riemenschneider*, 1 OApp3d 42, 1 OBR 251, 439 NE2d 434.

3. (1980) If the evidence obtained from the adversary proceeding shows fraud, collusion or the manifest inadequacy of the price fixed in the inventory, the court shall order a reappraisal as provided in RC § 2115.17. If these items are not shown, then the price fixed in the inventory is final: *Bratanov v. Riemenschneider*, 1 OApp3d 42, 1 OBR 251, 439 NE2d 434.

4. (1980) The adversary proceeding contemplated by RC § 2113.38 should permit a defendant the opportunity to have pretrial discovery in the form of an independent appraisal: *Bratanov v. Riemenschneider*, 1 OApp3d 42, 1 OBR 251, 439 NE2d 434.

5. (1980) Filing an objection to the inventory and appraisal is not a condition precedent to attacking the appraisal under RC § 2113.38, nor a waiver of any rights: *Bratanov v. Riemenschneider*, 1 OApp3d 42, 1 OBR 251, 439 NE2d 434.

§ 2113.40 Sale of personal property.

Ohio Rules

Application to sell personalty, CPSupR 31.

Forms

Application to sell personal property (entry authorizing sale of personal property). 2 *Couse* No.25.30

Entry authorizing sale of personal property. 2 *Couse* No.25.33

Notice of sale of personal property. 2 *Couse* No.25.32

Schedule of personal property for sale (consent to sale; waiver of notice). 2 *Couse* No.25.31

§ 2113.42 Report of sale.

Ohio Rules

Application to sell personalty, CPSupR 31.

§ 2113.51 Property may be delivered to legatee.

Forms

Bond to executor to redeliver property specifically bequeathed. 1 *Couse* No.13.41

§ 2113.52 [Devisee takes subject to tax lien; exoneration of mortgage lien.]

(A) A devisee taking real estate under a devise in a will, unless the will otherwise provides, or an heir taking real estate under the statutes of descent and distribution shall take the real estate subject to all taxes, penalties, interest, and assessments which are a lien against that real estate.

(B) If real estate devised in a will is subject to a mortgage lien that exists on the date of the testator's death, the person taking the real estate under the devise has no right of exoneration for the mortgage lien, regardless of a general direction in the will to pay the testator's debts, unless the will specifically provides a right of exoneration that extends to that lien.

*HISTORY: 139 v H 379 (Eff 9-21-82); 140 v S 115. Eff 10-14-83.

Cross-References to Related Sections

Contribution; exception, RC § 2107.54.

Law Review

S. 115 and H. 288: Steps toward logic and fairness in the Ohio probate law. Note. 10 UDayLRev 213 (1984).

§ 2113.53 Payment of legacies and distributions.

Forms

Bond to executor, by legatee, to refund legacy if necessary. 1 *Couse* No.13.40

[§ 2113.53.2] § 2113.532 Transfer of automobile title.

(A) Upon the death of a married resident who owned at least one automobile at the time of death, the interest of the deceased spouse in one automobile that is not otherwise specifically disposed of by testamentary disposition and that is selected by the surviving spouse immediately shall pass to the surviving spouse upon transfer of title to the automobile in accordance with section 4505.10 of the Revised Code. The automobile shall not be considered an estate asset and shall not be included and stated in the estate inventory.

(B) The executor or administrator, with the approval of the probate court, may transfer title to an automobile owned by the decedent:

(1) To the surviving spouse, when the automobile is purchased by the surviving spouse pursuant to section 2113.38 of the Revised Code;

(2) To a distributee;

(3) To a purchaser.

(C) The executor or administrator may transfer title to an automobile owned by the decedent without the approval of the probate court:

(1) To a legatee entitled to the automobile under the terms of the will;

(2) To a distributee if the distribution of the automobile is made without court order pursuant to section 2113.55 of the Revised Code;

(3) To a purchaser if the sale of the automobile is made pursuant to section 2113.39 of the Revised Code.

(D) As used in division (A) of this section, "automobile" includes a truck, if the deceased spouse did not own an automobile and if the truck was used as a method of conveyance by the deceased spouse or his family when the deceased spouse was alive.

*HISTORY: 137 v S 277 (Eff 1-13-78); 139 v H 620 (Eff 9-9-82); 140 v S 260. Eff 9-20-84.

Cross-References to Related Sections

Application for certificate of title, RC § 4505.06.

Definitions, RC § 4549.41.

Certificate of title when ownership of motor vehicle changed by operation of law, RC § 4505.10.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSUJ 321, 324, 336 (1976).

CASE NOTES AND OAG

1. (1980) A surviving spouse taking against a will of a deceased spouse is entitled to an automobile under RC § 2113.53.2 if the will does not specifically dispose of said vehicle: *In re Green*, 63 OMisc 44, 17 OO3d 388.

2. (1980) The value of an automobile taken under RC § 2113.53.2 shall not be considered an asset of the estate in computing a surviving spouse's interest under RC § 2105.06: *In re Green*, 63 OMisc 44, 17 OO3d 388.

3. (1983) "Automobile" as used in RC § 2113.53.2 means a "passenger car," except when the decedent did not own a passenger car, in which case "automobile" includes a truck, if the truck was used as a method of conveyance by the deceased spouse or his family when the deceased spouse was alive: OAG No.83-083.

4. (1983) Pursuant to RC § 2113.53.2, where the decedent left an automobile, a truck, and a motor home or any other type of motor vehicle, the surviving spouse is entitled to the automobile, but may not select from among the other vehicles: OAG No.83-083.

§ 2113.55 Distribution in kind.

Forms

Application to distribute in kind (consent to distribution in kind; entry setting hearing and ordering notice; entry approving distribution in kind). 2 *Couse* No.25.34

Entry approving distribution in kind. 2 *Couse* No.25.37

Notice of hearing on application to distribute in kind. 2 *Couse* No.25.36

Schedule of property to be distributed in kind (consent to distribution in kind). 2 *Couse* No.25.35

§ 2113.60 Repealed, 138 v S 317, § 2 [GC § 10509-187; 114 v 320(442); Bureau of Code Revision, 10-1-53]. Eff 3-23-81.

§ 2113.61 Application for certificate of transfer; duty of court.

Forms

Application for certificate of transfer [real estate] (entry issuing certificate of transfer). 2 *Couse* No.25.39

Certificate of transfer (authentication). 2 *Couse* No.25.40

Entry issuing certificate of transfer. 2 *Couse* No.25.41

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 332 (1976).

§ 2113.63 Fees

For recording and indexing the certificate provided for in section 2113.61 of the Revised Code, the county recorder shall be paid in fees provided by section 317.32 of the Revised Code for the recording and indexing of deeds, and the probate court shall be allowed the fees provided by section 2101.16 of the Revised Code for similar certificates.

The probate judge shall tax and collect, as other costs of administering the estate, the fees of the recorder and the court.

*HISTORY: 141 v H 419. Eff 3-13-86.

§ 2113.75 Foreign executor or administrator may prosecute suit in this state.

CASE NOTES AND OAG

1. (1977) Revised Code § 2113.75 places a nonresident personal representative suing in Ohio in the same position as other nonresident plaintiffs rather than the position of a personal representative appointed in Ohio: *McCluskey v. Rob San Services, Inc.*, 10 OO3d 248.

§ 2113.85 [Definitions.]

As used in sections 2113.85 to 2113.90 of the Revised Code:

(A) "Estate" means the gross estate of a decedent as determined for federal estate tax purposes under Subtitle B of the "Internal Revenue Code of 1954," 68 Stat. 373, 26 U.S.C. 2001, as amended, and for Ohio estate tax purposes under Chapter 5731. of the Revised Code.

(B) "Person interested in the estate" means any person who is entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or property interest included in the decedent's estate. A "person interested in the estate" includes, but is not limited to, a personal representative, guardian, and trustee. A "person interested in the estate" does not include a creditor of the decedent or of the decedent's estate.

(C) "Tax" means the federal estate tax determined under Subtitle B of the "Internal Revenue Code of 1954," 68 Stat. 373, 26 U.S.C. 2001, as amended, the Ohio estate tax determined under Chapter 5731. of the Revised Code, and any interest and penalties imposed in addition to the estate taxes.

(D) "Fiduciary" means an executor, administrator, or other person who by virtue of his representation of the decedent's estate is required to pay the tax.

HISTORY: 138 v S 317. Eff 3-23-81.

The provisions of § 3 of SB 317 (138 v —) read as follows:

SECTION 3. Sections 2113.85, 2113.86, 2113.87, 2113.88, 2113.89, 2113.90, and 2113.91 of the Revised Code, as enacted by this act, do not apply to taxes due on account of the death of a decedent who dies within six months after the effective date of this act.

Cross-References to Related Sections

Estate tax explained, RC § 2113.86 et seq.

Generation-skipping transfer tax apportioned in same manner, RC § 2113.91.

§ 2113.86 [Apportionment of estate taxes.]

Unless the will or other governing instrument otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made as follows:

(A) Except as provided in divisions (B) and (C) of this section, the tax shall be computed as to each person's interest in the estate by multiplying the applicable tax by a fraction, the numerator of which is the value of the person's interest against which the apportionment computation is being made, and the denominator of which is the aggregate value of the interests of all persons interested in the estate against which apportionment is made. The values used in determining the tax shall be used for the apportionment of the tax under this section.

(B) Any tax attributable to or otherwise apportioned against the interest of a beneficiary under a decedent's will, which interest is not part of the residuary estate passing under the will, shall be apportioned as follows:

(1) The tax shall first be charged to and paid by each person's interest in the residuary estate to the extent that each person's interest is subject to apportionment under division (A) of this section, and the tax shall be charged to each person's interest in the same manner as the tax directly attributable to each person's interest is apportioned under division (A) of this section.

(2) If the tax exceeds the total value of the residuary estate that is subject to apportionment under division (A) of this section or if none of the residuary estate is subject to apportionment under this section, all or any part of the tax that cannot be apportioned under division (B)(1) of this section shall be charged to and paid by each person's interest under the residuary estate that may be exempt from apportionment under any other provisions of sections 2113.85 to 2113.90 of the Revised Code, and each person's otherwise exempt interest shall bear its proportionate part of the tax based on the value of that person's interest, as determined under division (A) of this section.

(3) If the tax exceeds the total value of the residuary estate passing under the decedent's will, any part of the tax that cannot be apportioned to the residuary estate shall be apportioned to the interest of the beneficiaries of each devise or bequest that passes under the will other than as part of the residuary estate and that is subject to apportionment, in the manner provided under division (A) of this section.

(C) No interest in income and no estate for years or for life or other temporary interest in any property or fund shall be subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder shall be chargeable against the principal of the property or funds subject to the temporary interest and remainder.

(D) The fiduciary or any person interested in the estate who objects to the manner of apportionment of the tax may apply to the court that has jurisdiction of the estate and request the court to determine the apportionment of the tax under this section. If there are no probate proceedings, the probate court of the county in which the decedent was domiciled at death shall, upon application by the fiduciary or any other person, determine the apportionment of the tax under this section.

The fiduciary may notify any person interested in the estate of the manner of the apportionment of tax determined by the fiduciary. Upon receipt of notice, the person interested in the estate may, within thirty days after the date of receipt of the notice, indicate his objection to the manner of apportionment by application to the probate court. If the person interested in the estate fails to make the application within the thirty-day period, he is bound by the manner of apportionment determined by the fiduciary.

If the probate court finds that the assessment of penalties and interest assessed with respect to the tax is due to delay caused by the negligence of the fiduciary, the court may charge the fiduciary with the amount of the assessed penalties and interest. In any suit or judicial proceeding to recover from any person interested in the estate the amount of the tax apportioned to that person in accordance with sections 2113.85 to 2113.90 of the Revised Code, the determination of the probate court is conclusive.

HISTORY: 138 v S 317. Eff 3-23-81.

See provisions, § 3 of SB 317 (138 v —) following RC § 2113.85.

§ 2113.87 [Fiduciary may withhold or recover amount of tax; distribution prior to final apportionment.]

(A) The fiduciary may withhold from any property distributable to any person interested in the estate the amount of tax attributable to the person's interest. If the property in possession of the fiduciary and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from that person, the fiduciary may recover the deficiency from that person. If the property is not in the possession of the fiduciary, the fiduciary may recover from any person interested in the estate the amount of the tax apportioned to that person in accordance with this section.

(B) If the property held by the fiduciary is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the fiduciary, with the approval of the probate court that has jurisdiction of the administration of the estate.

HISTORY: 138 v S 317. Eff 3-23-81.

See provisions, § 3 of SB 317 (138 v —) following RC § 2113.85.

§ 2113.88 [Benefit of tax advantage; property exempt from apportionment.]

In making an apportionment, any exemption, deduction, or credit directly attributable to a particular legacy, devise, or gift shall inure to the benefit of the legatee, devisee, or donee.

The Ohio estate tax shall not be apportioned against any property with respect to which a federal estate tax marital, charitable, or orphan's deduction is allowable, whether or not a marital, charitable, or orphan's deduction or exemption is allowable for the property for Ohio estate tax purposes.

HISTORY: 138 v S 317. Eff 3-23-81.

See provisions, § 3 of SB 317 (138 v —) following RC § 2113.85.

CASE NOTES AND OAC

1. (1984) In the absence of any expression of the testatrix's intent about the allocation of federal estate taxes, they must be paid from the residuary estate, whether or not any one or more of the residuary beneficiaries were charitable institutions, bequests to which qualify for the charitable deduction: *Wittenberg Univ. v. Waterworth*, 13 OApp3d 452, 13 OBR 542, 469 NE2d 970.

§ 2113.89 [Action to recover share of tax; uncollectible tax.]

The fiduciary is not required to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until three months after the final determination of the tax. A fiduciary who institutes a suit or proceedings within the three-month period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but after that time became uncollectible. If, after making a reasonable attempt to collect the tax, the fiduciary cannot collect from any person interested in the estate the amount of the tax apportioned to that person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

HISTORY: 138 v S 317. Eff 3-23-81.

See provisions, § 3 of SB 317 (138 v —) following RC § 2113.85.

§ 2113.90 [Action by out-of-state fiduciary or obligated person.]

(A) A fiduciary who is acting in another state or a person required to pay the tax who is domiciled in another state may institute an action in the courts of this state and may recover a proportionate

amount of the federal estate tax determined under Subtitle B of the "Internal Revenue Code of 1954," 68 Stat. 373, 26 U.S.C. 2001, as amended, of an estate tax payable to another state, or of a death duty by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action brought pursuant to this section, the determination of apportionment by the court that has jurisdiction of the administration of the decedent's estate in the other state shall be prima facie correct.

(B) This section applies only if either of the following apply:

(1) The other state affords a remedy substantially similar to that afforded in division (A) of this section;

(2) With respect to the federal estate tax, if apportionment is authorized by the congress of the United States.

HISTORY: 138 v S 317. Eff 3-23-81.

See provisions, § 3 of SB 317 (138 v —) following RC § 2113.85.

§ 2113.91 [Generation-skipping transfer tax.]

The generation-skipping transfer tax imposed under Subtitle B of the "Internal Revenue Code of 1954," 68 Stat. 373, 26 U.S.C. 2001, as amended, shall be apportioned in the same manner as is provided in sections 2113.85 to 2113.90 of the Revised Code with respect to estate taxes imposed on a decedent's estate, except that division (B) of section 2113.86 of the Revised Code does not apply to the apportionment of the generation-skipping transfer tax.

HISTORY: 138 v S 317. Eff 3-23-81.

See provisions, § 3 of SB 317 (138 v —) following RC § 2113.85.

§ 2115.02 Inventory; separate schedule.

Ohio Rules

Late filing of inventory; extension of time for filing, CP-SupR 29(B).

Forms

Appointment of appraiser (entry setting hearing; entry approving appraiser). 2 Couse No.25.6

Inventory and appraisal (appraiser's certificate; waiver of notice of taking of inventory; waiver of notice of hearing on inventory; entry setting hearing and ordering notice). 2 Couse No.25.22

Schedule of assets. 2 Couse No.25.23

§ 2115.04 Notice of inventory.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

§ 2115.05 Who shall make inventory.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 350 (1976).

§ 2115.06 Appraisers; compensation; fees may be charged against the estate.

Ohio Rules

Appointment and compensation of appraisers in estates and land sales proceedings, CPSupR 28.

Forms

Appointment of appraiser (entry setting hearing; entry approving appraiser). 2 Couse No.25.6

CASE NOTES AND OAG

1. (1984) In a hearing on exceptions to the inventory, the court lacks jurisdiction to impose a constructive trust on savings bonds which it finds are not in fact estate assets: *In re Estate of Etzensperger*, 9 OS3d 19, 9 OBR 112, 457 NE2d 1161.

§ 2115.10 Emblements are assets.

Research Aids

Emblements and "away-going" crops:
O-Jur2d: L&T § 180

§ 2115.15 Signing, certifying, and return of inventory.

Forms

Schedule of assets. 2 Couse No.25.23

§ 2115.16 Hearing on inventory.

Ohio Rules

Notice of filing of inventory, CPSupR 29(A).

Forms

Notice of hearing on inventory. 2 Couse No.25.25
Waiver of notice of hearing on inventory. 2 Couse No.25.24

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 334 (1976).

CASE NOTES AND OAG

1. (1984) A probate court's order approving an inventory which does not include certain items appellant claims

are assets of the estate is an order affecting a substantial right made in a special proceeding. Thus, under RC § 2505.02, the order is a final appealable order: *Sheets v. Antes*, 14 OApp3d 278, 14 OBR 307, 470 NE2d 931.

§ 2115.17 Real estate appraisal conclusive.

CASE NOTES AND OAG

1. (1980) Revised Code § 2113.38, which authorizes the surviving spouse to file a petition to purchase the "mansion house" at the appraised value, contemplates an adversary-type proceeding in which the defendants—the heirs, devisees, legatees, lienholders et al.—are given the opportunity to show the presence of fraud, collusion or the manifest inadequacy of the price fixed in the inventory. If the evidence obtained from the adversary proceedings shows fraud, collusion or the manifest inadequacy of the price fixed in the inventory, the court shall order a reappraisal as provided in RC § 2115.17. If these items are not shown, then the price fixed in the inventory is final: *Bratanov v. Riemenschneider*, 1 OApp3d 42, 1 OBR 251, 439 NE2d 434.

§ 2117.02 Presentation of claim to probate court.

CASE NOTES AND OAG

1. (1978) The time provisions of RC § 2117.02 as to when testimony regarding an executor's or administrator's claim must be heard, are directory not mandatory: *In re McClintock*, 58 OMisc 5, 12 OO3d 60, 388 NE2d 762.

2. (1978) A failure to hear testimony regarding an executor's or administrator's claim within the time limits of RC § 2117.02 does not result in a lack of jurisdiction by the court over the claim: *In re McClintock*, 58 OMisc 5, 12 OO3d 60, 388 NE2d 762.

3. (1978) An executor's or administrator's claim need not be personally signed by the executor or administrator to be valid: *In re McClintock*, 58 OMisc 5, 12 OO3d 60, 388 NE2d 762.

4. (1980) An executor may not circumvent RC § 2117.02 by personally presenting a claim against the estate and then rejecting it in his capacity as executor: *Wilhoit v. Estate of Powell*, 70 OApp2d 61, 24 OO3d 75, 434 NE2d 742.

§ 2117.05 Compromise and settlement of claims.

CASE NOTES AND OAG

1. (1983) A creditor's receipt of payment of a debt owed by the decedent to the creditor from parties other than the decedent is considered an accord and satisfaction from the decedent's estate: *Surber v. Woodruff*, 10 OMisc2d 1, 10 OBR 87, 460 NE2d 1164 (CP).

2. (1983) Prior court approval of a settlement or compromise effected by an administrator or executor in settlement of a claim against the estate is not mandatory for the settlement or compromise to be valid and enforceable, so long as the settlement or compromise is bona fide, reasonable and beneficial to the estate: *Surber v. Woodruff*, 10 OMisc2d 1, 10 OBR 87, 460 NE2d 1164 (CP).

§ 2117.06 Presentation and allowance of creditor's claims; property tax assessments; statements and notices required.

(A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

- (1) To the executor or administrator in a writing;
- (2) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it.

(B) All claims shall be presented within three months after the date of the appointment of the executor or administrator, except that claims for assessments for personal and intangible property taxes, interest, and penalties for which the decedent was personally liable shall be presented by the tax commissioner or his agent within three months after the filing of the estate tax return prescribed by section 5731.21 of the Revised Code. Every claim presented shall set forth the claimant's address.

(C) In the absence of any prior demand for allowance, the executor or administrator shall allow or reject all claims, except tax assessment claims, within thirty days after their presentation; provided that failure of the executor or administrator to allow or reject within that time shall not prevent him from doing so after that time and shall not prejudice the rights of any claimant. Upon the allowance of a claim, the executor or the administrator, on demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date of such allowance.

(D) If the executor or administrator has actual knowledge of a pending action commenced against the decedent prior to his death in a court of record in this state, such executor or administrator shall file a notice of his appointment in such pending action within ten days after acquiring such knowledge. If the administrator or executor is other than a natural person, actual knowledge of a pending suit against the decedent shall be limited to the actual knowledge of that person charged with the responsibility of administering the estate.

(E) Any person whose claim has been presented, and not thereafter rejected, is a creditor as that term is used in Chapters 2113. to 2125. of the Revised Code. Claims that are contingent need not be presented except as provided in sections 2117.37 to 2117.42 of the Revised Code, but whether presented pursuant to those sections or this section, contingent claims may be presented in either of the manners described in division (A) of this section.

(F) If a creditor presents a claim against an estate in accordance with division (A)(2) of this section, the probate court shall not close the administration of the estate until that claim is allowed or rejected.

(G) The probate court shall not require an executor or administrator to make and return into the court a schedule of claims against the estate.

***HISTORY:** 139 v H 379 (Eff 9-21-82); 140 v H 291 (Eff 7-1-83); 140 v S 115 (Eff 10-14-83); 140 v H 37. Eff 6-22-84.

The provisions of § 6 of HB 37 (140 v —) read in part as follows:

SECTION 6. . . .section 2117.06 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 291 and Am. Sub. S.B. 115 of the 114th General Assembly. . . .

Comment by Director, Legislative Service Commission

Section 2117.06 of the Revised Code is amended by this [SB 115] act and also by Am. Sub. H.B. 291 of the 115th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable, so that they are required by that section to be harmonized to give effect to each amendment.

The provisions of § 127 of HB 291 (140 v —) read as follows:

SECTION 127. The amendment of sections 2117.06, 5731.01, 5731.011, 5731.02, 5731.05, 5731.09, 5731.14, 5731.15, 5731.16, 5731.18, 5731.21, 5731.22, 5731.26, 5731.42, and 5731.48, the enactment of sections 5731.131, 5731.181, 5731.231, and 5731.99, and the repeal of section 5731.20 of the Revised Code, all by this act, shall apply to the estate of any decedent whose death occurs on or after July 1, 1983.

Ohio Rules

Filing by fiduciary of rejection of claim, CPSupR 30(A).

ALR

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon. 17 ALR4th 530.

Law Review

S. 115 and H. 288: Steps toward logic and fairness in the Ohio probate law. Note. 10 UDayLRev 213 (1984).
Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 350 (1976).

CASE NOTES AND OAG

1. (1981) An action seeking recovery of certain estate assets from a decedent's administratrix, in which it is alleged that the administratrix fraudulently concealed material facts from claimant, is governed by the four-year limitation provisions of RC § 2305.09(C): *Thompson v. Stein*, 2 OApp3d 319, 2 OBR 362, 441 NE2d 1123.

2. (1983) Where sufficient evidence is presented to the trial court that a claim was mailed to the executor of an estate, well within the three-month presentment requirement of RC § 2117.06, and was correctly addressed and posted, and sufficient evidence is presented that the delivery rate for such a letter is one hundred percent within three days of mailing, it is within the court's discretion to weigh the evidence and determine that the claim was timely presented pursuant to RC § 2117.06, notwithstanding the executor's protest that the letter was received beyond the three-month period: *Cannell v. Bulicek*, 8 OApp3d 331, 8 OBR 441, 457 NE2d 891.

3. (1983) Where a claim has been properly revived, within three months after the defendant's death, against

the administratrix of the estate in her representative capacity, and results in a decision against the estate, no re-submissions of such claim and judgment are necessary or required under RC § 2117.06, 2117.07 or 2117.12. Under these circumstances, RC § 2117.17 has no pertinent application: *Blanchard v. Morgan*, 10 OApp3d 117, 10 OBR 141, 460 NE2d 715.

4. (1983) Adherence to the requirement in RC § 2117.06 that claims against an estate be presented within three months after the date of the appointment of an executor or administrator is mandatory and may not be waived by the executor or administrator: *In re Estate of Fisher*, 12 OApp3d 150, 12 OBR 474, 467 NE2d 898.

5. (1983) Although RC § 2117.06 requires that the claims of all creditors be presented to the administrator in writing, the statute is complied with when a summons and complaint are timely served upon the administrator: *Mathe v. Fowler*, 13 OApp3d 273, 13 OBR 337, 469 NE2d 89.

6. (1984) Where the executrix of an estate appoints an attorney to represent her in the administration of the estate, a claim against the estate presented to the attorney but not to the executrix personally satisfies the presentment requirements of RC § 2117.06: *Peoples Natl. Bank v. Treon*, 16 OApp3d 410, 16 OBR 480, 476 NE2d 372.

§ 2117.07 Presentation of claims after three months.

CASE NOTES AND OAG

1. (1981) A timely complaint in negligence which designates as a defendant one who died after the cause of action accrued but before the complaint was filed may be amended to substitute the executrix of the deceased defendant's estate for the original defendant after the limitations period has expired where the executrix, still bonded and acting at the time of the complaint and service of process, accepted service of summons within the one-year period for perfecting service after the filing of the complaint and voluntarily had the trial court substitute herself as a party-defendant in the action (*Barnhart v. Schultz*, 53 OS2d 59, 7 OO3d 142, distinguished): *Gentile v. Carr*, 4 OApp3d 55, 4 OBR 104, 446 NE2d 477.

2. (1983) Where a claim has been properly revived, within three months after the defendant's death, against the administratrix of the estate in her representative capacity, and results in a decision against the estate, no re-submissions of such claim and judgment are necessary or required under RC § 2117.06, 2117.07 or 2117.12. Under these circumstances, RC § 2117.17 has no pertinent application: *Blanchard v. Morgan*, 10 OApp3d 117, 10 OBR 141, 460 NE2d 715.

§ 2117.11 Rejection of a claim.

CASE NOTES AND OAG

1. (1982) A rejection of a creditor's claim against an estate by a personal representative pursuant to the provisions of RC § 2117.11 must be plain and unequivocal: *Hawkes Hospital v. Colley*, 2 OS3d 40, 2 OBR 584, 442 NE2d 761.

§ 2117.12 Action on rejected claim barred.

ALR

What constitutes rejection of claim against estate to commence running of statute of limitations applicable to rejected claims. 36 ALR4th 684.

CASE NOTES AND OAG

1. (1978) The creditor of a decedent who obtains a judgment in a court of common pleas against the estate of a decedent pursuant to RC § 2117.12 may commence a joint action against the fiduciary and the surety on the bond of the fiduciary under RC § 2109.59 in the probate court of the county wherein the fiduciary received his appointment: *In re Grant*, 56 OApp2d 207, 10 OO3d 205, 381 NE2d 1348.

2. (1982) A rejection of a creditor's claim against an estate by a personal representative pursuant to the provisions of RC § 2117.11 must be plain and unequivocal: *Hawkes Hospital v. Colley*, 2 OS3d 40, 2 OBR 584, 442 NE2d 761.

3. (1983) Where a claim has been properly revived, within three months after the defendant's death, against the administratrix of the estate in her representative capacity, and results in a decision against the estate, no re-submissions of such claim and judgment are necessary or required under RC § 2117.06, 2117.07 or 2117.12. Under these circumstances, RC § 2117.17 has no pertinent application: *Blanchard v. Morgan*, 10 OApp3d 117, 10 OBR 141, 460 NE2d 715.

§ 2117.15 Payment of debts after three months.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 350 (1976).

§ 2117.16 Repealed, 140 v S 115, § 2 [GC § 10509-118; 114 v 320; 119 v 394; Bureau of Code Revision, 10-1-53, 130 v 619; 133 v S 185; 136 v S 145]. Eff 10-14-83.

This section concerned schedule of debts.

§ 2117.17 Hearing on allowed claims; optional.

At any time after three months have elapsed since the date of the appointment of the executor or administrator, the probate court on its own motion may, and on motion of the executor or administrator shall, assign all claims against the estate that have been presented and any other known valid debts of the estate for hearing on a day certain. Forthwith upon such assignment, and in no case less than ten days before the date fixed for hearing or such longer period as the court may order, the executor or administrator shall cause written notice of the hearing to be served upon the following persons who have not waived the notice in writing or

otherwise voluntarily entered their appearance:

(A) If it appears that the estate is fully solvent, such notice shall be given to the surviving spouse and all other persons having an interest in the estate as devisees, legatees, heirs, and distributees.

(B) If it appears probable that there will not be sufficient assets to pay all of the valid debts of the estate in full, then such notice also shall be given to all creditors and claimants whose claims have been rejected and whose rights have not been finally determined by judgment, reference, or lapse of time.

The notice required by this section shall state that a hearing concerning the debts has been scheduled, shall set forth the time and place of the hearing and shall state that the action of the executor or administrator in allowing and classifying claims will be confirmed at such hearing unless cause to the contrary is shown. The notice shall be served personally or by certified mail in the manner specified for service of notice of the rejection of a claim under section 2117.11 of the Revised Code. Proof of service of the notice to the satisfaction of the court, by affidavit or otherwise, and all waivers of service shall be filed in court at the time of the hearing. At any time before hearing, any interested person may file exceptions in writing to the allowance or classification of any specific claim. The court may cause or permit other interested persons to be served with notice and witnesses to be subpoenaed as may be required to present the issues fully.

The court, upon hearing, shall determine whether the executor or administrator acted properly in allowing and classifying each claim and shall make an order confirming or disapproving such action.

An order of the court disapproving the allowance of a claim shall have the same effect as a rejection of the claim on the date on which the claimant is served with notice of the court's order. Notice of the court's order shall be served personally or by certified mail in the manner specified for service of notice of the rejection of a claim under section 2117.11 of the Revised Code. An order of the court confirming the allowance or classification of a claim shall constitute a final order and shall have the same effect as a judgment at law or decree in equity, and shall be final as to all persons having notice of the hearing and as to claimants subsequently presenting their claims, though without notice of such hearing. In the absence of fraud, the allowance and classification of a claim and the subsequent payment of it in good faith shall not be subject to question upon exceptions to the executor's or administrator's accounts. The confirmation of a claim by the court shall not preclude the executor or administrator from thereafter rejecting the claim on discovery of error in his previous action or on requisition as provided in sections 2117.13 and 2117.14 of the Revised Code.

*HISTORY: 140 v S 115. Eff 10-14-83.

Ohio Rules

Filing by fiduciary of schedule of all claims against estate, CPSupR 30(B).

CASE NOTES AND OAG

1. (1980) The tax commissioner may not contest the allowance of a claim in the probate court, but he may reach a different determination as to the tax implications of the claim: In re Estate of Beasley, 70 OApp2d 131, 24 OO3d 167, 435 NE2d 91.

§ 2117.18 Taxes or forfeitures.

Taxes, penalties, and interest placed on a duplicate or added by the county auditor or the tax commissioner because of a failure to make a return or because of a false or incomplete return for taxation shall be a debt of a decedent and have the same priority and be paid as other taxes. Such taxes, penalties, and interest shall be collectible out of the property of the estate either before or after distribution, by any means provided for collecting other taxes. No distribution or payment of inferior debts or claims shall defeat such collection; but no such tax, penalty, or interest can be added before notice to the executor or administrator, and before an opportunity is given him to be heard. All taxes omitted by the deceased must be charged on the tax lists and duplicate in his name.

In all such additions to the personal tax lists and duplicate, each succeeding tax year shall be considered as beginning at the time of the completion of the annual settlement of the duplicate for the previous year with the county treasurer.

*HISTORY: 139 v H 379. Eff 9-21-82.

§ 2117.20 [Surviving spouse or children to receive allowance.]

Forms

Schedule of property to be distributed in kind (consent to distribution in kind). 2 Couse No.25.35

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 324 (1976).

CASE NOTES AND OAG

1. (1980) A surviving spouse taking against a will of a deceased spouse under RC § 2107.39 is entitled to the \$5,000 statutory allowance under RC § 2117.20 unless specifically barred by the will: In re Green, 63 OMisc 44, 17 OO3d 388.

2. (1980) The value of the statutory allowance taken under RC § 2117.20 shall be deducted from the gross estate prior to computing a surviving spouse's interest under RC § 2105.06: In re Green, 63 OMisc 44, 17 OO3d 388.

§ 2117.24 Mansion house.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald

Robertson. 37 OSLJ 321, 331 (1976).

CASE NOTES AND OAG

1. (1984) Under RC § 2117.24, a surviving spouse who, immediately prior to her decedent's death, had not lived in the marital residence for eight months and was under a restraining order prohibiting her from being at the residence, is entitled to live in the mansion house for one year, or to receive a payment equal to the fair rental value of the mansion house for one year. Revised Code § 2117.24 was enacted to protect the surviving spouse, and its language, "may remain in the mansion house," does not limit its application to one who was a resident at the time of the decedent's death: *In re Johnson*, 14 OApp3d 235, 14 OBR 264, 470 NE2d 492.

§ 2117.25 Order in which debts to be paid.

Every executor or administrator shall proceed with diligence to pay the debts of the deceased, and shall apply the assets in the following order:

- (A) Costs and expenses of administration;
- (B) Bill of funeral director not exceeding eight hundred dollars for funeral and burial expenses, and such funeral expenses other than the bill of the funeral director as are approved by the probate court;
- (C) The allowance made to the surviving spouse and children;
- (D) Debts entitled to a preference under the laws of the United States;
- (E) Expenses of the last sickness of the decedent;
- (F) Personal property taxes and obligations for which the decedent was personally liable to the state or any of its subdivisions;
- (G) Debts for manual labor performed for the deceased within twelve months preceding decedent's death, not exceeding three hundred dollars to any one person;
- (H) Other debts as to which claims have been presented within three months after the appointment of the executor or administrator;
- (I) All other debts for which claims have been presented after three months from the appointment of the executor or administrator.

The part of the bill of the funeral director that exceeds eight hundred dollars, and the part of a claim included in division (G) of this section that exceeds three hundred dollars shall be included as a debt under division (H) or (I) of this section, depending upon the time when the claim for the additional amount is presented.

Chapters 2113. to 2125. of the Revised Code, relating to the manner in which and the time within which claims shall be presented, shall apply to claims set forth in divisions (B) and (G) of this section. Claims for an expense of administration or for the allowance for support need not be presented. The executor or administrator shall pay debts included in divisions (D) and (F) of this section, of

which he has knowledge, regardless of presentation.

The giving of written notice to an executor or administrator of a motion or application to revive an action pending against the decedent at the date of death shall be equivalent to the presentation of a claim to the executor or administrator for the purpose of determining the order of payment of any judgment rendered or decree entered in such an action.

No payments shall be made to creditors of one class until all those of the preceding class are fully paid or provided for. In the event of an insufficiency of assets to pay all the claims of one class, the creditors of that class shall be paid ratably.

If it appears at any time that the assets have been exhausted in paying prior or preferred charges, allowances, or claims, such payments shall be a bar to an action on any claim not entitled to such priority or preference.

*HISTORY: 137 v H 1. Eff 8-26-77.

ALR

Claims for expenses of last sickness or for funeral expenses as within contemplation of statute requiring presentation of claims against decedent's estate, or limiting time for bringing action thereon. 17 ALR4th 530.

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 337 (1976).

§ 2117.31 Estate of deceased joint debtor.

CASE NOTES AND OAG

1. (1978) A surviving joint obligor's right to contribution from the estate of the deceased joint obligor stems from the debt, and not from the ownership of the property which secures the joint obligation: *In re McClintock*, 58 OMisc 5, 12 OO3d 60, 388 NE2d 762.

2. (1978) Where a surviving joint obligor on a note has made no payment on the obligation, such obligor is not entitled to contribution from the estate of the deceased obligor for half of the obligation: *In re McClintock*, 58 OMisc 5, 12 OO3d 60, 388 NE2d 762.

§ 2121.01 [Presumption of death.]

CASE NOTES AND OAG

1. (1984) Revised Codes § 2121.01(A)(2) provides that "a presumption of the death of a person arises * * * when the person has disappeared and been continuously absent from his place of last domicile without being heard from and was at the beginning of his absence exposed to a specific peril of death, even though the absence has continued for less than a five-year-period." As used in RC § 2121.01(A)(2), the term "specific peril" means not the ordinary perils of travel or of navigation, but some unusual and extraordinary danger: *Skele v. Mutual Benefit Life Ins., Co.*, 20 OApp3d 213, 20 OBR 259, 485 NE2d 770.

§ 2121.06 [Descent of real estate.]

Upon the signing of the decree establishing the death of the presumed decedent, the real estate of the presumed decedent passes and devolves as in the case of actual death and the persons entitled by will, or under sections 2105.01 to 2105.21 of the Revised Code, may enter and take possession. Persons taking the real estate may sell or mortgage it and the purchaser or mortgagee takes a good title, free and discharged of any interest or claim of the presumed decedent. The persons taking such real estate shall not sell, convey, or mortgage any part thereof within the three-year period specified in section 2121.08 of the Revised Code without first giving bond in an amount to be fixed by the probate court and with sureties to be approved by the court. In the discretion of the court the bond may be taken without sureties. Such bond shall be conditioned to account for and pay over to the presumed decedent, in case within the three-year period after the decree is entered by the court it is established that the presumed decedent is still alive, the value of the real estate sold or conveyed, or in the case of the making of a mortgage, to pay the amount of the mortgage and interest thereon, or in case of a foreclosure of such mortgage, to account for and pay over the value of the real estate mortgaged.

*HISTORY: 137 v S 112. Eff 11-1-77.

§ 2121.08 [Administration of estate when decree vacated.]

(A) The probate court may at any time within a three-year period from the date of the decree establishing the death of a presumed decedent, upon proof satisfactory to the court that the presumed decedent is in fact alive, vacate the decree establishing the presumption of his death. After the decree has been vacated all the powers of the executor or administrator of the presumed decedent cease, but all proceedings had and steps taken with respect to the administration of the estate of the presumed decedent prior to the vacating of such decree remain valid. The executor or administrator of the estate of such presumed decedent who is found to be alive shall settle his account of his administration down to the time of the vacating of the decree and shall transfer all assets remaining in his hands to the person as whose executor or administrator he has acted, or to such person's authorized agent or attorney.

(B) The title of any person to any money, property, right, or interest as surviving spouse, next of kin, heir, legatee, devisee, co-owner with right of survivorship, beneficiary or other contractual payee, successor to a trust interest, or otherwise of the presumed decedent shall be subject to this section, and upon vacating of such decree as provided in this section any property, money, right, or inter-

est, or the fair value thereof if the same shall have been sold or otherwise disposed of, may be recovered from the person who had received any such property.

(C) Except as provided in division (D) of this section, in any action against a beneficiary for the recovery of property or the value thereof, or upon the bond given as condition for delivery of money, other personal property, or sale or encumbrance of real property, the beneficiary may set off as against such claim, an allowance for services rendered in maintaining or preserving the property, and for any moneys or other considerations made or given by the beneficiary for the preservation, care, or maintenance of the property during the period of absence of the person erroneously presumed to be dead, and the reasonable value of any part of the property used for support by those whom the person erroneously presumed to be dead had a legal obligation to support during his absence.

(D) There shall be no set off as against those assets defined in division (C) of section 2121.05 of the Revised Code to be assets of the presumed decedent which were created by the decree of presumed death. Those assets created by the erroneous decree of presumed death shall be returned with interest to the person entitled thereto.

(E) Any net cash surrender value on any policies of life insurance on the life of a person erroneously presumed to be dead are subject to the set off provision in division (C) of this section. The person erroneously presumed to be dead, or persons claiming under him, may recover whatever remains of cash values from the person to whom paid. Such claimants have no recourse against the insurance company which made such payments, and it is discharged from liability on the policies affected.

*HISTORY: 137 v S 112. Eff 11-1-77.

§ 2123.01 When proceedings to determine heirship may be had.

ALR

Criminal conspiracy between spouses. 74 ALR3d 838.

§ 2125.01 Action for wrongful death.

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it aggravated murder, murder, or manslaughter. When the action is against such administrator or executor, the damages recovered

shall be a valid claim against the estate of such deceased person. No action for the wrongful death of a person may be maintained against the owner or lessee of the real property upon which the death occurred if the cause of the death was the violent unprovoked act of a party other than the owner, lessee, or a person under the control of the owner or lessee, unless the acts or omissions of the owner, lessee, or person under the control of the owner or lessee constitute gross negligence.

When death is caused by a wrongful act, neglect, or default in another state or foreign country, for which a right to maintain an action and recover damages is given by a statute of such other state or foreign country, such right of action may be enforced in this state. Every such action shall be commenced within the time prescribed for the commencement of such actions by the statute of such other state or foreign country.

The same remedy shall apply to any such cause of action now existing and to any such action commenced before January 1, 1932, or attempted to be commenced in proper time and now appearing on the files of any court within this state, and no prior law of this state shall prevent the maintenance of such cause of action.

*HISTORY: 139 v H 332. Eff 2-5-82.

Text Discussion

Wrongful death action, McCormac, **Wrongful Death**, §§ 1.01—1.05, 2.01—2.08

Forms

Application to approve wrongful death settlement or distribution (entry setting hearing and ordering notice). 2 *Couse* No.25.49

Complaint for wrongful death, McCormac 5.34

ALR

Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent. 87 ALR3d 849.

Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action. 77 ALR3d 1175.

Effect of death of beneficiary upon right of action under death statute. 13 ALR4th 1060.

Judgment in favor of, or adverse to, person injured as barring action for his death. 26 ALR4th 1264.

Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child. 26 ALR4th 396.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value on earnings decedent would have made after death. 76 ALR3d 125.

Right of illegitimate child, after *Levy v. Louisiana*, to recover under wrongful death statute for death of putative father. 78 ALR3d 1230.

Law Review

DeAngelis v. Lutheran Medical Center [NY 1982]: Its Impact on the Child's Right to Parental Consortium. Note. 12 *CapitalULRev* 457 (1983).

The doctrine of interspousal immunity does not bar a wrongful death action brought by the estate of a deceased spouse against the surviving spouse. Daniel U. White. 52 *CinLRev* 936 (1983).

The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children. Kathryn A. Belfance. 6 *ONorthLRev* 543 (1979).

Loss of parental society and companionship: infant's action against person who negligently injured father—*Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 NE2d 690 (Mass 1980). 7 *UDayLRev* 495 (1982).

Ohio's new wrongful death statute: an expanded scope of recoverable damages. Comment. 53 *CinLRev* 1083 (1984).

Punitive Liability of Municipal Corporations. Casenote. 2 *ONorthLRev* 818, 819 (1975).

Brain Death & Ohio Law. Comment. 10 *AkronLRev* 145, 153 (1976).

Recovery of punitive damages in Ohio wrongful death actions: a preferred approach. James J. Ross. 6 *UDayLRev* 175 (1981).

Symposium—Administering Ohio's newly recognized tort: the negligent infliction of serious emotional distress. Comment. 17 *AkronLRev* 631 (1984).

Symposium—Interspousal immunity in Ohio after *Prem v. Cox*. Comment. 17 *AkronLRev* 647 (1984).

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1. (1976) A fleeing suspect does not assume the risk as a matter of law, it is a question of fact for the jury in light of all the facts and circumstances: *Jones v. Wittenberg University*, 534 F2d 1203, 3 *OO3d* 311.

2. (1976) Although RC §§ 2125.01 et seq. and 2305.21 are triggered by an individual's death, they create distinct causes of action designed to accomplish divergent statutory purposes: *Jones v. Wittenberg University*, 534 F2d 1203, 3 *OO3d* 311.

3. (1976) Decedent should not be deemed to have assumed the risk of injury from the negligently fired warning shot as a matter of law when even the police officer who fired the shot could not have anticipated its striking the decedent: *Jones v. Wittenberg University*, 534 F2d 1203, 3 *OO3d* 311.

4. (1976) It was not error for judge in wrongful death action to refuse to charge jury on contributory negligence where suspect was shot and killed while fleeing custody of police officers: *Jones v. Wittenberg University*, 534 F2d 1203, 3 *OO3d* 311.

5. (1976) Legal obligation to support is only one of a number of factors which Ohio courts have recognized as matters which a jury can consider in awarding damages in wrongful death actions, and due to the speculative nature

of the injury and the myriad factors to be considered, courts generally defer to a jury's opinion on the existence or amount of pecuniary injury: *Jones v. Wittenberg University*, 534 F2d 1203, 3 OO3d 311.

6. (1977) Since the father of a child has the burden of support and care, he also has the right to the earnings of that child during minority even though the child is not a member of his household, custody of such child having previously been given to the father by a court of competent jurisdiction: *Motorist Mut. Ins. Co. v. Speck*, 59 OApp2d 224, 13 OO3d 239, 393 NE2d 500.

7. (1978) Where a business establishment sells alcoholic beverages to one it knows or has reason to believe is intoxicated, and that person is killed as a proximate result of his intoxication, such establishment is liable in damages to the estate of the decedent, unless the deceased exhibited an absence of care on his own behalf which was equal to or greater than that of the defendant: *Kernock v. The Mark II*, 62 OApp2d 103, 16 OO3d 254, 404 NE2d 766.

8. (1976) It is well established under Ohio law that a police officer may be held personally liable where use of excessive force or negligence results in personal injury or death and even a justifiable use of force will not insulate an officer from liability if this otherwise justifiable conduct is negligently performed: *Jones v. Wittenberg University*, 534 F2d 1203, 3 OO3d 311 (6th Cir.).

9. (1979) In an action for wrongful death, based upon alleged medical malpractice, neither RC § 2125.01 (action for wrongful death) nor Ohio case law recognizes any recovery for the loss of any chance of survival: *Williams v. Grant*, 65 OApp2d 225, 19 OO3d 168, 417 NE2d 586.

10. (1982) Amendments to wrongful death act and comparative negligence statute are not to be applied retroactively in absence of evidence that changes were intended to apply retroactively. Court is thus bound by legislative intent and Ohio case law to apply law in effect on date of the accident to the trial of the case: *Tackett v. Consol. Rail Corp.*, 536 FSupp 409 (SD).

11. (1983) The doctrine of interspousal immunity does not bar an action for wrongful death brought by the estate of a deceased against the surviving spouse: *Prem v. Cox*, 2 OS3d 149, 2 OBR 694, 443 NE2d 511.

12. (1982) The provisions of RC §§ 2125.01 and 2125.02 of the Wrongful Death Act, as amended February 5, 1982 (Am. Sub. H.B. No. 332), are to be applied retroactively: *Robinson v. Parker-Hannifin Corp.*, 4 OMisc2d 6, 4 OBR 257, 444 NE2d 1084, 447 NE2d 781 (CP).

13. (1983) Damages caused by an intentional trespasser need not be foreseeable to be compensable: *Baker v. Shymkiv*, 6 OS3d 151, 6 OBR 206, 451 NE2d 811.

14. (1984) In an action for wrongful death pursuant to RC § 2125.01, the contributory negligence of a beneficiary is a partial defense only as to such beneficiary's share of the right to a recovery of damages, but does not constitute a defense as against other, non-negligent, beneficiaries. This issue of whether the contributory negligence of a beneficiary is the proximate cause of the wrongful death must be submitted to the jury pursuant to the comparative negligence provisions of RC § 2315.19(A)(1): *Shinaver v. Szymanski*, 14 OS3d 51, 14 OBR 446, 471 NE2d 477.

15. (1984) The contributory negligence of a driver of a vehicle which results in the death of his passenger is not imputed to his passenger and therefore does not affect the passenger's right of action for injuries and medical expenses proximately caused by the negligence of another driver. This right of action is maintainable under the general survival statute, RC § 2305.21, and is independent of

the wrongful death action pursuant to RC § 2125.01: *Shinaver v. Szymanski*, 14 OS3d 51, 14 OBR 446, 471 NE2d 477.

16. (1985) A viable fetus which is negligently injured en ventre sa mere and subsequently stillborn may be the basis for a wrongful death action pursuant to RC § 2125.01: *Werling v. Sandy*, 17 OS3d 45, 17 OBR 37, 476 NE2d 1053.

§ 2125.02 Proceedings.

(A)(1) An action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

(2) The jury, or the court if the action is not tried to a jury, may award damages authorized by divisions (B) and (C) of this section, as it determines are proportioned to the injury and loss resulting to these beneficiaries by reason of the wrongful death, and may award the reasonable funeral and burial expenses incurred as a result of the wrongful death. In its verdict, the jury or court shall set forth separately the amount, if any, awarded for the reasonable funeral and burial expenses incurred as a result of the wrongful death.

(3) The date of the decedent's death fixes the status of all beneficiaries of the action for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after his death is a beneficiary of the action.

In determining the amount of damages to be awarded, the jury or court may consider all factors existing at the time of the decedent's death that are relevant to a determination of the damages suffered by reason of the wrongful death.

(B) Compensatory damages may be awarded in an action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, and education, suffered by the surviving spouse, minor children, parents, or next of kin;

(4) Loss of prospective inheritance, to the decedent's heirs at law at the time of his death;

(5) The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin.

(C) A personal representative appointed in this state, with the consent of the court making the appointment, may, at any time before or after the

commencement of an action for wrongful death, settle with the defendant the amount to be paid.

(D) All actions for wrongful death shall be commenced within two years after a decedent's death.

*HISTORY: 139 v H 332. Eff 2-5-82.

Comparative Legislation

KY—KRS § 411.130

Text Discussion

Damages, McCormac, *Wrongful Death*, §§ 3.01—3.07

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Motions, McCormac, *Wrongful Death*, §§ 5.25—5.27

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Sample testimony, McCormac, *Wrongful Death*, Appendix B

Third-party claims, McCormac, *Wrongful Death*, § 5.41

ALR

Excessiveness or inadequacy of punitive damages awarded in personal injury or death cases. 35 *ALR4th* 441.

Minority of surviving children as tolling limitation period in state wrongful death action. 85 *ALR3d* 162.

Negligence of spouse or child as barring or reducing recovery for loss of consortium by other spouse or parent. 25 *ALR4th* 118.

Law Review

DeAngelis v. Lutheran Medical Center [NY 1982]: Its Impact on the Child's Right to Parental Consortium. Note. 12 *CapitalULRev* 457 (1983).

The Inadequacy of Pecuniary Loss as a Measure of Damages in Actions for the Wrongful Death of Children. Kathryn A. Belfance. 6 *ONorthLRev* 543 (1979).

Loss of parental society and companionship: infant's action against person who negligently injured father—*Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 NE2d 690 (Mass 1980). 7 *UDayLRev* 495 (1982).

Ohio's new wrongful death statute: an expanded scope of recoverable damages. Comment. 53 *CinLRev* 1083 (1984).

Torts—pecuniary injury—refusal to extend the scope of pecuniary injury under the wrongful death statute to include loss of comfort, etc.—*Keaton v. Ribbeck*, 58 OS2d 443 (1979). 9 *CapitalULRev* 615 (1980).

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1. (1976) A jury's verdict in a wrongful death action in Ohio will generally not be set aside unless it is so excessive that it could not have been arrived at except as a result of passion or prejudice: *Jones v. Wittenberg University*, 534 F2d 1203, 3 *OO3d* 311.

2. (1976) Wrongful death actions are designed to recompense a decedent's beneficiaries for any "pecuniary injury" they may have suffered by virtue of his untimely death: *Jones v. Wittenberg University*, 534 F2d 1203, 3 *OO3d* 311.

3. (1978) Punitive damages are clearly excluded in wrongful death actions by RC § 2125.02. Punitive damages are available in a survival action under RC § 2305.21 if there is evidence that decedent suffered property loss or personal injury before he died. Here no evidence was presented either that decedent owned the car in which he was riding or that he survived the collision for a time sufficient to experience pain and suffering before death: *Rubeck, Exr., v. Huffman*, 54 OS2d 20, 8 *OO3d* 11, 374 NE2d 411.

4. (1977) Although RC § 2125.02 requires approval by the probate court of a settlement of a wrongful death action executed by a personal representative appointed in Ohio, the courts of Ohio will give effect to a settlement and release executed in Georgia by the decedent's widow on behalf of herself and their children before the representative was appointed: *McCluskey v. Rob San Services, Inc.*, 443 FSupp 65, 10 *OO3d* 248.

5. (1978) Where a wrongful death award is made under the federal tort claims act, in an action governed by Ohio law, such award should not be reduced by the amount of income tax the decedent would have paid on future income, at least in cases involving low or average incomes. Neither should the award be reduced on account of the surviving spouse's remarriage. The effect of each of these considerations is too speculative to take into account in making an award: *Kalavity v. U.S.*, 584 F2d 809, 11 *OO3d* 313.

6. (1979) Compensation for loss of the society, comfort and companionship of the decedent is not recoverable under Ohio's wrongful death law: *Keaton v. Ribbeck*, 58 OS2d 443, 12 *OO3d* 375, 391 NE2d 307.

7. (1978) Punitive damages are assessed over and above the amount adequate to compensate an injured party, and are, by definition, not available in a wrongful death action: *Schaefer v. D & J Produce*, 62 *OApp2d* 53, 16 *OO3d* 108, 403 NE2d 1015.

8. (1978) Revised Code § 2125.02 requires that an action for wrongful death be brought in the name of the personal representative of the deceased person and Civ. R. 17(A) specifically allows this as an exception to the general rule that an action must be prosecuted in the name of the real party in interest: *De Garza v. Chetister*, 62 *OApp2d* 149, 16 *OO3d* 335, 405 NE2d 331.

9. (1978) An action for wrongful death is an asset of the decedent's estate and is, therefore, sufficient to justify the appointment of an administrator or an ancillary administrator in this state, even though there existed no other ne-

cessity for such an appointment, and the deceased was not domiciled in this state, and left no property in this state. In such a case, the court for the county where the injury was received and the deceased died may properly entertain such jurisdiction: *De Garza v. Chetister*, 62 OApp2d 149, 16 OO3d 335, 405 NE2d 331.

10. (1981) The statute of limitations for a wrongful death action is not tolled where the defendant negligently conceals the cause of plaintiff's death: *Bazdar v. Koppers Co., Inc.*, 524 FSupp 1194 (N.D.).

11. (1982) Where an act of medical malpractice allegedly results in the death of the patient, the controlling statute of limitations is RC § 2125.02, not RC § 2305.11(A): *Koler v. St. Joseph Hospital*, 69 OS2d 477, 23 OO3d 413, 432 NE2d 821.

12. (1982) The provisions of RC §§ 2125.01 and 2125.02 of the Wrongful Death Act, as amended February 5, 1982 (Am. Sub. H.B. No. 332), are to be applied retroactively: *Robinson v. Parker-Hannifin Corp.*, 4 OMisc2d 6, 4 OBR 257, 444 NE2d 1084, 447 NE2d 781 (CP).

13. (1982) Revised Code § 2125.02, as amended effective February 5, 1982, in Am. Sub. H.B. No. 332, substantially alters the dimension and character of wrongful death actions and cannot be given a retroactive effect: *Rivers v. Kairis*, 2 OMisc2d 6, 1 OBR 317, 442 NE2d 494 (CP).

14. (1982) The contingency of marriage may be considered by the trier of fact in determining the amount recoverable by surviving parents for the wrongful death of their child: *Terveer v. Baschnagel*, 3 OApp3d 312, 3 OBR 365, 445 NE2d 264.

15. (1982) Under Ohio law, the jury in a wrongful death action is to consider the gross income of a decedent rather than the net income after taxes, and thus it is improper for the trial court to instruct the jury that its award is not subject to federal income taxes or that in calculating any loss based on future earnings of decedent, the jury should deduct federal income taxes from those earnings: *Terveer v. Baschnagel*, 3 OApp3d 312, 3 OBR 365, 445 NE2d 264.

16. (1982) Revised Code § 2125.02, as amended effective February 5, 1982 in Am. Sub. H.B. No. 332, and dealing with the procedures in a wrongful death action, is remedial and procedural in nature and may be applied retrospectively: *Wright v. Conney*, 3 OMisc2d 9, 3 OBR 298, 444 NE2d 1088 (CP).

17. (1984) An amended complaint to add a new party defendant in a wrongful death action relates back to the date the motion for leave to file the amended complaint was filed; if the motion for leave is filed within the two-year statute of limitations, the amended complaint is timely even if filed after the two-year period: *Chaddock v. Johns-Manville Sales Corp.*, 577 FSupp 837 (S.D.).

18. (1984) Revised Code § 2125.02 as amended, effective February 5, 1982, is remedial in nature as written and promulgated by the General Assembly, and applies to all wrongful death actions tried in any forum on or after that date: *French v. Dwiggins*, 9 OS3d 32, 9 OBR 123, 458 NE2d 827.

19. (1984) Ohio law is applicable in determining the amount of damages recoverable in an action commenced in Ohio by Ohio representatives of an Ohio decedent killed in a foreign state, to recover under a policy of insurance issued in Ohio which limits recovery from the underinsured motorist to those damages which the insureds are "legally entitled to recover," because the compelling state interest of Ohio in fully compensating its citizens in wrongful death cases outweighs the interests of the foreign

state in determining the standard of care and against subjecting its citizens to unlimited recoveries: *Paul v. West American Ins. Co.*, 19 OApp3d 82, 19 OBR 166, 482 NE2d 1309.

20. (1984) An action pursuant to RC § 2305.11(A) for medical malpractice is not a precondition to the maintenance of a wrongful death action pursuant to RC §§ 2125.01 and 2125.02: *Brosse v. Cumming*, 20 OApp3d 260, 20 OBR 323, 485 NE2d 803.

21. (1984) Although originating in the same wrongful act or neglect, a claim for malpractice against a physician and a claim against the same physician for wrongful death resulting from the malpractice are two distinct claims, no part of either being embraced in the other. The time frame for filing the medical malpractice suit is governed by RC § 2305.11(A), while RC § 2125.02(D) provides that a cause of action for wrongful death shall be commenced within two years after the decedent's death: *Brosse v. Cumming*, 20 OApp3d 260, 20 OBR 323, 485 NE2d 803.

§ 2125.03 Distribution to beneficiaries.

(A) The amount received by a personal representative in an action for wrongful death under sections 2125.01 and 2125.02 of the Revised Code, whether by settlement or otherwise, shall be distributed to the beneficiaries or any one or more of them. The court that appointed the personal representative shall, except when all of the beneficiaries are on an equal degree of consanguinity to the deceased person, adjust the share of each beneficiary in such manner as is equitable, having due regard for the injury and loss to each beneficiary resulting from the death and for the age and condition of the beneficiaries. If all of the beneficiaries are on an equal degree of consanguinity to the deceased person, the beneficiaries may adjust the share of each beneficiary among themselves. If the beneficiaries do not adjust their shares among themselves, the court shall adjust the share of each beneficiary in the same manner as the court adjusts the shares of beneficiaries who are not on an equal degree of consanguinity to the deceased person.

The court may create a trust for children of the decedent by ordering that the portion of the amount received by the personal representative for such children be deposited in trust for the benefit of one or more of the beneficiaries, until the beneficiary reaches twenty-five years of age, and order the distribution of the amount in accordance with the provisions of the trust. Prior to appointment as a trustee of a trust created pursuant to this section, the person to be appointed shall be approved by each adult beneficiary and by the guardian of each minor beneficiary of the trust.

(B) The court shall distribute the amount of funeral and burial expenses awarded, or received by settlement, by reason of the death to the personal representative of the decedent, to be expended by the personal representative for the payment, or as reimbursement for the payment, of the expenses.

*HISTORY: 138 v H 387 (Eff 8-7-80); 139 v H 332. Eff 2-5-82.

Text Discussion

Distribution to beneficiaries, McCormac, *Wrongful Death*, §§ 10.01—10.04

Forms

Application to approve wrongful death settlement or distribution, McCormac, *Wrongful Death*, § 10.05

Application to approve wrongful death settlement or distribution (entry setting hearing and ordering notice). 2 Couse No.25.49

Distribution of wrongful death proceeds, McCormac, *Wrongful Death*, § 10.07

Distribution of wrongful death proceeds (consent to distribution; entry approving report of distribution). 2 Couse No.25.51

Entry approving settlement or distributing wrongful death proceeds, McCormac, *Wrongful Death*, § 10.06

Entry approving settlement or distributing wrongful death proceeds. 2 Couse No.25.50

Law Review

DeAngelis v. Lutheran Medical Center [NY 1982]: Its Impact on the Child's Right to Parental Consortium. Note. 12 CapitalULRev 457 (1983).

Loss of parental society and companionship: infant's action against person who negligently injured father—*Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 NE2d 690 (Mass 1980). 7 UDayLRev 495 (1982).

Ohio's new wrongful death statute: an expanded scope of recoverable damages. Comment. 53 CinLRev 1083 (1984).

§ 2125.04 New action.

Forms

Application to approve wrongful death settlement or distribution (entry setting hearing and ordering notice). 2 Couse No.25.49

§ 2127.01 Sale of lands by executors and administrators.

Ohio Rules

Land sales, CPSupR 33.

[§ 2127.01.1] § 2127.011 [Conditions for disposal of real estate.]

Forms

Consent to power to sell real estate. 2 Couse No.25.38

Law Review

Uniform Probate Code Compared to Ohio Law. Donald Robertson. 37 OSLJ 321, 335 (1976).

CASE NOTES AND OAG

1. (1978) The administrator of an estate who executes a contract for the sale of the decedent's realty does not breach that contract by selling the realty to other purchasers, where the contract contains the clause "subject to the approval of the probate court," and such approval is never obtained, and where the heirs have never given con-

sent to the sale under the contract, as required by RC §§ 2127.04 and 2127.01.1: *Bilang v. Benson*, 62 OApp2d 134, 16 OO3d 297, 405 NE2d 311.

§ 2127.04 [Action with consent or upon request of beneficiaries or upon representative's own motion; procedure when beneficiary cannot be found.]

(A) With the consent of all persons entitled to share in an estate upon distribution, the executor, administrator, or administrator with the will annexed may, and upon the request of these persons shall, commence an action in the probate court for authority to sell any part or all of the decedent's real estate, even though not required to be sold to pay debts or legacies. A guardian may make such a request, or give consent, on behalf of his ward.

(B) An executor, administrator, or administrator with the will annexed may commence an action in the probate court, on his own motion, to sell any part or all of the decedent's real estate, even though it is not required to be sold to pay debts or legacies. The court shall not issue an order of sale in the action unless one of the following categories applies:

(1) At least fifty per cent of all the persons interested in the real estate proposed to be sold have consented to the sale; and, prior to the issuance of the order, no written objection is filed with the court by any person or persons who hold aggregate interests in the interest of the decedent in the real estate proposed to be sold, that total in excess of twenty-five per cent; and the court determines that the sale is in the best interest of the decedent's estate.

(2) No person's interest in the interest of the decedent in the real estate proposed to be sold exceeds ten per cent; and, prior to the issuance of the order, no written objection is filed with the court by any person or persons who hold aggregate interests in the interest of the decedent in the real estate proposed to be sold, that total in excess of twenty-five per cent; and the court determines that the sale is in the best interest of the decedent's estate.

(3) The real estate proposed to be sold escheats to the state under division (J) of section 2105.06 of the Revised Code.

(C) Notwithstanding any provision of the Revised Code, an executor, administrator, or administrator with the will annexed shall commence an action in the probate court to sell any part or all of the decedent's real estate if any person who is entitled to inherit all or part of the real estate cannot be found after a due and diligent search. The court shall not issue an order of sale in the action unless the sale is in the best interest of the person who cannot be found and in the best interest of the decedent's estate.

If a sale is ordered under this division, the costs of its administration shall be taken from the proceeds of the sale.

(D) A surviving spouse who is an executor or administrator of the decedent spouse's estate is not disqualified, by reason of being executor or administrator, as a person to whom a parcel of real estate may be sold pursuant to this section.

*HISTORY: 139 v H 271. Eff 2-2-82.

CASE NOTES AND OAG

1. (1978) The administrator of an estate who executes a contract for the sale of the decedent's realty does not breach that contract by selling the realty to other purchasers, where the contract contains the clause "subject to the approval of the probate court," and such approval is never obtained, and where the heirs have never given consent to the sale under the contract, as required by RC §§ 2127.04 and 2127.01.1: *Bilang v. Benson*, 62 OApp2d 134, 16 OO3d 297, 405 NE2d 311.

2. (1983) Applying amended RC § 2127.04(B)(1) to the estate of a decedent who died prior to the effective date of the amendment violates RC § 1.58 by denying a non-consenting beneficiary a right he enjoyed under the statute before it was amended: *Duffy v. Hefferman*, 9 OApp3d 273, 9 OBR 487, 459 NE2d 898.

3. (1983) Revised Code § 2127.04(B)(1) may not be used to sell the real estate of a decedent who died prior to the February 2, 1982 effective date of the amended statute: *Duffy v. Hefferman*, 9 OApp3d 273, 9 OBR 487, 459 NE2d 898.

§ 2127.14 Service of summons.

Ohio Rules

Summons and notice in probate court, CPSupR 21.

ALR

What constitutes action affecting real property within district of suit, so as to authorize constructive service on nonresident defendant under 28 USCS § 1655. 29 ALR Fed 851.

§ 2127.19 Release of liens.

CASE NOTES AND OAG

1. (1976) Notwithstanding the provisions of RC § 2127.19, where the proceeds of a probate sale of real estate to pay debts are insufficient to completely cover the amount owing for unpaid taxes, penalties and interest, a lien remains on the land for the unpaid balance: *Marini v. Roach*, 54 OApp2d 114, 8 OO3d 212, 375 NE2d 808.

§ 2127.22 Appraisalment may be dispensed with; new appraisalment; appraisers.

Ohio Rules

Appointment and compensation of appraisers in estates and land sales proceedings, CPSupR 28.

§ 2127.25 Compensation of appraisers.

Ohio Rules

Appointment and compensation of appraisers in estates and land sales proceedings, CPSupR 28.

§ 2127.26 Repealed, 138 v S 317, § 2 [GC § 10510-30; 114 v 320(457); Bureau of Code Revision, 10-1-53; 125 v 903(982); 138 v H 674]. Eff 3-23-81.

This section dealt with assignment of homestead.

§ 2127.28 Expense of sale.

Ohio Rules

Evidence of title, CPSupR 33(A).

§ 2127.29 Order of sale.

Ohio Rules

Land sales, CPSupR 33.

§ 2127.31 Persons interested may give bond to prevent sale.

Forms

Bond to prevent sale of real estate. 1 Couse No.13.43

§ 2127.32 Public or private sale.

The real estate included in the court's order of sale, as provided in section 2127.29 of the Revised Code, shall be sold either in whole or in parcels at public auction at the door of the courthouse in the county in which the order of sale was granted, or at another place, as the court directs, and the order shall fix the place, day, and hour of sale. If it appears to be more for the interest of the ward or the estate to sell the real estate at private sale, the court may authorize the complainant to sell it either in whole or in parcels. If an order for private sale is issued, it shall be returned by the complainant. Upon motion and showing of a person interested in the proceeds of the sale, filed after thirty days from the date of the order, the court may require the complainant to return the order, if the premises have not been sold. Thereupon, the court may order the real estate to be sold at public sale.

If upon showing of any person interested, the court finds that it will be to the interest of the ward or the estate, it may order a reappraisalment and sale in parcels.

If the sale is to be public, the executor, administrator, or guardian must give notice of the time and place of the sale by advertisement at least three weeks successively in a newspaper published in the county where the lands are situated.

*HISTORY: 137 v H 42. Eff 10-7-77.

Ohio Rules

Land sales, CPSupR 33.

§ 2127.38 Distribution of money received.

The sale price of real estate sold following an action by an executor, administrator, or guardian shall be applied and distributed as follows:

(A) To discharge the costs and expenses of the sale, including reasonable fees to be fixed by the probate court for services performed by attorneys for the fiduciary in connection with the sale, and compensation, if any, to the fiduciary for his services in connection with the sale as the court may fix, which costs, expenses, fees, and compensation shall be paid prior to any liens upon the real estate sold and notwithstanding the purchase of the real estate by a lienholder;

(B) To the payment of taxes, interest, penalties, and assessments then due against the real estate, and to the payment of mortgages and judgments against the ward or deceased person, according to their respective priorities of lien, so far as they operated as a lien on the real estate of the deceased at the time of the sale, or on the estate of the ward at the time of the sale, which shall be apportioned and determined by the court, or on reference to a master, or otherwise;

(C) In the case of an executor or administrator, the remaining proceeds of sale shall be applied as follows:

(1) To the payment of legacies with which the real estate of the deceased was charged, if the action is to sell real estate to pay legacies;

(2) To discharge the claims and debts of the estate in the order provided by law.

Whether the executor or administrator was appointed in this state or elsewhere, the surplus of the proceeds of sale must be considered for all purposes as real estate, and be disposed of accordingly.

*HISTORY: 139 v H 379. Eff 9-21-82.

§ 2129.04 Ancillary administration.

Forms

Supplemental application for ancillary administration. 2
Couse No.25.8

§ 2129.05 Foreign wills.

Forms

Supplemental application for ancillary administration. 2
Couse No.25.8

§ 2129.07 Proceedings to admit foreign will to record.

An authenticated copy of a will executed, proved, and allowed in a country other than the

United States and territories thereof and the probate of such will must be produced by the executor, or by a person interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon such judge shall continue the motion to admit it to probate for two months. Notice of the filing of such application must be given to all persons interested, in a public newspaper published in or in general circulation in the county where the motion is made, at least three weeks consecutively. The first publication shall be at least forty days before the time set for the final hearing of the motion.

If, on such hearing, it appears to the probate court that the instrument ought to be allowed in this state, it shall order the copy to be filed and recorded. The will, and the probate and record thereof, then shall have the same effect as if the will originally had been proved and allowed in that court. This section does not give effect to the will of an alien different from that which it would have had if originally proved and allowed in this state. When such copy has been filed and recorded, and when no ancillary administration proceedings have been had or are being had in Ohio, sections 2107.39 to 2107.45 of the Revised Code, relating to election shall be the same as in the case of resident decedents, except that such election shall be made not later than six months after the record of such copy.

*HISTORY: 137 v H 42. Eff 10-7-77.

§ 2129.08 Appointment

Forms

Supplemental application for ancillary administration. 2
Couse No.25.8

§ 2131.01 American experience table to be used.

Cross-References to Related Sections

American experience table of mortality, see Appendix, p. 466 et seq.

CASE NOTES AND OAG

1. (1980) Where a testamentary gift is given in the form of a remainder or other future interest, the value of the gift, for purposes of RC § 2107.06, the mortmain statute, is the "present value" of the interest as of the date of the testator's death: Upole v. Roberts, 1 OApp3d 15, 1 OBR 80, 437 NE2d 1205.

§ 2131.03 Action to set aside antenuptial or separation agreement.

CASE NOTES AND OAG

1. (1982) An antenuptial agreement will not be set aside unless the provision for the surviving spouse is wholly disproportionate to the amount she would receive under the law and such spouse was misled as to value of her spouse's

property: *Hook v. Hook*, 69 OS2d 234, 23 OO3d 239, 431 NE2d 667.

§ 2131.04 Expectant estates descendible, devisable, and alienable.

CASE NOTES AND OAG

1. (1978) A trust beneficiary's right to receive distribution of principal and undistributed income upon termination of the trust is an equitable future interest which is alienable even though the right to distribution is conditioned upon survival of the beneficiary to the time of termination of the trust: *Martin v. Martin*, 54 OS2d 101, 8 OO3d 106, 374 NE2d 1384.

§ 2131.08 Statute against perpetuities.

(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest. All estates given in tail, by deed or will, in lands or tenements lying within this state, shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpetuities, except as set forth in divisions (B) and (C) of this section.

(B) For the purposes of this section, the time of the creation of an interest in real or personal property subject to a power reserved by the grantor to revoke or terminate the interest shall be the time at which the reserved power expires, either by reason of the death of the grantor or by release of the power or otherwise.

(C) Any interest in real or personal property that would violate the rule against perpetuities, under division (A) of this section, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest, the period of perpetuities shall be measured by actual rather than possible events.

(D) Divisions (B) and (C) of this section shall be effective with respect to interests in real or personal property created by wills of decedents dying after December 31, 1967, with respect to interests in real or personal property created by inter vivos instruments executed after December 31, 1967, and with respect to interests in real or personal property created by inter vivos instruments executed on or before December 31, 1967 that by reason of division (B) of this section will be treated as interests created after December 31, 1967. Divisions (B) and (C) of this section shall be effective with respect to interests in real or personal property created by the exercise of a power of appointment if divisions (B) and (C) of this section apply to the instrument that exercises the power, whether or not divisions (B)

and (C) of this section apply to the instrument that creates the power.

*HISTORY: 138 v S 317. Eff 3-23-81.

Law Review

Application of the Rule Against Perpetuities to Powers of Appointment: Ohio Style. C. Terry Johnson and Frank B. Williams, III. 5 UDayLRev 39 (1980).

Charitable Trusts—Rule Against Perpetuities. Casenote. 37 OSLJ 685, 689 (1976).

Conversion of Fee Tail into Fee Simple. 4 ONorthLRev 210 (1977).

CASE NOTES AND OAG

1. (1976) A deed dated November 30, 1962, purporting to convey land in trust "for and during the natural lifetime of the Grantor herein or until December 1, 1990, whichever later occurs" is invalid to create any expectant estates in said land because not within the rule against perpetuities (RC § 2131.08 as in effect in 1962): *Eisenmann v. Eisenmann*, 52 OMisc 119, 6 OO3d 449, 370 NE2d 788.

2. (1976) Revised Code § 2131.08, as amended effective October 24, 1967, does not apply to authorize reform of any inter vivos conveyance (deed) executed before December 31, 1967 (invalid as not within the rule against perpetuities), except those wherein the grantor reserved a power to revoke or terminate such interest or such a power expired "by reason of the death of the grantor or by release of the power or otherwise." RC § 2131.08(B) and (D): *Eisenmann v. Eisenmann*, 52 OMisc 119, 6 OO3d 449, 370 NE2d 788.

3. (1976) When land is conveyed in trust, to terminate upon the occurrence of a limiting event and then to "x, y and z, the heirs of their body and assigns forever, if any, and if none, to the survivor or survivors of them," said grantees become the owners of estates in fee tail and the natural issue of each grantee who survives any of such donees prior to the occurrence of the limiting event, take the expectant estate of the deceased donee as heirs of his body and become vested in interest, although not in possession, of such estate: *Eisenmann v. Eisenmann*, 52 OMisc 119, 6 OO3d 449, 370 NE2d 788.

§ 2131.10 Deposit payable on death.

A natural person, adult or minor, referred to in sections 2131.10 and 2131.11 of the Revised Code as the owner, may enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings, authorized to receive money on an investment share certificate, share account, deposit, or stock deposit, and transacting business in this state, whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit may be made payable on the death of the owner to another natural person or to any entity or organization, referred to in such sections as the beneficiary, notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code. In creating such accounts, "payable on death" or "payable on the death of" may be abbreviated to "P.O.D."

Every contract of an investment share certificate, share account, deposit, or stock deposit authorized

by this section shall be deemed to contain a right on the part of the owner during his lifetime both to withdraw the proceeds of such investment share certificate, share account, deposit, or stock deposit, in whole or in part, as though no beneficiary has been named, and to designate a change in beneficiary. The interest of the beneficiary shall be deemed not to vest until the death of the owner.

No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the bank, building and loan or savings and loan association, credit union, or society for savings.

*HISTORY: 140 v H 348. Eff 9-20-84.

Law Review

Joint Bank Accounts with Survivorship. Note. 7 Capital-ULRev 476, 487 (1977).

Probate—personal property—banks and banking—joint tenancy. *In re Estate of Thompson*, 66 OS2d 433 (1981). Case note. 50 CinLRev 852 (1981).

CASE NOTES AND OAG

1. (1979) Under the Ohio rules of statutory construction the singular includes the plural and the plural includes the singular. Where there is no evidence that such a construction is out of context with the language of a statute, that construction should be used. "Person" and "beneficiary" in RC § 2131.10 include both the singular and the plural; therefore, multiple beneficiaries for a "payable on death" account are legally permissible: *Wingate v. Hordge*, 60 OS2d 55, 14 OO3d 212, 396 NE2d 770.

2. (1979) Where the trustee/grantor of a savings account trust retains full control over the trust, including the power to revoke the trust completely, that fact establishes the right of creditors of the trustee to reach the funds on deposit in the account: *Prestige Vacations, Inc. v. Kozak*, 13 OO3d 409 (USDC).

3. (1981) A former beneficiary of a P.O.D. account may challenge the action of the savings institution with respect to changing the registration of such account only by complying with the provisions of RC § 1151.19.2: *Miller v. Peoples Federal S. & L. Assn.*, 68 OS2d 175, 22 OO3d 406, 429 NE2d 439.

4. (1981) The depositor of a payable-on-death (P.O.D.) account retains her rights to ownership and full control of such account during her lifetime. Following a finding of incompetency by the Probate Court, the depositor's ownership rights pass to the legally appointed guardian of her estate, including the right to designate a change in the registration of such account: *Miller v. Peoples Federal S. & L. Assn.*, 68 OS2d 175, 22 OO3d 406, 429 NE2d 439.

5. (1981) When RC §§ 1107.08(B), 2131.10 and 2131.11 are read in pari materia, it is clear that the General Assembly intended that only natural persons may be designated as the beneficiaries of "P.O.D." (payable on death) accounts; hence, a corporation may not be a beneficiary of a "P.O.D." account: *Powell v. City National Bank & Trust Co.*, 2 OApp3d 1, 2 OBR 1, 440 NE2d 560.

6. (1984) A guardian cannot, as a matter of law, revoke an inter vivos trust established by her ward prior to the ward's being declared incompetent without first obtaining court approval for the revocation: *Friedrich v. BancoOhio Natl. Bank*, 14 OApp3d 247, 14 OBR 276, 470 NE2d 467.

§ 2131.11 Release and discharge upon payment.

CASE NOTES AND OAG

1. (1981) When RC §§ 1107.08(B), 2131.10 and 2131.11 are read in pari materia, it is clear that the General Assembly intended that only natural persons may be designated as the beneficiaries of "P.O.D." (payable on death) accounts; hence, a corporation may not be a beneficiary of a "P.O.D." account: *Powell v. City National Bank & Trust Co.*, 2 OApp3d 1, 2 OBR 1, 440 NE2d 560.

§ 2151.01 Construction; purpose.

Research Aids

Construction and purpose of statute:

O-Jur2d: Juv Cts § 5

Law Review

Capital punishment of children in Ohio: "They'd never send a boy of seventeen to the chair in Ohio, would they?" Victor L. Streib. 18 AkronLRev 51 (1984).

The proposed Ohio juvenile code of 1977-1978. Robt. J. Willey. 39 OSLJ 273 (1978).

The representation of juveniles before the court: a look into the past and the future. Note. 31 CaseWResLRev 580 (1981).

State intervention in the family: making a federal case out of it. Martin Guggenheim. 45 OSLJ 399 (1984).

CASE NOTES AND OAG

1. (1983) The "welfare of the child/interests of public safety" standard contained in RC § 2151.01 sufficiently satisfies due process as it is not unconstitutionally vague: *Doe v. Staples*, 706 F2d 985 (6th Cir).

[§ 2151.01.1] § 2151.011 Definitions.

(A) As used in the Revised Code:

(1) "Juvenile court" means the division of the court of common pleas or a juvenile court separately and independently created having jurisdiction under Chapter 2151. of the Revised Code.

(2) "Juvenile judge" means a judge of a court having jurisdiction under Chapter 2151. of the Revised Code.

(B) As used in this chapter:

(1) "Child" means a person who is under the age of eighteen years, except that any child who violates a federal or state law or municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of his age at the time the complaint is filed or hearing had on the complaint and except that a person whose case is transferred for criminal prosecution pursuant to section 2151.26 of the Revised Code and is subsequently convicted in that case shall after the transfer be deemed not to be a child in any case in which he is alleged to have committed an act that if committed by an adult would constitute the offense of murder or aggravated murder, or would constitute an ag-

gravated felony of the first or second degree or a felony of the first or second degree.

(2) "Adult" means an individual eighteen years of age or older.

(3) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.

(4) "Shelter" means the temporary care of children in physically unrestricted facilities pending court adjudication or disposition.

(5) "Foster home" means a family home in which any child is received apart from his parents for care, supervision, or training.

(6) "Certified foster home" means a foster home operated by persons holding a permit in force, issued under sections 5103.03 to 5103.05 of the Revised Code.

(7) "Approved foster care" means facilities approved by the department of youth services under section 5139.37 of the Revised Code.

(8) "Organization" means any institution, public, semipublic, or private, and any private association, society, or agency located or operating in the state, incorporated or unincorporated, having among its functions the furnishing of protective services or care for children, or the placement of children in foster homes or elsewhere.

(9) "Certified organization" means any organization mentioned under division (B)(8) of this section which holds a certificate in force, issued under sections 5103.03 to 5103.05 of the Revised Code.

(10) "Legal custody" means a legal status created by court order which vests in the custodian the right to have physical care and control of the child and to determine where and with whom he shall live, and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(11) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the person, including but not necessarily limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(12) "Permanent custody" means a legal status created by the court which vests in the county department of welfare which has assumed the administration of child welfare, county children services board, or certified organization, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights,

privileges, and obligations, including all residual rights and obligations.

(13) "Temporary custody" means legal custody as defined in division (B)(10) of this section which may be terminated at any time at the discretion of the court.

(14) "Commit" means to vest custody as ordered by the court.

(15) "Probation" means a legal status created by court order following an adjudication that a child is delinquent; a juvenile traffic offender, or unruly whereby the child is permitted to remain in the parent's, guardian's, or custodian's home subject to supervision, or under the supervision of any agency designated by the court and returned to the court for violation of probation at any time during the period of probation.

(16) "Protective supervision" means a legal status created by court order whereby the child is permitted to remain in the parent's, guardian's, or custodian's home under supervision and subject to return to the court during the period of protective supervision.

(17) "Adequate parental care" means the provision of adequate food, clothing, and shelter to ensure a child's health and physical safety and the provision of specialized services warranted by a child's physical or mental needs.

*HISTORY: 138 v H 695 (Eff 10-24-80); 139 v H 440 (Eff 11-23-81); 140 v S 210. Eff 7-1-83.

The effective date of SB 210 is set by section 3 of the act.

Cross-References to Related Sections

"Parent" defined, RC § 3313.64.

Research Aids

Definitions relating to control:

O-Jur2d: Juv Cts § 11

Definitions relating to facilities:

O-Jur2d: Juv Cts § 12

Definitions relating to persons:

O-Jur2d: Juv Cts § 10

Dispositional hearing; delinquent child:

O-Jur2d: Juv Cts § 169

Juvenile court and juvenile judge defined:

O-Jur2d: Juv Cts § 19

Nature of proceedings:

O-Jur2d: Juv Cts § 66

Law Review

Consent to medical treatment for minors under care of children services board. Stephen D. Freedman. 10 CapitalULRev 309 (1980).

H.B. 695: updating Ohio's temporary and permanent custody procedures for child abuse, neglect and dependency cases. Note. 7 UDayLRev 293 (1981).

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require? Marvin M. Moore, *et al.* 16 AkronLRev 681 (1983).

CASE NOTES AND OAC

1. (1977) In an RC § 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing

officer may not award custody to the nonparent without first making a finding of parental unsuitability—that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child: In re Perales, 52 OS2d 89, 6 OO3d 293, 369 NE2d 1047.

2. (1981) There is no authority for a juvenile court to commit a delinquent juvenile to a jail for adult offenders, absent a finding that housing in an appropriate juvenile facility is unavailable, or that the public safety and protection so require: State v. Grady, 3 OApp3d 174, 3 OBR 199, 444 NE2d 51.

3. (1984) Revised Code § 2151.01.1(B)(12) provides that the grant of permanent custody divests the parents of all rights, including residual rights: In re Palmer, 12 OS3d 194, 12 OBR 259, 465 NE2d 1312.

4. (1983) When a court places an abused, neglected or dependent child in the permanent custody of a children's services board thereby divesting the natural parents of all parental rights and privileges, the board has no duty to involve the natural parents in decisions concerning the provision or assistance in the acquisition of family planning information or contraceptive devices for the child: OAG No.83-088.

5. (1984) Revised Code § 3313.64(B)(2)(a) provides that "[a] child who does not reside in the district where his parent resides shall be admitted to the schools of the district in which he resides if * * * [h]e is in the legal or permanent custody of a government agency or a person other than his natural or adoptive parent." In order to obtain "legal or permanent custody" of a child, the person seeking custody must do so through the court system. Thus, an agreement, without court intervention, between a grandparent and the child's parents "granting" custody to the grandparent does not comply with RC § 3313.64(B)(2)(a) and the child has no right to attend school in the district where the grandfather resides: State ex rel. Henry v. Madison Plains Local Bd. of Edn., 20 OApp3d 185, 20 OBR 230, 485 NE2d 732.

§ 2151.02 "Delinquent child" defined.

Cross-References to Related Sections

Delinquent child not to benefit by death, RC § 2105.19

Research Aids

Abusing or contributing to delinquency of child:

O-Jur2d: Juv Cts § 195

Delinquent child defined:

O-Jur2d: Juv Cts § 60

Unruly child defined:

O-Jur2d: Juv Cts § 62

Law Review

The representation of juveniles before the court: a look into the past and the future. Note. 31 CaseWResLRev 580 (1981).

Status offenders and juvenile court: a proposal for revamping jurisdiction. Comment. 42 OSLJ 1005 (1981).

CASE NOTES AND OAG

1. (1979) The violation of RC § 2903.07, vehicular homicide, when committed by a juvenile is an act of delin-

quency, not a juvenile traffic offense: In re Fox, 60 OMisc 31, 14 OO3d 80, 395 NE2d 918.

2. (1984) A "delinquent child" is a child whose conduct would constitute a violation of any criminal law statute: In re Burgess, 13 OApp3d 374, 13 OBR 456, 469 NE2d 914.

[§ 2151.02.1] § 2151.021 Juvenile traffic offender defined.

A child who violates any traffic law, traffic ordinance, or traffic regulation of this state, the United States, or any political subdivision of this state, other than a resolution, ordinance, or regulation of a political subdivision of this state the violation of which is required to be handled by a parking violations bureau or a joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, shall be designated as a "juvenile traffic offender."

*HISTORY: 139 v H 707. Eff 1-1-83.

Research Aids

Juvenile traffic offender defined:

O-Jur2d: Juv Cts § 61

CASE NOTES AND OAG

1. (1976) The time limits of RC § 2945.71 et seq., for the prosecution of criminal offenders do not apply to an adjudicatory hearing on a complaint alleging a child to be a juvenile traffic offender. The only applicable time limit, outside Juv. R. 29, is the six months limitation for prosecution of a minor misdemeanor stated in RC § 2901.13(A)(3): In re TLK, 2 OO3d 324 (CP).

2. (1979) The violation of RC § 2903.07, vehicular homicide, when committed by a juvenile is an act of delinquency, not a juvenile traffic offense: In re Fox, 60 OMisc 31, 14 OO3d 80, 395 NE2d 918.

3. (1983) Revised Code § 2501.02 grants the courts of appeals jurisdiction over appeals from juvenile court judgments and final orders rendered in juvenile traffic offender proceedings: In re Hartman, 2 OS3d 154, 2 OBR 699, 443 NE2d 516.

[§ 2151.02.2] § 2151.022 Unruly child defined.

Research Aids

Abusing or contributing to delinquency of child:

O-Jur2d: Juv Cts § 195

Unruly child defined:

O-Jur2d: Juv Cts § 62

ALR

Truancy as indicative of delinquency or incorrigibility, justifying commitment of infant or juvenile. 5 ALR4th 1212.

Law Review

Status offenders and juvenile court: a proposal for revamping jurisdiction. Comment. 42 OSLJ 1005 (1981).

§ 2151.03 Neglected child defined.

Research Aids

Neglected child defined:

O-Jur2d: Juv Cts § 63

Taking child into custody:

O-Jur2d: Juv Cts § 68

Unruly child defined:

O-Jur2d: Juv Cts § 62

Law Review

The child abuse amendment of 1984: the Infant Doe amendment. Comment. 18 AkronLRev 515 (1985).

In re Phillip B.: what happened to the best interests of the child? Casenote. 12 ToledoLRev 151 (1980).

Major evidentiary issues in prosecutions of family abuse cases. Susan P. Mele. 11 ONorthLRev 245 (1984).

CASE NOTES AND OAG

1. (1979) A child is not necessarily neglected or dependent merely because the child's mother lives with a man who is not her legal spouse. In the absence of evidence showing a detrimental impact upon the child, the relationship does not warrant the state in removing the child from parental custody in the best interest of that child: In re Burrell, 58 OS2d 37, 12 OO3d 43, 388 NE2d 738.

2. (1980) A parent's primary rights to the care and custody of a child are rights that must be protected, and parental custody will be terminated only when necessary for the mental and physical development of the child: In re Bibb, 70 OApp2d 117, 24 OO3d 159, 435 NE2d 96.

3. (1980) Unlike a finding of neglect under RC § 2151.03, which requires proof that the parents were willfully at fault in abandoning or neglecting the children or refusing to perform their parental duties, a finding of dependency under RC § 2151.04 must be grounded on whether the children are receiving proper care and support. The focus is on the condition of the children, not the fault of the parents: In re Bibb, 70 OApp2d 117, 24 OO3d 159, 435 NE2d 96.

4. (1982) In actions brought pursuant to RC §§ 2151.27 and 2151.03, the state's primary objective is not to decide conflicting claims to custody; its objective is to determine if a child is receiving proper parental care, and if that care is being provided by a relative pursuant to an agreement initiated by the child's parent, then the child is not a neglected child: In re Reese, 4 OApp3d 59, 4 OBR 109, 446 NE2d 482.

[§ 2151.03.1] § 2151.031 Abused child defined.

Cross-References to Related Sections

Definitions, RC § 3113.31.

Research Aids

Abused child defined:

O-Jur2d: Juv Cts § 63.1

Law Review

The child abuse amendment of 1984: the Infant Doe amendment. Comment. 18 AkronLRev 515 (1985).

Evidence—hearsay—child abuse and neglect—a child's statements naming an abuser are admissible under

the medical diagnosis or treatment exception to the hearsay rule. Case note. 53 CinLRev 1155 (1984).

Major evidentiary issues in prosecutions of family abuse cases. Susan P. Mele. 11 ONorthLRev 245 (1984).

State intervention in the family: making a federal case out of it. Martin Guggenheim. 45 OSLJ 399 (1984).

§ 2151.04 Dependent child defined.

Research Aids

Dependent child defined:

O-Jur2d: Juv Cts § 64

Law Review

The Effect of Custodial Parents' Sexual Conduct in Dependency Determinations. Comment. 40 OSLJ 1017 (1979).

State intervention in the family: making a federal case out of it. Martin Guggenheim. 45 OSLJ 399 (1984).

CASE NOTES AND OAG

1. (1979) A child is not necessarily neglected or dependent merely because the child's mother lives with a man who is not her legal spouse. In the absence of evidence showing a detrimental impact upon the child, the relationship does not warrant the state in removing the child from parental custody in the best interest of that child: In re Burrell, 58 OS2d 37, 12 OO3d 43, 388 NE2d 738.

2. (1978) Where the evidence shows that to return a child to her natural parent would be clearly detrimental to the child, such child is a "dependent child" under RC § 2151.04(C) and the court is authorized to commit the child permanently to the Children's Services Board under RC § 2151.35.3(D), even though the parent might be capable of giving proper care and support to other children: In re Justice, 59 OApp2d 78, 13 OO3d 139, 392 NE2d 897.

3. (1979) Once a child has been found to be "dependent" as defined in RC § 2151.04, the "best interests" of the child are the primary consideration in determining whether an award of permanent custody is justified pursuant to RC § 2151.35.3(D): In re Cunningham, 59 OS2d 100, 13 OO3d 78, 391 NE2d 1034.

4. (1980) A parent's primary rights to the care and custody of a child are rights that must be protected, and parental custody will be terminated only when necessary for the mental and physical development of the child: In re Bibb, 70 OApp2d 117, 24 OO3d 159, 435 NE2d 96.

5. (1980) The fact of dependency must be proved by clear and convincing evidence. RC § 2151.35: In re Bibb, 70 OApp2d 117, 24 OO3d 159, 435 NE2d 96.

6. (1980) Unlike a finding of neglect under RC § 2151.03, which requires proof that the parents were willfully at fault in abandoning or neglecting the children or refusing to perform their parental duties, a finding of dependency under RC § 2151.04 must be grounded on whether the children are receiving proper care and support. The focus is on the condition of the children, not the fault of the parents: In re Bibb, 70 OApp2d 117, 24 OO3d 159, 435 NE2d 96.

7. (1982) Neither RC § 2151.04 nor 2151.35.3 is constitutionally broad or vague: In re Williams, 7 OApp3d 324, 7 OBR 421, 455 NE2d 1027.

8. (1984) The court may award custody to neither parent where it finds that one parent is preoccupied with religious fanaticism and the other parent is emotionally un-

stable: *Birch v. Birch*, 11 OS3d 85, 11 OBR 327, 463 NE2d 1254.

9. (1983) Where the state can show, by clear and convincing evidence, that the "condition" or "environment" into which a newborn baby would enter would be threatening to the health and safety of the child, the state may intervene and have the child declared a "dependent child" pursuant to RC § 2151.04(C): *In re Campbell*, 13 OApp3d 34, 13 OBR 36, 468 NE2d 93.

§ 2151.05 Child without proper parental care.

Research Aids

Without proper parental care or guardianship defined:

O-Jur2d: Juv Cts § 65

The child abuse amendment of 1984: the *Infant Doe* amendment. Comment. 18 AkronLRev 515 (1985).

CASE NOTES AND OAG

1. (1982) In actions brought pursuant to RC §§ 2151.27 and 2151.03, the state's primary objective is not to decide conflicting claims to custody; its objective is to determine if a child is receiving proper parental care, and if that care is being provided by a relative pursuant to an agreement initiated by the child's parent, then the child is not a neglected child: *In re Reese*, 4 OApp3d 59, 4 OBR 109, 446 NE2d 482.

§ 2151.06 Residence or legal settlement.

Research Aids

Residence or legal settlement of child:

O-Jur2d: Juv Cts § 95

§ 2151.07 Creation and powers of juvenile court.

Cross-References to Related Sections

Judge of court of common pleas, juvenile division, created for Montgomery and Summit counties, RC § 2301.03.

Research Aids

Jurisdiction:

O-Jur2d: Juv Cts § 39

Juvenile court and juvenile judge defined:

O-Jur2d: Juv Cts § 19

CASE NOTES AND OAG

1. (1981) A juvenile court has authority to grant immunity under RC § 2945.44, even though there was not any criminal proceeding pending against the "grantee" of the immunity, and even though the grantee was not a witness at the time of the grant: *In re Poth*, 2 OApp3d 361, 2 OBR 417, 442 NE2d 105.

§ 2151.08 Juvenile court in Hamilton county.

Research Aids

Juvenile court and juvenile judge defined:

O-Jur2d: Juv Cts § 19

§ 2151.09 Separate building and site may be purchased or leased.

Research Aids

Terms and sessions of court:

O-Jur2d: Juv Cts § 20

§ 2151.10 Appropriation for expenses of the court and maintenance of children.

The juvenile judge shall annually submit a written request for an appropriation to the board of county commissioners that shall set forth estimated administrative expenses of the juvenile court that the judge considers reasonably necessary for the operation of the court, including reasonably necessary expenses of the judge and such officers and employees as he may designate in attending conferences at which juvenile or welfare problems are discussed, and such sum each year as will provide for the maintenance and operation of the detention home, the care, maintenance, education, and support of neglected, abused, dependent, and delinquent children, other than children entitled to aid under sections 5107.01 to 5107.16 of the Revised Code, and for necessary orthopedic, surgical, and medical treatment, and special care as may be ordered by the court for any neglected, abused, dependent, or delinquent children. The board shall conduct a public hearing with respect to the written request submitted by the judge and shall appropriate such sum of money each year as it determines, after conducting the public hearing and considering the written request of the judge, is reasonably necessary to meet all the administrative expenses of the court. All disbursements from such appropriations shall be upon specifically itemized vouchers, certified to by the judge.

If the judge considers the appropriation made by the board pursuant to this section insufficient to meet all the administrative expenses of the court, he shall commence an action under Chapter 2731. of the Revised Code in the court of appeals for the judicial district for a determination of the duty of the board of county commissioners to appropriate the amount of money in dispute. The court of appeals shall give priority to the action filed by the juvenile judge over all cases pending on its docket. The burden shall be on the juvenile judge to prove that the appropriation requested is reasonably necessary to meet all administrative expenses of the court. If, prior to the filing of an action under Chapter 2731. of the Revised Code or during the pendency of the action, the judge exercises his contempt power in order to obtain the sum of money in dispute, he shall not order the imprisonment of any member of the board of county commissioners notwithstanding sections 2705.02 to 2705.06 of the Revised Code.

*HISTORY: 138 v S 63. Eff 7-26-79.

Research Aids

Appropriation for maintenance of child:

O-Jur2d: Juv Cts § 26

Expense for transporting child:

O-Jur2d: Juv Cts § 184

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1. (1976) Where the basic function of a court is impeded by a failure or refusal of the body responsible to provide a necessary appropriation, that court possesses the inherent power to order such appropriation and to enforce its order by contempt proceedings: State ex rel. Edwards v. Murray, 48 OS2d 303, 2 OO3d 446, 358 NE2d 577.

2. (1980) The county commissioners could not collaterally attack the court's appropriation request in an appeal from the judgment of contempt: In re Appropriation for 1979, 62 OS2d 99, 16 OO3d 104, 403 NE2d 974.

3. (1981) Revised Code § 2151.10, effective July 26, 1979, is an impermissible legislative encroachment upon the inherent powers of the judiciary, and is, therefore, unconstitutional: State ex rel. Johnston v. Taulbee, 66 OS2d 417, 20 OO3d 361, 423 NE2d 80.

4. (1981) When a judge undertakes to enforce his ex parte order, directing a board of county commissioners to purchase furnishings and equipment reasonably necessary for the proper and efficient operation of the court, by proceedings in contempt, the board has remedy by way of appeal only from the finding and order in the contempt proceedings: In re Furnishings for Courtroom Two, 66 OS2d 427, 20 OO3d 367, 423 NE2d 86.

5. (1983) The statutory limitation on appointee compensation, set forth in RC § 2101.11, may not validly be applied to the judge of the probate division of the court of common pleas when there has been no showing that the judge abused his discretion in establishing either the size or compensation ranges of his staff: State ex rel. Slaby v. Summit County Council, 7 OApp3d 199, 7 OBR 258, 454 NE2d 1379.

6. (1983) That portion of RC § 2101.11(B), containing language substantially identical to that in RC § 2151.10, effective July 26, 1979, is unconstitutional: State ex rel. Slaby v. Summit County Council, 7 OApp3d 199, 7 OBR 258, 454 NE2d 1379.

7. (1983) Regardless of statutory authorization, the judges of the courts of common pleas and their divisions have the inherent authority to determine in the first instance, in the exercise of sound discretion, the sum of money reasonable for the efficient operation of the court, and absent an abuse of discretion in the determination of such sum, may proceed either in contempt or mandamus to receive the necessary funding from their respective counties: State ex rel. Slaby v. Summit County Council, 7 OApp3d 199, 7 OBR 258, 454 NE2d 1379.

8. (1984) A court may modify its budget request at any time if such modification is otherwise reasonable and necessary: State ex rel. Arbaugh v. Richland Cty. Bd. of Comrs., 14 OS3d 5, 14 OBR 311, 470 NE2d 880.

9. (1984) Mandamus will issue where the county commissioners fail to meet their burden of proving that the

budget requests submitted for the probate and juvenile divisions of the court of common pleas were unreasonable and unnecessary: State ex rel. Rudes v. Rofkar, 15 OS3d 69, 15 OBR 163, 472 NE2d 354.

10. (1985) Mandamus action by court officials to secure the requested funding appropriation will be denied where the requested salary increases for court employees constitute an abuse of discretion. State ex rel. Britt v. Bd. of Franklin Cty. Commrs., 18 OS3d 1, 18 OBR 1, 480 NE2d 77.

§ 2151.11 Assignment of court employees to combat juvenile delinquency.

Research Aids

Administrative and quasi-judicial powers and duties:

O-Jur2d: Juv Cts § 21

CASE NOTES AND OAG

1. (1976) Where the basic function of a court is impeded by a failure or refusal of the body responsible to provide a necessary appropriation, that court possesses the inherent power to order such appropriation and to enforce its order by contempt proceedings: State ex rel. Edwards v. Murray, 48 OS2d 303, 2 OO3d 446, 358 NE2d 577.

§ 2151.12 Clerk; bond; judge as clerk.

Whenever the courts of common pleas, division of domestic relations, exercise the powers and jurisdictions conferred in sections 2151.01 to 2151.54 of the Revised Code, or whenever the juvenile judge, or a majority of the juvenile judges of a multi-judge juvenile division, of a court of common pleas, juvenile division and the clerk of the court of common pleas agree in an agreement that is signed by the judge and the clerk and entered formally in the journal of the court, the clerks of courts of common pleas shall keep the records of such courts. In all other cases, the juvenile judge shall be the clerk of his own court.

In counties in which the juvenile judge is clerk of his own court, before entering upon the duties of his office as such clerk, he shall execute and file with the county treasurer a bond in a sum to be determined by the board of county commissioners, with sufficient surety to be approved by the board, conditioned for the faithful performance of his duties as clerk. The bond shall be given for the benefit of the county, the state, or any person who may suffer loss by reason of a default in any of the conditions of the bond.

*HISTORY: 137 v S 336. Eff 3-3-78.

Research Aids

Court personnel:

O-Jur2d: Juv Cts § 24

§ 2151.13 Employees; compensation; bond.

Research Aids

Court personnel:

O-Jur2d: Juv Cts § 24

§ 2151.14 Duties and powers of probation department; records; command assistance.

Research Aids

Nature of proceedings:

O-Jur2d: Juv Cts § 66

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O-Jur2d: Juv Cts § 25

Restrictions on use of juvenile court records:

O-Jur2d: Juv Cts § 148

Taking child into custody:

O-Jur2d: Juv Cts § 68

CASE NOTES AND OAG

1. (1981) The federal constitution does not encompass a general right to nondisclosure of private information. Thus disclosure of juvenile court records, including individual social histories, to appropriate governmental and social agencies is not unconstitutional: *J.P. v. DeSanti*, 653 F2d 1080 (6th Cir).

§ 2151.15 Powers and duties vested in county department of probation.

Research Aids

Probation department and officers:

O-Jur2d: Juv Cts § 25

[§ 2151.15.1] § 2151.151 [Contract for services for children on probation.]

(A) The juvenile judge may contract with any agency, association, or organization, which may be of a public or private, or profit or nonprofit nature, or with any individual for the provision of supervisory or other services to children placed on probation who are under the custody and supervision of the juvenile court.

(B) The juvenile judges of two or more adjoining or neighboring counties may join together for purposes of contracting with any agency, association, or organization, which may be of a public or private, or profit or nonprofit nature, or with any individual for the provision of supervisory or other services to children placed on probation who are under the custody and supervision of the juvenile court of any of the counties that joins [join] together.

HISTORY: 139 v H 440. Eff 11-23-81.

§ 2151.16 Referees; powers and duties.

Research Aids

Appointment of referees:

O-Jur2d: Juv Cts § 137

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O-Jur2d: Juv Cts § 143

Hearings and proceedings before referee:

O-Jur2d: Juv Cts § 139

Hearing without jury:

O-Jur2d: Juv Cts § 146

Report of referee:

O-Jur2d: Juv Cts § 142

CASE NOTES AND OAG

1. (1976) A juvenile judge has no authority to commit the trial of a criminal charge against an adult to a referee and any proceedings so committed are null and void: *State v. Eddington*, 52 OApp2d 312, 6 OO3d 317, 369 NE2d 1054.

§ 2151.17 Rules governing practice and procedure.

Research Aids

Court personnel:

O-Jur2d: Juv Cts § 24

Rules governing practice and procedure:

O-Jur2d: Juv Cts § 22

§ 2151.18 [Records; monthly report of data; annual report; distribution of copies.]

(A) The juvenile court shall maintain records of all official cases brought before it, including an appearance docket, a journal, and a cashbook. The court shall maintain a separate docket for traffic offenses. All traffic cases shall be recorded on the separate docket instead of on the general appearance docket. The parents of any child affected, if they are living, or the nearest of kin of the child, if the parents are deceased, may inspect these records, either in person or by counsel during the hours in which the court is open.

(B) The clerk of the court shall maintain a statistical record that includes all of the following:

(1) The number of complaints that are filed with the court that allege that a child is delinquent, in relation to which the court determines, under division (D) of section 2151.27 of the Revised Code, that the victim of the alleged delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the alleged commission of the act;

(2) The number of complaints described in division (B)(1) of this section that result in the child being adjudicated delinquent;

(3) The number of complaints described in division (B)(2) of this section in which the act upon which the adjudication of delinquency is based caused property damage or would be a theft offense, as defined in division (K) of section 2913.01 of the Revised Code, if committed by an adult;

(4) The number of complaints described in division (B)(3) of this section that result in the child

being required, as an order of disposition made under division (A)(8) of section 2151.355 [2151.35.5] of the Revised Code, to make restitution for all or part of the property damage caused by his delinquent act or for all or part of the value of the property that was the subject of the delinquent act that would be a theft offense if committed by an adult;

(5) The number of complaints described in division (B)(2) of this section in which the act upon which the adjudication of delinquency is based would have been an offense of violence if committed by an adult;

(6) The number of complaints described in division (B)(5) of this section that result in the child being committed, as an order of disposition made under division (A)(3), (4), (5), or (6) of section 2151.355 [2151.35.5] of the Revised Code, to any facility for delinquent children operated by the county, a district, or a private agency or organization or to the department of youth services;

(7) The number of complaints described in division (B)(1) of this section that result in the case being transferred for criminal prosecution to an appropriate court having jurisdiction of the offense, under division (A) of section 2151.26 of the Revised Code or that involve an act of a child that is required to be prosecuted in an appropriate court having jurisdiction of the offense, under division (G) of that section.

The clerk of the court shall compile an annual summary covering the preceding calendar year showing all of the information for that year contained in the record maintained under this division. The record and the annual summary shall be public records open for inspection. Neither the record nor the annual summary shall include the identity of any party to a case.

(C) The juvenile court shall submit monthly to the department of youth services, on forms provided by the department, any data regarding all official cases of the court that the department reasonably requests. The department shall publish this data on a statewide basis in statistical form at least annually. The department shall not publish the identity of any party to a case.

(D) Not later than June of each year, the court shall prepare an annual report covering the preceding calendar year showing the number and kinds of cases that have come before it, the disposition of the cases, and any other data pertaining to the work of the court that the juvenile judge directs or that the department of youth services requests. Copies of such report shall be filed with the department and with the board of county commissioners. With the approval of the board, copies may be printed for distribution to persons and agencies interested in the court or community program for dependent, neglected, abused, or delinquent children and juvenile traffic offenders. The number of copies ordered printed and the estimated cost of each

printed copy shall appear on each copy of the report printed for distribution.

*HISTORY: 138 v H 394 (Eff 9-26-79); 139 v H 440 (Eff 11-23-81); 140 v S 5. Eff 9-26-84.

Research Aids

Nature of proceedings:

O-Jur2d: Juv Cts § 66

Records and reports:

O-Jur2d: Juv Cts § 23

§ 2151.19 Summons; expense.

Research Aids

Determinations of motions:

O-Jur2d: Juv Cts § 123

Expense of serving writs:

O-Jur2d: Juv Cts § 182

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O-Jur2d: Juv Cts § 115

§ 2151.20 Seal of court; dimensions.

Research Aids

Administrative and quasi-judicial powers and duties:

O-Jur2d: Juv Cts § 21

§ 2151.21 Jurisdiction in contempt.

Research Aids

Jurisdiction in contempt:

O-Jur2d: Juv Cts § 56

CASE NOTES AND OAC

1. (1981) A juvenile court has authority to grant immunity under RC § 2945.44, even though there was not any criminal proceeding pending against the "grantee" of the immunity, and even though the grantee was not a witness at the time of the grant: In re Poth, 2 OApp3d 361, 2 OBR 417, 442 NE2d 105.

[§ 2151.21.1] § 2151.211 [Employee may not be penalized for being subpoenaed in delinquency case.]

No employer shall discharge or terminate from employment, threaten to discharge or terminate from employment, or otherwise punish or penalize any employee because of time lost from regular employment as a result of the employee's attendance at any proceeding in a delinquency case pursuant to a subpoena. This section generally does not require and shall not be construed to require an employer to pay an employee for time lost as a result of attendance at any proceeding in a delinquency case. However, if an employee is subpoenaed to appear at a proceeding in a delinquency case and the proceeding pertains to an offense against the employer or an offense involving the employee during the course of his employment, the employer shall

not decrease or withhold the employee's pay for any time lost as a result of compliance with the subpoena. Any employer who knowingly violates this section is in contempt of court.

HISTORY: 140 v S 172. Eff 9-26-84.

§ 2151.22 Terms of court; sessions.

Research Aids

Terms and sessions of court:

O-Jur2d: Juv Cts § 20

§ 2151.23 Jurisdiction of juvenile court.

(A) The juvenile court has exclusive original jurisdiction under the Revised Code:

(1) Concerning any child who on or about the date specified in the complaint is alleged to be a juvenile traffic offender, or a delinquent, unruly, abused, neglected, or dependent child;

(2) To determine the custody of any child not a ward of another court of this state;

(3) To hear and determine any application for a writ of habeas corpus involving the custody of a child;

(4) To exercise the powers and jurisdiction given the probate division of the court of common pleas in Chapters 5122. and 5123. of the Revised Code, if the court has probable cause to believe that a child otherwise within the jurisdiction of the court is a mentally ill person subject to hospitalization by court order, as defined in section 5122.01 of the Revised Code, or a mentally retarded person subject to institutionalization by court order, as defined in section 5123.01 of the Revised Code;

(5) To hear and determine all criminal cases charging adults with the violation of any section of Chapter 2151. of the Revised Code;

(6) Under the interstate compact on juveniles in section 2151.56 of the Revised Code;

(7) To hear and determine applications for consent to marry pursuant to section 3101.04 of the Revised Code.

(B) The juvenile court has original jurisdiction under the Revised Code:

(1) To hear and determine all cases of misdemeanors charging adults with any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance;

(2) To determine the paternity of any child alleged to have been born out of wedlock pursuant to Chapter 3111. of the Revised Code;

(3) Under the uniform reciprocal enforcement of support act in Chapter 3115. of the Revised Code;

(4) To hear and determine an application for an order for the support of any child, if the child is not a ward of another court of this state.

(C) The juvenile court, except as to juvenile courts which are a separate division of the court of

common pleas, or a separate and independent juvenile court, has jurisdiction to hear, determine, and make a record of any action for divorce or alimony involving the custody or care of children[,] filed in the court of common pleas and certified by the court of common pleas with all the papers filed therein to the court for trial, provided that no such certification shall be made to any court unless the consent of the juvenile judge is first obtained. After such certification is made and consent obtained, the court shall proceed as if such action were originally begun in said court except as to awards for alimony or support due and unpaid at the time of certification, over which the court has no jurisdiction.

(D) The juvenile court has jurisdiction to hear and determine all matters as to custody and support of children duly certified by the court of common pleas to the juvenile court after a divorce decree has been granted, including jurisdiction to modify the judgment and decree of the common pleas court as the same relate to the custody and support of children.

(E) The juvenile court has jurisdiction to hear and determine the case of any child certified to the court by any court of competent jurisdiction if such child comes within the jurisdiction of the court as defined by this section.

(F) The juvenile court shall exercise its jurisdiction in child custody matters in accordance with section 3109.04 and sections 3109.21 to 3109.36 of the Revised Code.

(G) Each order for child support made by a juvenile court on or after April 15, 1985, shall be accompanied, unless the order is subject to division (C) of section 3113.21 of the Revised Code, by an order requiring the amount ordered for support to be withheld from the personal earnings or workers' compensation payments of the person required to pay the support in accordance with division (B)(1)(a) or (b) of section 3113.21 of the Revised Code, by an order requiring the amount ordered for support to be deducted from an account of the person required to pay the support in accordance with division (B)(1) (c)(i) of that section, by an order requiring the posting of bond in accordance with division (B)(1) (c)(ii) of that section, by a provisional order of the type described in division (B)(2) of that section, or by an order of the type described in division (G)(2) of that section, whichever is appropriate under the requirements of that section. Each order for child support made by a juvenile court on or after April 15, 1985, that is subject to division (C) of section 3113.21 of the Revised Code may be accompanied by an order requiring the posting of bond in accordance with that division, but shall not be accompanied by any order of a type described in division (B)(1)(a), (1)(b), (1)(c), (2)(a)(i), (2)(a)(ii), (2)(a)(iii), (2)(a)(iv), or

(G) of that section. If any person required to pay child support under an order made by a juvenile court on or after April 15, 1985, is found in contempt of court for failure to make support payments under the order, the court that makes the finding shall, in addition to any other penalty or remedy imposed, assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

*HISTORY: 137 v S 135 (Eff 10-25-77); 139 v H 1 (Eff 8-5-81); 139 v H 515 (Eff 6-1-82); 140 v H 93 (Eff 3-19-84); 140 v H 614. Eff 4-10-85.

Cross-References to Related Sections

Court order for child support issued on and after 4-15-85; earlier default provisions inapplicable; bureau of support to notify court; court action; notification of recipient, RC § 2301.37.1.

Hearing to determine employment status, workers' compensation benefits or funds on deposit of person ordered to pay child support; withholding of support from assets, RC § 3113.21.

Nonsupport of dependents as misdemeanor of first degree; court costs and attorney fees may be imposed upon conviction of failure to obey certain support orders, RC § 2919.21.

Written agreement filed with court for scheduled payment of child support; possible cash bond required of payor where order not administered by bureau of support, RC § 3113.21(C).

Research Aids

Children within purview of statute:

O-Jur2d: Juv Cts § 57

Dispositional hearing; delinquent child:

O-Jur2d: Juv Cts § 169

Exclusive original jurisdiction:

O-Jur2d: Juv Cts § 40

Jurisdiction; adult charged with violation of juvenile court law:

O-Jur2d: Juv Cts § 44

Jurisdiction; child custody:

O-Jur2d: Juv Cts § 43

Jurisdiction in contempt:

O-Jur2d: Juv Cts § 56

Jurisdiction; juvenile traffic offender, etc.:

O-Jur2d: Juv Cts § 42

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O-Jur2d: Juv Cts § 41

Jurisdiction: misdemeanors involving adults with violations affecting child:

O-Jur2d: Juv Cts § 46

Jurisdiction upon certification from common pleas court:

O-Jur2d: Juv Cts § 49

Jurisdiction upon certification for other court:

O-Jur2d: Juv Cts § 47

Original jurisdiction:

O-Jur2d: Juv Cts § 45

Law Review

Child Custody. 3 ONorthLRev 265 (1975).

Consent to medical treatment for minors under care of children services board. Stephen D. Freedman. 10 CapitalULRev 309 (1980).

In re Eyrd [62 OS2d 334 (1981)]: child custody rights of unwed fathers. Case note. 11 CapitalULRev 347 (1981).

Family Law: Illegitimate children. Ohio Law Survey. 51 CinLRev 186 (1982).

Fathers, biological and anonymous, and other legal strangers: determination of parentage and artificial insemination by donor under Ohio law. Susan G. Eisenman. 45 OSLJ 383 (1984).

State intervention in the family: making a federal case out of it. Martin Guggenheim. 45 OSLJ 399 (1984).

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1. (1975) After a full hearing, the retroactive modification of a prior multiple child support order will not be disturbed on appeal in the absence of an abuse of discretion by the trial court: *Asztalos v. Fortney*, 48 OApp2d 66, 2 OO3d 45, 355 NE2d 517.

2. (1975) The equities involved in a multiple child support order case are such that if a substantial change in material circumstances has occurred since the original decree was entered, the Juvenile Court may, upon a proper hearing, modify a support order retroactively. (*McPherson v. McPherson*, 153 OS 82, 41 OO 151, distinguished.): *Asztalos v. Fortney*, 48 OApp2d 66, 2 OO3d 45, 355 NE2d 517.

3. (1975) Where an original child support order was for a total sum on behalf of four children and did not designate a specific amount for each child, and thereafter one child was emancipated and the custody of a second child was transferred from the wife to the husband, the court, in its discretion, may modify the prior order retroactively. A modification, if any, need not be made on a pro rata basis: *Asztalos v. Fortney*, 48 OApp2d 66, 2 OO3d 45, 355 NE2d 517.

4. (1975) Where a court, having acquired jurisdiction over a child by virtue of a divorce action between the child's parents, certifies the matter of the child's custody to a juvenile court, the consent of the juvenile court having first been obtained, the juvenile court has exclusive jurisdiction over the child's custody by virtue of RC § 3109.06 and RC § 2151.23(D) and a finding of unfitness of the parents or that there is no suitable relative to have custody is not a necessary prerequisite to such certification: *In re Height*, 47 OApp2d 203, 1 OO3d 279, 353 NE2d 887.

5. (1976) A juvenile judge has no authority to commit the trial of a criminal charge against an adult to a referee and any proceedings so committed are null and void: *State v. Eddington*, 52 OApp2d 312, 6 OO3d 317, 369 NE2d 1054.

6. (1978) Where a petition is filed which states a proper cause of action for a writ of habeas corpus, and there is no plain and adequate remedy in the ordinary course of the law, Sections 2 and 3, respectively, of Article IV of the Ohio Constitution require the Supreme Court and the Court of Appeals to exercise their original jurisdiction in habeas corpus; and in such a case, these courts cannot

refuse to exercise that original jurisdiction under the doctrine of *forum non conveniens*: *Hughes v. Scaffide*, 53 OS2d 85, 7 OO3d 175, 372 NE2d 598.

7. (1977) Under RC § 2151.23(A), the Juvenile Court has exclusive original jurisdiction in applications for a writ of habeas corpus involving custody of a child and is thereby empowered to determine custody in such proceeding: *In re Wright*, 52 OMisc 4, 6 OO3d 31, 367 NE2d 931.

8. (1977) In an RC § 2151.23(A)(2) child custody proceeding between a parent and a nonparent, the hearing officer may not award custody to the nonparent without first making a finding of parental unsuitability—that is, without first determining that a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child: *In re Perales*, 52 OS2d 89, 6 OO3d 293, 369 NE2d 1047.

9. (1979) A parent has forfeited his paramount right to custody if he has abandoned the child. The court must then weigh the best interests of the child in determining whether to grant the writ returning the child to the parent: *In re Young*, 58 OS2d 90, 12 OO3d 93, 388 NE2d 1235.

10. (1979) A parent may be denied custody if a preponderance of the evidence indicates that he has abandoned the child: *Hughes v. Scaffide*, 58 OS2d 88, 12 OO3d 92, 388 NE2d 1233.

11. (1979) The juvenile court has exclusive original jurisdiction, pursuant to RC § 2151.23(A), concerning any child who is alleged in a proper complaint to be neglected, and the court does not lose jurisdiction by failing to adhere to the time limits set forth in Juv. R. 29(A) and 34(A): *Linger v. Weiss*, 57 OS2d 97, 11 OO3d 281, 386 NE2d 1354.

12. (1979) A parent, alleging that he failed to receive notice of a hearing concerning the shelter care of his child, must move the juvenile court for a rehearing, pursuant to Juv. R. 7(C), before seeking a writ of habeas corpus: *Linger v. Weiss*, 57 OS2d 97, 11 OO3d 281, 386 NE2d 1354.

13. (1978) The determination of whether or not a child is "dependent," as defined in RC § 2151.04, must be made as of the time of the hearing on the complaint, and a determination that a child is not a "dependent child" at one time is no bar to a later determination that the child is then "dependent": *In re Justice*, 59 OApp2d 78, 13 OO3d 139, 392 NE2d 897.

14. (1978) In any case where a court of common pleas has made an award of custody or an order for support, or both, of minor children, that court may certify the case to the juvenile court of any county in the state for further proceedings: *Pylant v. Pylant*, 61 OApp2d 247, 15 OO3d 407, 401 NE2d 940.

15. (1977) Both the courts of appeals and the juvenile courts have original jurisdiction in habeas corpus actions as to the custody of children: *In re Children*, 64 OApp2d 168, 18 OO3d 123, 411 NE2d 802.

16. (1981) Legitimation of the child is not a prerequisite for the natural father to have equality of standing with the mother in a RC § 2151.23(A)(2) custody action. All three methods by which a father in Ohio can legitimate his child—(1) in an acknowledgment proceeding brought under RC § 2105.18; (2) by adopting the child; or (3) by marrying the mother—require the consent of the mother, and therefore the mother can thwart any attempt by the natural father to legitimate the child. A second reason for

not requiring legitimation is that such a requirement would not necessarily be in the best interests of the child, and would, in fact, result in dissimilar treatment between legitimate and illegitimate children. Therefore, where the alleged natural father of an illegitimate child has participated in the nurturing process of the child, files a complaint seeking custody of the child under RC § 2151.23(A)(2), and the mother admits that he is the natural father of the child, the natural father has equity of standing with the mother with respect to the custody of the child. The court shall determine which parent shall have the legal custody of the child, taking into account what would be in the best interests of the child: *In re Byrd*, 66 OS2d 334, 20 OO3d 309, 421 NE2d 1284.

17. (1981) Revised Code § 2151.23 does not limit the juvenile court to deciding only particular aspects of a juvenile's case, or in any way restrict its jurisdiction, other than by limiting the court to dealing with juveniles. Thus a juvenile may challenge in that forum the distribution of juvenile court records, including social histories, to governmental and social agencies: *J. P. v. DeSanti*, 653 F2d 1080 (6th Cir.).

18. (1982) The Juvenile Court acts beyond the scope of its jurisdiction when it orders the Ohio Department of Mental Health to pay the cost of care of a child placed in a private, non-public psychiatric hospital: *In re Hamil*, 69 OS2d 97, 23 OO3d 151, 431 NE2d 317.

19. (1981) In a child custody dispute between the parent of a child and a non-parent brought under RC § 3109.04, a suitable parent has a paramount right to custody so long as such custody is not detrimental to the child. (*In re Perales*, 52 OS2d 89, 6 OO3d 293, adopted for RC § 3109.04 custody disputes): *Thrasher v. Thrasher*, 3 OApp3d 210, 3 OBR 240, 444 NE2d 431.

20. (1983) Parent may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that his custody would be detrimental to the child: *Reynolds v. Ross Cty. Children's Service Agency*: 5 OS3d 27, 5 OBR 87, 448 NE2d 816.

21. (1983) Revised Code § 2151.23(A) which states that "[t]he juvenile court has exclusive original jurisdiction under the Revised Code: *** (2) [t]o determine the custody of any child not a ward of another court of this state ****" confers concurrent jurisdiction upon this state's court, where another state's court has already properly assumed and exercised jurisdiction in conformity with RC §§ 3109.21 to 3109.36: *Squires v. Squires*, 12 OApp3d 138, 12 OBR 460, 468 NE2d 73.

22. (1983) Where a complaint is filed alleging that a child is dependent or neglected in violation of RC §§ 2151.03(B) and 2151.04(A), (B), and (C), JuvR 29(D)(2) does not prohibit the child's mother from participating in the adjudicatory hearing just because she entered a plea of "admitted" to the allegations in the complaint: *In re Sims*, 13 OApp3d 37, 13 OBR 40, 468 NE2d 111.

23. (1984) A court which obtains jurisdiction over and enters orders regarding the custody and support of children retains continuing and exclusive jurisdiction over such matters: *Hardesty v. Hardesty*, 16 OApp3d 56, 16 OBR 59, 474 NE2d 368.

24. (1985) Prohibition will not issue to prevent a juvenile court, in a URESA action, from requiring information as to a party's financial status: *Manrow v. Court of Common Pleas of Lucas Cty.*, 20 OS3d 37, 20 OBR 285, 485 NE2d 713.

§ 2151.24 Separate room for hearings.

Research Aids

Terms and sessions of court:

O-Jur2d: Juv Cts § 20

§ 2151.25 Transfer to juvenile court.

Research Aids

Transfer of criminal case to juvenile court:

O-Jur2d: Juv Cts § 51

§ 2151.26 Relinquishment of jurisdiction for purpose of criminal prosecution.

(A) After a complaint has been filed alleging that a child is delinquent by reason of having committed an act that would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making the following determinations:

(1) The child was fifteen or more years of age at the time of the conduct charged;

(2) There is probable cause to believe that the child committed the act alleged;

(3) After an investigation, including a mental and physical examination of the child made by a public or private agency, or a person qualified to make the examination, that there are reasonable grounds to believe that:

(a) He is not amenable to care or rehabilitation or further care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;

(b) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.

(B) The court, when determining whether to transfer a case pursuant to division (A) of this section, shall determine if the victim of the delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act. Regardless of whether or not the child knew the age of the victim, the fact that the victim was sixty-five years of age or older or permanently and totally disabled shall be considered by the court in favor of transfer, but shall not control the decision of the court.

(C) The child may waive the examination if the court finds the waiver competently and intelligently made. Refusal to submit to a mental and physical examination by the child constitutes waiver of the examination.

(D) Notice in writing of the time, place, and purpose of such hearing shall be given to the child's parents, guardian, or other custodian and his counsel at least three days prior to the hearing.

(E) No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen, unless the child has been transferred as provided in this section. Any prosecution that is had in a criminal court on the mistaken belief that the child was over eighteen years of age at the time of the commission of the offense shall be deemed a nullity, and the child shall not be considered to have been in jeopardy on the offense.

(F) Upon such transfer, the juvenile court shall state the reasons for the transfer and order the child to enter into a recognizance with good and sufficient surety for his appearance before the appropriate court for any disposition that the court is authorized to make for a like act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint.

(G) Any child whose case is transferred for criminal prosecution pursuant to this section and who is subsequently convicted in that case shall thereafter be prosecuted as an adult in the appropriate court for any future act that he is alleged to have committed that if committed by an adult would constitute the offense of murder or aggravated murder, or would constitute an aggravated felony of the first or second degree or a felony of the first or second degree.

*HISTORY: 137 v S 119 (Eff 8-30-78); 139 v H 440 (Eff 11-23-81); 140 v S 210. Eff 7-1-83.

The effective date of SB 210 is set by section 3 of the act.

Cross-References to Related Sections

Child; exceptions, RC § 2151.01.1.

Clerk of juvenile courts to maintain certain records in delinquency cases if victim was sixty-five years of age or older or permanently and totally disabled, RC § 2151.18.

Copies of fingerprints, photographs, and records may be used or released if child's case is transferred for criminal prosecution, RC § 2151.31.3.

Research Aids

Notice and hearing on transfer:

O-Jur2d: Juv Cts § 53

Relinquishment of jurisdiction by juvenile court:

O-Jur2d: Juv Cts § 52

Waiver of mental or physical examination:

O-Jur2d: Juv Cts § 54

ALR

Possibility of rehabilitation as affecting whether juvenile offender should be tried as adult. 22 ALR4th 1162.

Law Review

Capital punishment of children in Ohio: "They'd never send a boy of seventeen to the chair in Ohio, would they?" Victor L. Streib. 18 AkronLRev 51 (1984).

H.B. 440: Ohio restructures its juvenile justice system. Note. 8 UDayLRev 237 (1982).

Juvenile Court Transfer & Double Jeopardy. Casenote. 9 AkronLRev 389, 397 (1976).

Juvenile law—the waiver of juvenile court jurisdiction. *State v. Adams*, 69 OS2d 120 (1982). Case note. 16 AkronLRev 324 (1982).

Relinquishment of jurisdiction for purposes of criminal prosecution of juveniles. Comment. 8 NoKyLRev 377, 389 (1981).

Slamming the door on prodigals: changing conceptions of childhood and the demise of juvenile justice. Comment. 9 NoKyLRev 517 (1982).

CASE NOTES AND OAG

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1. (1977) Informal proceedings conducted in a juvenile court in 1962 for the purpose of determining whether or not to bind over a juvenile defendant to be tried as an adult do not constitute an "adjudicatory hearing" as described in *Breed v. Jones*, 421 US 519 (1975): *State v. Sims*, 55 OApp2d 285, 9 OO3d 417, 380 NE2d 1350.

2. (1981) The probable cause hearing required by RC § 2151.26 prior to bind-over of a juvenile for prosecution as an adult is not an adjudicatory proceeding to which jeopardy attaches. Thus the juvenile's subsequent trial as an adult does not place him in double jeopardy: *Keener v. Taylor*, 640 F2d 839, 22 OO3d 248 (6th Cir.).

3. (1980) A minor criminal defendant, by entering a plea of guilty, does not waive his objections to constitutional deficiencies in the hearing wherein the Juvenile Court relinquished jurisdiction to the Court of Common Pleas: *State v. Riggins*, 68 OApp2d 1, 22 OO3d 1, 426 NE2d 504.

4. (1981) Prohibition will not issue to prevent a common pleas court from trying a juvenile who has been transferred for prosecution as an adult: *State ex rel. Torres v. Simmons*, 68 OS2d 118, 22 OO3d 340, 429 NE2d 862.

5. (1981) Transfer of a charge amounting to a felony in an adult from Juvenile Court to Common Pleas Court under RC § 2151.26 and Juv. R. 30 does not discharge jurisdiction in Juvenile Court over a pending charge amounting to a misdemeanor in an adult unless the misdemeanor stems from the same act constituting the felony and is an offense included in it: *State ex rel. Duganitz v. Court*, 23 OO3d 572 (App.).

6. (1982) When a minor is transferred from the Juvenile Court to the Court of Common Pleas on a charge which would constitute a felony if committed by an adult, the grand jury is empowered to return an indictment under the facts submitted to it and is not confined to returning indictments only on charges originally filed in the Juvenile Court: *State v. Adams*, 69 OS2d 120, 23 OO3d 164, 431 NE2d 326.

7. (1982) Once a juvenile is bound over in any county in Ohio pursuant to RC § 2151.26 and Juv. R. 30, that juvenile is bound over for all felonies committed in other counties of this state, as well as for future felonies he may com-

mit: *State v. Adams*, 69 OS2d 120, 23 OO3d 164, 431 NE2d 326.

8. (1981) Revised Code § 2151.35.5(A)(9) which allows the juvenile court to "make any further disposition that the court finds proper" does not authorize the court to exercise unlimited discretion in sentencing a delinquent child: *State v. Grady*, 3 OApp3d 174, 3 OBR 199, 444 NE2d 51.

9. (1982) The duty upon the juvenile court before ordering a relinquishment of jurisdiction for purposes of criminal prosecution is, after investigation, to find there are reasonable grounds to believe that the child is one who will not be readily brought to yield, submit and respond to care, supervision and rehabilitation in any facility designed for such care of delinquent children and that the requirement as to legal restraint exists: *State v. Whiteside*, 6 OApp3d 30, 6 OBR 140, 452 NE2d 332.

10. (1982) The court of common pleas may not review the factual findings of the juvenile court, under RC § 2151.26(A), on the issue of the child's amenability to care or rehabilitation; such issue must be presented after trial on appeal to the court of appeals: *State v. Whiteside*, 6 OApp3d 30, 6 OBR 140, 452 NE2d 332.

11. (1985) In ordering a bind over, a juvenile court is not required to make written findings as to the factors listed in JuvR 30 (E): *State v. Douglas*, 20 OS3d 34, 20 OBR 282, 485 NE2d 711.

§ 2151.27 Complaint.

(A) Any person having knowledge of a child who appears to be a juvenile traffic offender or to be delinquent, unruly, abused, neglected, or dependent may, with respect to that child, file a sworn complaint in the juvenile court of the county in which the child has a residence or legal settlement, or in which the traffic offense, delinquency, unruliness, abuse, neglect, or dependency allegedly occurred. Such a sworn complaint may be upon information and belief, and in addition to the allegation that the child is delinquent, unruly, abused, neglected, dependent, or a juvenile traffic offender, the complaint shall allege the particular facts upon which the allegation of delinquency, unruliness, abuse, neglect, dependency, or juvenile traffic offender is based.

(B) Whenever a child, before arriving at the age of eighteen years, allegedly commits an act for which he may be adjudged delinquent, unruly, or a juvenile traffic offender, and the specific complaint alleging the act is not filed or a hearing is not held until after the child arrives at the age of eighteen years, the court has jurisdiction to hear and dispose of the complaint, as if the complaint were filed and hearing held before the child arrived at the age of eighteen years.

(C) If the complainant in an abuse, neglect, or dependency case desires permanent custody of the child or children, the complaint shall contain a prayer specifically requesting permanent custody.

(D) For purposes of the record to be maintained by the clerk under division (B) of section 2151.18 of the Revised Code, when a complaint is filed that

alleges that a child is delinquent, the court shall determine if the victim of the alleged delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the alleged commission of the act.

*HISTORY: 140 v S 5. Eff 9-26-84.

Cross-References to Related Sections

Clerk of juvenile courts to maintain certain records in delinquency cases if victim was sixty-five years of age or older or permanently and totally disabled, RC § 2151.18.

Research Aids

Children within purview of statute: age:

O-Jur2d: Juv Cts § 59

Form of complaint:

O-Jur2d: Juv Cts § 102

Jurisdiction upon certification from another court:

O-Jur2d: Juv Cts § 47

Proper county for filing complaint:

O-Jur2d: Juv Cts § 96

Who may file complaint:

O-Jur2d: Juv Cts § 100

CASE NOTES AND OAC

1. (1982) In actions brought pursuant to RC §§ 2151.27 and 2151.03, the state's primary objective is not to decide conflicting claims to custody; its objective is to determine if a child is receiving proper parental care, and if that care is being provided by a relative pursuant to an agreement initiated by the child's parent, then the child is not a neglected child: In re Reese, 4 OApp3d 59, 4 OBR 109, 446 NE2d 482.

2. (1983) In proving its case in a neglect and dependency proceeding, the state is not limited to those faults and habits of the custodial parent which are specifically listed in the complaint. It is not the intent of JuvR 10(B) to force a complainant to state in the complaint every fact surrounding each incident described: In re Sims, 13 OApp3d 37, 13 OBR 40, 468 NE2d 111.

3. (1984) Even though a complaining witness may designate a particular statute or statutes as being violated by a child, a juvenile court is free to find, on the basis of the facts alleged and proved, a violation of an additional statute and that the accused is a delinquent child: In re Burgess, 13 OApp3d 374, 13 OBR 456, 469 NE2d 914.

[§ 2151.27.1] § 2151.271 Transfer to juvenile court of another county.

Research Aids

Transfer of proceeding to county of child's residence:

O-Jur2d: Juv Cts § 97

CASE NOTES AND OAC

1. (1981) Revised Code § 2151.27.1 does not encompass a transfer of the cause after a dispositional order has been made: In re Sekulich, 65 OS2d 13, 19 OO3d 192, 417 NE2d 1041.

§ 2151.28 Summons.

Research Aids

Expense of serving writs:

O-Jur2d: Juv Cts § 182

Form of summons:

O-Jur2d: Juv Cts § 107

Hearing on request for permanent custody:

O-Jur2d: Juv Cts § 155

Issuance of summons:

O-Jur2d: Juv Cts § 106

Jurisdiction in contempt:

O-Jur2d: Juv Cts § 56

Orders endorsed upon summons:

O-Jur2d: Juv Cts § 108

Scheduling adjudicatory hearing:

O-Jur2d: Juv Cts § 150

Service of summons, proof:

O-Jur2d: Juv Cts § 109

Subpoena to compel attendance at hearing:

O-Jur2d: Juv Cts § 116

Summons for hearing making temporary commitment permanent:

O-Jur2d: Juv Cts § 110

Taking child into custody:

O-Jur2d: Juv Cts § 68

Waiver of notice of service:

O-Jur2d: Juv Cts § 111

[§ 2151.28.1] § 2151.281 Guardian ad litem.

The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged or adjudicated delinquent or unruly child when:

(A) The child has no parent, guardian, or legal custodian;

(B) The court finds that there is a conflict of interest between the child and his parent, guardian, or legal custodian.

The court shall appoint a guardian ad litem to protect the interest of a child in any proceeding concerning an alleged abused or neglected child, and in any proceeding held pursuant to section 2151.414 [2151.41.4] of the Revised Code. The guardian ad litem so appointed shall not be the attorney responsible for presenting the evidence alleging child abuse and neglect.

In any proceeding concerning an alleged or adjudicated delinquent, unruly, abused, neglected, or dependent child where the parent appears to be mentally incompetent or is under eighteen years of age, the court shall appoint a guardian ad litem to protect the interest of such parent.

The court shall require such guardian ad litem to faithfully discharge his duties, and upon his failure to do so shall discharge him and appoint another. The court may fix compensation for the service of the guardian ad litem which shall be paid from the treasury of the county.

A parent who is eighteen years of age or older and not mentally incompetent shall be deemed sui

juris for the purpose of any proceeding relative to his child alleged or adjudicated to be an abused, neglected, or dependent child.

In any case wherein a parent of a child alleged or adjudicated to be an abused, neglected, or dependent child is under eighteen years of age, the parents of said parent shall be summoned to appear at any hearing respecting the alleged or adjudicated to be an abused, neglected, or dependent child.

*HISTORY: 138 v H 695 (Eff 10-24-80); 140 v S 321. Eff 4-9-85.

Research Aids

Appointment of guardian ad litem:

O-Jur2d: Juv Cts § 89

Compensation of guardian ad litem:

O-Jur2d: Juv Cts § 186

Issuance of summons:

O-Jur2d: Juv Cts § 106

Withdrawal or discharge of guardian ad litem:

O-Jur2d: Juv Cts § 90

Law Review

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require. Marvin M. Moore, *et al.* 16 AkronLRev 681 (1983).

The representation of juveniles before the court: a look into the past and the future. Note. 31 CaseWResLRev 580, 591 (1981).

CASE NOTES AND OAG

1. (1985) An attorney should not serve as both guardian ad litem and appointed counsel where there is a conflict in such roles: In re Baby Girl Baxter, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

§ 2151.29 Service of summons.

Cross-References to Related Sections

See RC §§ 2151.41.3, 2151.41.4 which refer to this section.

Research Aids

Proof of service of summons:

O-Jur2d: Juv Cts § 109

§ 2151.30 Issuance of warrant.

Research Aids

Issuance of warrant:

O-Jur2d: Juv Cts § 112

§ 2151.31 Apprehension, custody, and detention.

A child may be taken into custody:

(A) Pursuant to an order of the court under this chapter;

(B) Pursuant to the laws of arrest;

(C) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child is suffering from illness or injury and is not receiving proper care, as

defined in section 2151.03 of the Revised Code, or is in immediate danger from his surroundings, and that his removal is necessary;

(D) By an enforcement official, as defined in section 4109.01 of the Revised Code, under the circumstances set forth in section 4109.08 of the Revised Code;

(E) By a law enforcement officer or duly authorized officer of the court when there are reasonable grounds to believe that the child has run away from his parents, guardian, or other custodian.

Taking a child into custody shall not be deemed an arrest except for the purpose of determining its validity under the constitution of this state or of the United States.

A child taken into custody shall not be detained or placed in shelter care prior to the hearing on the complaint unless his detention or care is required to protect the person and property of others or those of the child, or because the child may abscond or be removed from the jurisdiction of the court, or because he has no parents, guardian, or custodian or other person able to provide supervision and care for him and return him to the court when required, or because an order for his detention or shelter care has been made by the court pursuant to this chapter.

*HISTORY: 137 v H 883. Eff 1-12-79.

Research Aids

Admission procedure at shelter or detention facility:

O-Jur2d: Juv Cts § 73

Fingerprints and photographs of children:

O-Jur2d: Juv Cts § 71

Taking child into custody:

O-Jur2d: Juv Cts § 68

When child may be detained:

O-Jur2d: Juv Cts § 69

[§ 2151.31.1] § 2151.311 Procedure upon apprehension.

Research Aids

Admission procedure at shelter or detention facility:

O-Jur2d: Juv Cts § 73

When child may be detained:

O-Jur2d: Juv Cts § 69

[§ 2151.31.2] § 2151.312 Place of detention.

(A) A child alleged to be delinquent, unruly, or a juvenile traffic offender may be detained only in the following places:

(1) A certified foster home or a home approved by the court;

(2) A facility operated by a certified child welfare agency;

(3) A detention home or center for delinquent children which is under the direction or supervision

of the court or other public authority or of a private agency and approved by the court;

(4) Any other suitable place designated by the court.

A child may be detained in jail or another facility for detention of adults only if the facility described in division (A)(3) of this section is not available and the detention is in a room separate and removed from those for adults. The court may order that a child over the age of fifteen years be detained in a jail in a room separate and removed from adults if public safety and protection reasonably require such detention.

The official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime shall inform the court immediately when a child, who is or appears to be under the age of eighteen years, is received at the facility, and shall deliver him to the court upon request, or transfer him to a detention facility designated by the court.

If a case is transferred to another court for criminal prosecution, the child may be transferred to the appropriate officer or detention facility in accordance with the law governing the detention of persons charged with crime.

(B) Notwithstanding division (A) of this section, no child shall be placed in or committed to any adult jail or other facility for the detention of adults unless a facility described in division (A)(3) of this section is not available and then only if such child is over fifteen years of age, the public safety and protection requires that the detention be in such a place, and the detention is in a room totally separate by both sight and sound from all adult detainees.

(C) A child alleged to be neglected, abused, or dependent shall not be detained in a jail or other facility intended or used for the detention of adults charged with criminal offenses or of children alleged to be delinquent unless upon order of the court.

*HISTORY: 139 v H 440. Eff 11-23-81.

Research Aids

Place of detention; delinquent, unruly child, etc.:

O-Jur2d: Juv Cts § 79

Place of detention; neglected or dependent child:

O-Jur2d: Juv Cts § 80

Place of detention; period of detention:

O-Jur2d: Juv Cts § 78

Transfer of child upon transfer of criminal case:

O-Jur2d: Juv Cts § 81

CASE NOTES AND OAG

1. (1981) There is no authority for a juvenile court to commit a delinquent juvenile to a jail for adult offenders, absent a finding that housing in an appropriate juvenile facility is unavailable, or that the public safety and protection so require: *State v. Grady*, 3 OApp3d 174, 3 OBR 199, 444 NE2d 51.

2. (1984) Juveniles sent to an adult jail and detained in a facility unequipped to provide individual treatment and counselling are deprived of due process. Such incarceration made for the sole purpose of frightening them and directing them away from a life of crime violates their eighth amendment rights: *Doe v. McFaul*, 599 FSupp 1421 (N.D.)

[§ 2151.31.3] § 2151.313 Fingerprints and photographs.

(A)(1) Except as provided in division (A)(2) of this section, no child shall be fingerprinted or photographed in the investigation of any violation of law without the consent of the juvenile judge.

(2) Fingerprints and photographs of a child may be taken by law enforcement officers when the child is arrested or otherwise taken into custody for the commission of an act that would be a felony if committed by an adult, without the consent of the juvenile judge, when there is probable cause to believe that the child may have been involved in the commission of the act. A law enforcement officer who takes fingerprints or photographs of a child under this division immediately shall inform the juvenile court that the fingerprints or photographs were taken, and shall provide the court with the identity of the child, the number of fingerprints and photographs taken, and the name and address of each person who has custody and control of the fingerprints or photographs or copies of the fingerprints or photographs.

(B)(1) Subject to division (B)(2) of this section, fingerprint and photographs of a child obtained or taken under division (A)(1) or (2) of this section, and any records of the arrest or custody that was the basis for the taking of the fingerprints or photographs, initially may be retained only until the expiration of thirty days after the date taken, except that the court may limit the initial retention of fingerprints and photographs obtained under division (A)(1) of this section to a shorter period of time. During the initial period of retention, the fingerprints and photographs, copies of the fingerprints and photographs, and records of the arrest or custody shall be used or released only in accordance with division (C) of this section. At the expiration of the initial period for which fingerprints and photographs, copies of fingerprints and photographs, and records of the arrest or custody of a child may be retained under this division, if no complaint is pending against the child in relation to the act for which any such fingerprints and photographs originally were obtained or taken and if the child has neither been adjudicated delinquent in relation to that act nor been convicted of or pleaded guilty to a criminal offense based on that act subsequent to a transfer of the child's case for criminal prosecution pursuant to section 2151.26 of the Revised Code, the fingerprints and photographs, all copies of the fingerprints and photographs, and all records of the

arrest or custody that was the basis of the taking of the fingerprints and photographs shall be removed from the file and delivered to the juvenile court. If, at the end of the initial period, such a complaint is pending against the child or the child either has been adjudicated delinquent in relation to the act or has been convicted of or pleaded guilty to a criminal offense based on the act subsequent to transfer of the child's case, the fingerprints and photographs, copies of the fingerprints and photographs, and the records of the arrest or custody that was the basis of the taking of the fingerprints and photographs may further be retained, subject to division (B)(2) of this section, until the expiration of two years after the date on which the fingerprints or photographs were taken or until the child attains eighteen years of age, whichever is earlier.

During this additional period of retention, the fingerprints and photographs, copies of the fingerprints and photographs, and records of the arrest or custody shall be used or released only in accordance with division (C) of this section. At the expiration of the additional period, if no complaint is pending against the child in relation to the act for which any such fingerprints originally were obtained or taken or in relation to any other act for which the fingerprints were used in an investigation authorized by division (C) of this section and that would be a felony if committed by an adult, the fingerprints, all copies of the fingerprints, and all records of the arrest or custody that was the basis of the taking of the fingerprints shall be removed from the file and delivered to the juvenile court, and if no complaint is pending against the child concerning the act for which any such photographs originally were obtained or taken or concerning a similar act that would be a felony if committed by an adult, the photographs and all copies of the photographs, and, if no fingerprints were taken at the time the photographs were taken, all records of the arrest or custody that was the basis of the taking of the photographs shall be removed from the file and delivered to the juvenile court. In either case, if, at the expiration of the applicable additional period, such a complaint is pending against the child, the photographs and copies of the photographs, or the fingerprints and copies of the fingerprints, whichever is applicable, and the records of the arrest or custody may be retained, subject to division (B)(2) of this section, until final disposition of the complaint, and upon final disposition of the complaint, they shall be removed from the file and delivered to the juvenile court.

(2) If a sealing or expungement order issued under section 2151.358 [2151.35.8] of the Revised Code requires the sealing or destruction of any fingerprints or photographs of a child obtained or taken under division (A)(1) or (2) of this section or of the records of an arrest or custody that was the basis of

the taking of any such fingerprints or photographs prior to the expiration of any period for which they otherwise could be retained under division (B)(1) of this section, the fingerprints, photographs, and arrest or custody records that are subject to the order and all copies of the fingerprints, photographs, and arrest or custody records shall be sealed or destroyed in accordance with the order.

(3) All fingerprints, photographs, records of an arrest or custody, and copies delivered to a juvenile court in accordance with division (B)(1) of this section shall be destroyed by the court.

(C) Until they are delivered to the juvenile court or sealed or destroyed pursuant to a sealing or expungement order, the originals and copies of fingerprints, and photographs of a child that are obtained or taken pursuant to division (A)(1) or (2) of this section, and the records of the arrest or custody that was the basis of the taking of the fingerprints or photographs shall be used or released only as follows:

(1) During the initial thirty-day period of retention, originals and copies of fingerprints and photographs, and records of the arrest or custody shall be used, prior to the filing of a complaint against the child in relation to the act for which the fingerprints and photographs were originally obtained or taken, only for the investigation of that act, and shall be released, prior to the filing of such a complaint, only to a court that would have jurisdiction of the child's case under this chapter. Subsequent to the filing of such a complaint, originals and copies of fingerprints and photographs, and records of the arrest or custody shall be used or released during the initial thirty-day period of retention only as provided in division (C)(2)(a), (b), or (c) of this section.

(2) Originals and copies of fingerprints and photographs, and records of the arrest or custody that are retained beyond the initial thirty-day period of retention subsequent to the filing of a complaint, an adjudication of delinquency, or a conviction of or guilty plea to a criminal offense shall be used or released only as follows:

(a) Originals and copies of photographs, and, if no fingerprints were taken at the time the photographs were taken, records of the arrest or custody that was the basis of the taking of any such photographs shall be used only for the investigation of the act for which they originally were obtained or taken or for the investigation of any similar act that would be a felony if committed by an adult;

(b) Originals and copies of fingerprints, and records of the arrest or custody that was the basis of the taking of any such fingerprints shall be used only for the investigation of the act for which they originally were obtained or taken or for the investigation of any other act that would be a felony if committed by an adult;

(c) Originals and copies of fingerprints, photographs, and records of the arrest or custody that was the basis of the taking of the fingerprints or photographs shall be released only to:

(i) Law enforcement officers of this state or a political subdivision of this state, upon notification to the juvenile court of the name and address of the law enforcement officer or agency to whom or to which they will be released;

(ii) A court that has jurisdiction of the child's case under Chapter 2151. of the Revised Code or subsequent to a transfer of the child's case for criminal prosecution pursuant to section 2151.26 of the Revised Code.

(D) No person shall knowingly do any of the following:

(1) Fingerprint or photograph a child in the investigation of any violation of law other than as provided in division (A)(1) or (2) of this section;

(2) Retain fingerprints or photographs of a child obtained or taken under division (A)(1) or (2) of this section, copies of any such fingerprints or photographs, or records of the arrest or custody that was the basis of the taking of any such fingerprints or photographs other than in accordance with division (B) of this section;

(3) Use or release fingerprints or photographs of a child obtained or taken under division (A)(1) or (2) of this section, copies of any such fingerprints or photographs, or records of the arrest or custody that was the basis of the taking of any such fingerprints or photographs other than in accordance with division (B) or (C) of this section.

*HISTORY: 137 v H 315 (Eff 3-15-78); 140 v H 258. Eff 9-26-84.

Research Aids

Fingerprints and photographs of children:

O-Jur2d: Juv Cts § 71

Removal and destruction of fingerprints or photograph of child:

O-Jur2d: Juv Cts § 72

CASE NOTES AND OAG

1. (1976) Where testimony is offered for the purpose of identifying the accused as the perpetrator of a crime, but such is based in part on illegally obtained evidence, it will not be excluded if the totality of circumstances manifests an effective identification apart from and independent of the tainted procedure: *State v. Jones*, 49 OApp2d 170, 3 OO3d 222, 359 NE2d 1386.

2. (1978) Although a violation of RC § 2151.31.3 warrants the criminal prosecution of the violator under RC § 2151.99(B), it does not compel the exclusion of evidence pertaining to the taking of a minor's fingerprints: *State v. Davis*, 56 OS2d 51, 10 OO3d 87, 381 NE2d 641.

[§ 2151.31.4] § 2151.314 Detention hearing.

Research Aids

Delivery of child to shelter or detention facility:

O-Jur2d: Juv Cts § 73

Detention hearing; evidence:

O-Jur2d: Juv Cts § 76

Detention hearing; notice:

O-Jur2d: Juv Cts § 75

Detention hearing; rehearing:

O-Jur2d: Juv Cts § 77

§ 2151.32 Selection of custodian.

Research Aids

Religious faith in selecting custodian:

O-Jur2d: Juv Cts § 165

§ 2151.33 Temporary care; emergency medical treatment; reimbursement.

Research Aids

Costs; emergency medical treatment:

O-Jur2d: Juv Cts § 187

Temporary orders:

O-Jur2d: Juv Cts § 91

Temporary orders; emergency medical treatment:

O-Jur2d: Juv Cts § 92

Law Review

The outer limits of parental autonomy: withholding medical treatment from children. Comment. 42 OSJ 813 (1981).

CASE NOTES AND OAG

1. (1984) Revised Code §§ 2151.412 and 2151.414 are applicable only where the child or children have previously been determined dependent, neglected or abused, their temporary custody has been committed to a children services board, a welfare department or a certified organization, and an order is sought changing temporary to permanent custody. These sections are not applicable where the original request was for permanent custody, and an order of temporary custody was issued pending hearing on the complaint as provided by RC § 2151.33: In re Covert, 17 OApp3d 122, 17 OBR 185, 477 NE2d 678.

§ 2151.34 Treatment of children in custody; detention home.

No child under eighteen years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where the child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime. A child may be confined in a place of juvenile detention for a period not to exceed ninety days, during which time a social history may be prepared to include court record, family history, personal history, school and attendance records, and such other pertinent studies and material as will be of assistance to the juvenile court in its disposition of the charges against such juvenile offenders.

Upon the advice and recommendation of the judge, the board of county commissioners shall provide, by purchase, lease, construction, or otherwise, a place to be known as a detention home, which shall be within a convenient distance of the juvenile court, and not used for the confinement of adult persons charged with criminal offenses, where delinquent, unruly, dependent, neglected, abused children, or juvenile traffic offenders may be detained until final disposition. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of the counties shall form themselves into a joint board, and proceed to organize a district for the establishment and support of a detention home for the use of the juvenile courts of those counties, where delinquent, unruly, dependent, neglected, abused children, or juvenile traffic offenders may be detained until final disposition, by using a site or buildings already established in one of the counties, or by providing for the purchase of a site and the erection of the necessary buildings thereon.

The county or district detention home shall be maintained as provided in sections 2151.01 to 2151.54 of the Revised Code. In any county in which there is no detention home, or which is not served by a district detention home, the board of county commissioners shall provide funds for the boarding of such children temporarily in private homes. Children who are alleged to be or have been adjudged delinquent, unruly, dependent, neglected, abused, or juvenile traffic offenders, may, after complaint is filed, be detained in the detention home or certified foster homes until final disposition of their case. The court may arrange for the boarding of such children in certified foster homes or in uncertified foster homes for a period not exceeding sixty days, subject to the supervision of the court, or may arrange with any county department of welfare which has assumed the administration of child welfare, county children services board, or certified organization to receive for temporary care children within the jurisdiction of the court. A district detention home approved for such purpose by the department of youth services under section 5139.281 [5139.28.1] of the Revised Code may receive children committed to its temporary custody under section 2151.355 [2151.35.5] of the Revised Code and provide the care, treatment, and training required.

In case a detention home is established as an agency of the court, or a district detention home is established by the courts of several counties as hereinbefore provided, it shall be furnished and carried on, as far as possible, as a family home in charge of a superintendent or matron in a non-punitive neutral atmosphere. The judge, or the directing board of a district detention home, may appoint a super-

intendent, a matron, and other necessary employees for such home and fix their salaries. During the school year, when possible, a comparable educational program with competent and trained staff shall be provided for those children of school age. A sufficient number of trained recreational personnel shall be included among the staff to assure wholesome and profitable leisure-time activities. Medical and mental health services shall be made available to insure the courts all possible treatment facilities shall be given to those children placed under their care. In the case of a county detention home, such salaries shall be paid in the same manner as is provided by section 2151.13 of the Revised Code for other employees of the court, and the necessary expenses incurred in maintaining such detention home shall be paid by the county. In the case of a district detention home, such salaries and the necessary expenses incurred in maintaining such detention home shall be paid as provided in sections 2151.341 [2151.34.1] to 2151.3415 [2151.34.15] of the Revised Code.

In case the court arranges for the board of children temporarily detained in such foster homes, or arranges for such board through any private certified organization, a reasonable sum to be fixed by the court for the board of such children shall be paid by the county. In order to have such foster homes available for service an agreed monthly subsidy may be paid and a fixed rate per day for care of children actually residing therein.

*HISTORY: 139 v H 440. Eff 11-23-81.

Cross-References to Related Sections

Public office, definition, RC § 117.01.

Research Aids

Acquisition and operating costs; district detention home:

O-Jur2d: Juv Cts § 30

Boarding children in private homes:

O-Jur2d: Juv Cts § 38

County detention homes:

O-Jur2d: Juv Cts § 27

Court personnel:

O-Jur2d: Juv Cts § 24

District detention home:

O-Jur2d: Juv Cts § 28

Operation, maintenance and management of detention homes:

O-Jur2d: Juv Cts § 36

Particular orders; delinquent child:

O-Jur2d: Juv Cts § 169

Particular orders; neglected or dependent child:

O-Jur2d: Juv Cts § 167

Place of detention; delinquent, unruly, child, etc.:

O-Jur2d: Juv Cts § 79

Place of detention; period of time:

O-Jur2d: Juv Cts § 78

Superintendent and employees of detention homes:

O-Jur2d: Juv Cts § 37

CASE NOTES AND OAG

1. (1983) Where a joint board of county commissioners is created for the purpose of constructing and maintaining

a multicounty detention and treatment facility for the training and treatment of juveniles, the county prosecuting attorneys of the participating counties have no duty to provide legal counsel for the joint board of county commissioners: OAG No.83-064.

2. (1983) Where a joint board of county commissioners is created for the purpose of constructing and maintaining a multicounty detention and treatment facility for the training and treatment of juveniles, the joint board of county commissioners may employ legal counsel: OAG No.83-064.

3. (1985) Revised Code § 2151.357 does not require the school district of residence of a child placed in a detention home by a juvenile court to pay the cost of nonacademic summer activities provided for the child by the detention home. OAG No. 85-028.

[§ 2151.34.1] § 2151.341 [Application for financial assistance; tax assessment for operation of district detention home.]

A board of county commissioners that provides a detention home and the board of trustees of a district detention home may make application to the department of youth services under section 5139.281 [5139.28.1] of the Revised Code for financial assistance in defraying the cost of operating and maintaining the home. Such application shall be made on forms prescribed and furnished by the department. The joint boards of county commissioners of district detention homes shall make annual assessments of taxes sufficient to support and defray all necessary expenses of such home not paid from funds made available under section 5139.281 [5139.28.1] of the Revised Code.

*HISTORY: 137 v S 221 (Eff 11-23-77); 139 v H 440. Eff 11-23-81.

Research Aids

Detention homes; acquisition and operating costs:

O-Jur2d: Juv Cts § 30

[§ 2151.34.2] § 2151.342 District detention home may receive donations and bequests.

Research Aids

District detention home board of trustees; powers:

O-Jur2d: Juv Cts § 33

[§ 2151.34.3] § 2151.343 District detention home trustees.

Research Aids

District detention home board of trustees; appointment:

O-Jur2d: Juv Cts § 32

[§ 2151.34.4] § 2151.344 Meetings.

Research Aids

District detention home board of trustees; compensation:

O-Jur2d: Juv Cts § 35

District detention home board of trustees; meetings:

O-Jur2d: Juv Cts § 34

[§ 2151.34.5] § 2151.345 Superintendent of district detention home; duties.

Research Aids

Place of detention; delinquent, unruly child, etc.:

O-Jur2d: Juv Cts § 78

Superintendent and employees of detention homes:

O-Jur2d: Juv Cts § 37

[§ 2151.34.6] § 2151.346 District detention homes operated same manner as county detention homes.

Research Aids

Operation, maintenance, and management of detention homes:

O-Jur2d: Juv Cts § 36

[§ 2151.34.7] § 2151.347 Selection of site.

Research Aids

District detention home; site and buildings:

O-Jur2d: Juv Cts § 29

[§ 2151.34.8] § 2151.348 Each county shall be represented on board of trustees.

Research Aids

District detention home board of trustees; appointment:

O-Jur2d: Juv Cts § 32

[§ 2151.34.9] § 2151.349 Removal of trustees.

Research Aids

District detention home board of trustees; appointment and removal:

O-Jur2d: Juv Cts § 32

[§ 2151.34.10] § 2151.3410 Interim powers of board of trustees.

Research Aids

District detention home board of trustees; powers:

O-Jur2d: Juv Cts § 33

[§ 2151.34.11] § 2151.3411 Joint board of county commissioners; powers and duties.

Research Aids

District detention home; site and buildings:

O-Jur2d: Juv Cts § 29

[§ 2151.34.12] § 2151.3412 Appraisal of district detention home's site and buildings; funding of expenses.

Research Aids

District detention homes; acquisition and operating costs:

O-Jur2d: Juv Cts § 30

District detention home; site and buildings:

O-Jur2d: Juv Cts § 29

CASE NOTES AND OAG

1. (1984) Revised Code §§ 2151.34.12 and 2151.77 require that the costs of operating and maintaining district juvenile detention and rehabilitation facilities be apportioned among the counties participating in the district on the basis of the counties' actual use of such facilities where no levy has been approved pursuant to RC § 5705.19(A). Neither a joint board of county commissioners formed pursuant to RC §§ 2151.34 and 2151.65 nor a district board of trustees appointed pursuant to RC §§ 2151.34.3 and 2151.68 has the authority to direct or permit the apportionment of such costs in any other manner: OAG No.84-052.

2. (1984) A board of county commissioners has the authority pursuant to RC § 305.26 to compound or release, in whole or in part, or otherwise settle payments due the county as a result of an erroneous apportionment of the costs of operating and maintaining district juvenile detention or rehabilitation facilities: OAG No.84-052.

[§ 2151.34.13] § 2151.3413 Withdrawal by county from detention home district; continuity of district tax levy.

Research Aids

Board of trustees of district detention home; appointment and removal:

O-Jur2d: Juv Cts § 32

District detention homes: withdrawal by county from district:

O-Jur2d: Juv Cts § 31

[§ 2151.34.14] § 2151.3414 Designation of fiscal officer of detention home district; adjustment of accounts.

Research Aids

District detention homes; acquisition and operating costs:

O-Jur2d: Juv Cts § 30

[§ 2151.34.15] § 2151.3415 Board of county commissioners; expenses.

Research Aids

Organization of district detention home:

O-Jur2d: Juv Cts § 28

[§ 2151.34.16] § 2151.3416 [Financial assistance for home.]

The board of county commissioners of each county which participates in the establishment of a district detention home may apply to the department of youth services for financial assistance to defray the county's share of the cost of acquisition or construction of such home, as provided in section 5139.271 [5139.27.1] of the Revised Code. Application shall be made in accordance with rules adopted by the department. No county shall be reimbursed for expenses incurred in the acquisition or construction of a district detention home which serves a district having a population of less than one hundred thousand.

*HISTORY: 139 v H 440. Eff 11-23-81.

Research Aids

District detention homes; acquisition and operating costs:

O-Jur2d: Juv Cts § 30

§ 2151.35 Hearing procedure; findings; record.

The juvenile court may conduct its hearings in an informal manner and may adjourn such hearings from time to time. In the hearing of any case, the general public may be excluded and only such persons admitted as have a direct interest in the case.

All cases involving children shall be heard separately and apart from the trial of cases against adults. The court may excuse the attendance of the child at the hearing in cases involving abused, neglected, or dependent children. The court shall hear and determine all cases of children without a jury.

If the court finds from clear and convincing evidence that the child is an abused, neglected, or dependent child, or finds beyond a reasonable doubt that the child is a delinquent or unruly child or a juvenile traffic offender, the court shall proceed immediately, or at a postponed hearing, to hear the evidence as to the proper disposition to be made under sections 2151.352 [2151.35.2] to 2151.355 [2151.35.5] of the Revised Code. If the court does not so find, it shall order that the complaint be dismissed and that the child be discharged from any detention or restriction theretofore ordered.

A record of all testimony and other oral proceedings in juvenile court shall be made in all proceedings that are held pursuant to section 2151.414 [2151.41.4] of the Revised Code or in which an order or disposition may be made pursuant to division (A)(4) of section 2151.353 [2151.35.3] of the Revised Code, and shall be made upon request in any other proceedings. The record shall be made as provided in section 2301.20 of the Revised Code.

*HISTORY: 138 v H 695. Eff 10-24-80.

Analogous in part to former RC § 2151.35 [GC § 1639-30; 117 v 520; 119 v 731; 121 v 557; Bureau of Code Revision 10-1-53; 125 v

324; 127 v 547; 130 v 621; 130 v 623; 132 v S 278; 133 v S 49] repealed in 133 v H 320, § 2.

See also analogous provisions now contained in RC §§ 2151.35.2, 2151.35.3, 2151.35.5, 2151.35.6.

Text Discussion

Juvenile court. Wonnell. § 6.15.

Law Review

Constitutional law—due process of law—family law—burden of proof—before a state may sever permanently the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.—*Santosky v. Kramer*, 102 SCt 1388 (1982). Case note. 51 CinLRev 933 (1982).

Fathers, biological and anonymous, and other legal strangers: determination of parentage and artificial insemination by donor under Ohio law. Susan G. Eisenman. 45 OSLJ 383 (1984).

Lehr v. Robertson: putting the genie back in the bottle: the supreme court limits the scope of the putative father's right to notice, hearing, and consent in the adoption of his illegitimate child. Jane P. Perry. 15 ToledoLRev 1501 (1984).

Santosky v. Kramer [455 US 745 (1982)]: child neglect—fair preponderance or clear and convincing evidence. Case note. 10 ONorthLRev 405 (1983).

Standard of proof in proceedings to terminate parental rights. Note. 31 ClevStLRev 679 (1982).

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require? Marvin M. Moore, et al. 16 AkronLRev 681 (1983).

CASE NOTES AND OAG

1. (1979) The conduct of a parent is relevant under the terms of RC § 2151.35 solely insofar as that parent's conduct forms a part of the environment of the child. As a part of the child's environment such conduct is only significant if it can be demonstrated to have an adverse impact upon the child sufficient to warrant state intervention. That impact cannot be simply inferred in general, but must be specifically demonstrated in a clear and convincing manner: In re Burrell, 58 OS2d 37, 12 OO3d 43, 388 NE2d 738.

2. (1980) The fact of dependency must be proved by clear and convincing evidence. RC § 2151.35: In re Bibb, 70 OApp2d 117, 24 OO3d 159, 435 NE2d 96.

3. (1982) An agreement by a parent with the welfare department for permanent surrender of a child prior to consent of the juvenile court is not only revocable by the parent prior to consent of the juvenile court, but such revocation also operates to dissolve the offer to surrender: In re Williams, 7 OApp3d 324, 7 OBR 421, 455 NE2d 1027.

4. (1985) In proceedings where parental rights are subject to termination, both the Juvenile Rules and the Revised Code prescribe that such proceedings be bifurcated into separate adjudicatory and dispositional hearings (RC § 2151.35 and JuvR 29 and 34, construed and applied.): In re Baby Girl Baxter, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

5. (1984) The fact of dependency must be proven by clear and convincing evidence. (RC § 2151.35, applied.): In re Green, 18 OApp3d 43, 18 OBR 155, 480 NE2d 492.

6. (1984) In an action seeking a determination of dependency and neglect and an order of permanent custody of a

child, the statutes of Ohio make no exception to the privilege attaching to the communications between psychiatrist and patient, psychologist and patient (or client), and to the privilege, if it exists, between social workers employed in the office of the psychiatrist and psychologist and client: In re Decker, 20 OApp3d 203, 20 OBR 248, 485 NE2d 751.

[§ 2151.35.1] § 2151.351 [Time limit for holding child not alleged or adjudicated delinquent.]

No child who is not alleged to be, or adjudicated, delinquent by reason of violating any law, ordinance, or regulation, a violation of which would be a crime if committed by an adult shall be held for longer than five days in a secure setting, as defined in rules adopted by the department of youth services.

HISTORY: 139 v H 440. Eff 11-23-81.

Not analogous to former RC § 2151.35.1 (132 v S 383; 133 v H 320; 136 v H 85), repealed, 136 v H 164, § 2, eff 1-13-76, providing for assignment of counsel to represent children and their parents.

[§ 2151.35.2] § 2151.352 Right to counsel.

Research Aids

Appearance and withdrawal of counsel:

O-Jur2d: Juv Cts § 88

Definitions relating to persons:

O-Jur2d: Juv Cts § 10

Procedure to obtain counsel:

O-Jur2d: Juv Cts § 87

Right to attend hearing:

O-Jur2d: Juv Cts § 145

Right to attorney under juvenile court law:

O-Jur2d: Juv Cts § 86

Telephone and visitation rights:

O-Jur2d: Juv Cts § 74

Utilization and availability of social history, etc.:

O-Jur2d: Juv Cts § 135

Text Discussion

Counsel and guardian ad litem. 2 Anderson Fam.L. § 11.35

ALR

Right of juvenile court defendant to be represented during court proceedings by parent. 11 ALR4th 719.

Law Review

Constitutional law—poverty law—equal protection—due process—parent and child—right to counsel—the constitutional guarantees of due process and equal protection require that indigent parents be provided counsel and a free trial transcript on first appeals of right in civil actions instituted by the state for permanent termination of parental rights. Case note. 49 CinLRev 664 (1980).

Indigents; right to counsel in civil litigation: *Heller* high water in Ohio. Note. 12 ToledoLRev 131 (1980).

State ex rel. *Heller v. Miller* [61 OS2d 6 (1980)]: between civil and criminal; counsel and transcript for indi-

gents on appeal of an order terminating parental rights. Case note. 7 ONorthLRev 316 (1980).

Parental termination proceeding—right to counsel—the due process clause does not require appointment of counsel in every parental termination proceeding; whether appointment is required is to be decided by trial court, subject to appellate review. *Lassiter v. Dep't of Soc. Services*, 101 SCt 2153 (1981). Case note. 50 CinLRev 882 (1981).

Standard of proof in proceedings to terminate parental rights. Note. 31 ClevStLRev 679 (1982).

Termination of parental rights and appointed counsel: *Lassiter v. Dep't of Social Services* [101 SCt 2153 (1981)]. Note. 9 ONorthLRev 141 (1982).

The representation of juveniles before the court: a look into the past and the future. Note. 31 CaseWResLRev 580 (1981).

CASE NOTES AND OAG

1. (1977) Where an infant child has been in the custody of prospective adoptive parents as a result of a permanent order of custody in a dependency action and that permanent order is subsequently vacated and the parent moves to terminate temporary custody, it appears that the interests of the child and parent may conflict and a guardian ad litem must be appointed for the child pursuant to Juvenile Rule 4(B) prior to the hearing on the mother's motion to terminate custody: In re Christopher, 54 OApp2d 137, 8 OO3d 271, 376 NE2d 603.

2. (1977) The guardian ad litem appointed for a child in a dependency action where the interest of the child and the parent may conflict must have no ties or loyalties to anyone with an adversary interest in the outcome such as a natural parent or the prospective adoptive parents: In re Christopher, 54 OApp2d 137, 8 OO3d 271, 376 NE2d 603.

3. (1980) In actions instituted by the state to force the permanent, involuntary termination of parental rights, the United States and Ohio Constitutions' guarantees of due process and equal protection of the law require that indigent parents be provided with counsel and a transcript at public expense for appeals as of right: State ex rel. Heller v. Miller, 61 OS2d 6, 15 OO3d 3, 399 NE2d 66.

4. (1981) A trial court is not required to appoint the attorney chosen by an indigent: State ex rel. Butler v. Demis, 66 OS2d 123, 20 OO3d 121, 420 NE2d 116.

5. (1984) Parents do not have a constitutional right to counsel at temporary custody proceedings: Beard v. Williams Cty. Dept. of Social Services, 12 OS3d 40, 12 OBR 35, 465 NE2d 397.

6. (1984) Pursuant to RC § 2151.35.2, a child, his parents, custodian, or other persons in loco parentis, if indigent, is entitled to be represented in all juvenile proceedings by a public defender in accordance with the comprehensive system set forth in RC Chapter 120., regardless of whether the outcome of the proceeding could result in a loss of liberty: OAG No.84-023.

[§ 2151.35.3] § 2151.353 [Disposition of abused, neglected or dependent child.]

(A) If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(1) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, includ-

ing supervision as directed by the court for the protection of the child;

(2) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, either parent or a relative residing within or outside the state, or a probation officer for placement in a certified foster home;

(3) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires;

(4) Commit the child to the permanent custody of the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified organization, if the court determines that the parents have acted in such a manner that the child is a child without adequate parental care, it is likely that the parents would continue to act in such a manner that the child will continue to be a child without adequate parental care if a reunification plan were prepared pursuant to section 2151.412 [2151.41.2] of the Revised Code, and the permanent commitment is in the best interests of the child. If the court grants permanent custody under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding.

(B) No order for permanent custody shall be made at the hearing at which the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting permanent custody and the summons served on the parents contains a full explanation that the granting of an order for permanent custody permanently divests them of their parental rights and contains a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent.

If after making disposition as authorized by division (A)(2) or (3) of this section, a motion is filed in accordance with section 2151.413 [2151.41.3] of the Revised Code, which motion requests permanent custody of the child, the court may grant permanent custody of the child to the movant in accordance with section 2151.414 [2151.41.4] of the Revised Code.

(C) No order of temporary custody shall be made unless the summons served on the parents contains a statement that an adjudication of abuse, neglect, or dependency may result in an order of temporary custody, a full explanation that the granting of an order of temporary custody will cause the removal of the child from their legal custody until the court

terminates the order of temporary custody or permanently divests them of their parental rights, and a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent.

*HISTORY: 138 v H 695 (Eff 10-24-80); 139 v H 440. Eff 11-23-81.

Cross-References to Related Sections

Adoption of child with special needs, RC § 5153.16.
See RC §§ 2151.38, 2151.41.2, 2151.41.3 which refer to this section.

Text Discussion

Complaint and summons. 2 *Anderson Fam.L.* § 11.34
Counsel and guardian ad litem. 2 *Anderson Fam.L.* § 11.35
Procedures at permanent termination hearing. 2 *Anderson Fam.L.* § 11.33
Termination upon adjudication. 2 *Anderson Fam.L.* § 11.32.1

Research Aids

Hearing on request for permanent custody:
O-Jur2d: Juv Cts § 155
Particular orders; neglected or dependent child:
O-Jur2d: Juv Cts § 167

ALR

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 *ALR4th* 756.
Validity of state statute providing for termination of parental rights. 22 *ALR4th* 774.

Law Review

Abandonment of Children as a Civil Wrong: Burnette v. Wahl. Comment. 41 *OSLJ* 533 (1980).
Adjudication that Child is Neglected. 3 *ONorthLRev* 264 (1975).
H.B. 695: updating Ohio's temporary and permanent custody procedures for child abuse, neglect and dependency cases. Note. 7 *UDayLRev* 293 (1981).
Risk of Error Analysis. Jane E. Jackson. 14 *ToledoLRev* 1 (1982).
Santosky v. Kramer: A Higher Evidentiary Standard is Applied in Parental Rights Termination Cases. Mary Frederick McCloy. 14 *ToledoLRev* 165 (1982).
Standard of proof in proceedings to terminate parental rights. Note. 31 *ClevStLRev* 679 (1982).
SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require. Marvin M. Moore, *et al.* 16 *AkronLRev* 681 (1983).

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1. (1976) In a hearing concerning the dependency of a child, the trial court need not consider the desires of the mother with regard to its placement prior to the permanent commitment with a county agency: In re Baumgartner, 50 *OApp2d* 37, 4 *OO3d* 22, 361 *NE2d* 501.

2. (1977) Where a natural parent moves to terminate temporary custody in another based on a previous finding of dependency, the parent's present suitability and fitness for the role of parent must be considered in the context of the child's best interests: In re Christopher, 54 *OApp2d* 137, 8 *OO3d* 271, 376 *NE2d* 603.

3. (1978) Where the evidence shows that to return a child to her natural parent would be clearly detrimental to the child, such child is a "dependent child" under RC § 2151.04(C) and the court is authorized to commit the child permanently to the Children's Services Board under RC § 2151.35.3(D), even though the parent might be capable of giving proper care and support to other children: In re Justice, 59 *OApp2d* 78, 13 *OO3d* 139, 392 *NE2d* 897.

4. (1979) Once a child has been found to be "dependent" as defined in RC § 2151.04, the "best interests" of the child are the primary consideration in determining whether an award of permanent custody is justified pursuant to RC § 2151.35.3(A)(4): In re Cunningham, 59 *OS2d* 100, 13 *OO3d* 78, 391 *NE2d* 1034.

5. (1979) A finding of parental unfitness is not a mandatory prerequisite to an award of permanent custody to a child welfare agency, although it may enter into a consideration of the child's "best interests." Consideration of "best interests" should not enter into the initial step of adjudicating dependency: In re Cunningham, 59 *OS2d* 100, 13 *OO3d* 78, 391 *NE2d* 1034.

6. (1983) Due process does not require a formal and full-blown adversary hearing in every case involving constitutionally protected liberty or property interests; therefore, the Hamilton County Welfare Department is not required to disclose the identity of persons who complain about parental misconduct, where the welfare department has temporary legal custody of the child and the parent, who has physical custody, is effectively notified of the charges against her and is provided a hearing to confront those charges: Doe v. Staples, 706 *F2d* 985 (6th Cir).

7. (1983) In cases involving children in the temporary legal custody of the Hamilton County Welfare Department, when removal from a natural parent is deemed appropriate by the welfare department, due process requires that parents be given notice prior to removal, with reasons for the removal, and that parents be afforded full opportunity at a hearing to present witnesses and evidence and have a right to a retained attorney, and that the hearing be conducted by a neutral and detached hearing officer who is to state in writing the decision reached and the reasons therefore: Doe v. Staples, 706 *F2d* 985 (6th Cir).

8. (1982) In a case in which a social welfare agency moves for permanent custody of a child for adoptive placement, if the record reveals that the non-custodial parent has maintained a continuing interest in his or her child's welfare, RC § 2151.41.2(C) places a mandatory duty on the social welfare agency to prepare a comprehensive reunification plan for that non-custodial parent: In re Ball, 5 *OApp3d* 56, 5 *OBR* 152, 449 *NE2d* 490.

9. (1982) Neither RC § 2151.04 nor 2151.35.3 is unconstitutionally broad or vague: In re Williams, 7 *OApp3d* 324, 7 *OBR* 421, 455 *NE2d* 1027.

10. (1984) Parents do not have a constitutional right to counsel at temporary custody proceedings: *Beard v. Williams Cty. Dept. of Social Services*, 12 OS3d 40, 12 OBR 35, 465 NE2d 397.

11. (1982) Revised Code § 2151.41.4(A) lists numerous determinations to be made by the juvenile court during a hearing upon a motion for permanent custody, but the statute does not require these determinations to be listed in the court's judgment entry, and thus, the failure to do so is not error. Such determinations would be appropriately included within the court's findings of fact and conclusions of law, if they were requested by any of the parties pursuant to RC § 2151.41.4(B): *In re Covin*, 8 OApp3d 139, 8 OBR 196, 456 NE2d 520.

12. (1983) In conducting the adjudicatory phase of the hearing under RC § 2151.41.4, the best interests of the child should not enter into the determination of whether the child is receiving adequate parental care. The focus, at this stage, is on the parents and on what they are providing in terms of food, shelter and care, as well as what they are capable of providing in the future: *In re Vickers Children*, 14 OApp3d 201, 14 OBR 228, 470 NE2d 438.

13. (1983) Hearsay is not admissible in adversarial juvenile court proceedings at which a parent, charged with neglecting his or her children, may lose custody of the children: *In re Vickers Children*, 14 OApp3d 201, 14 OBR 228, 470 NE2d 438.

14. (1984) When a case concerning a child is transferred or certified from another court, the certification from the transferring court is deemed to be the complaint: *In re Snider*, 14 OApp3d 353, 14 OBR 420, 471 NE2d 516.

15. (1984) Such certification does not constitute a complaint in the juvenile court that such child is neglected, dependent or abused and those dispositions provided for under RC § 2151.35.3 pertaining to neglected, dependent or abused children, including an award of permanent custody to a county welfare department which has assumed the administration of child welfare, are not applicable to such a child, disposition thereof being subject to and controlled by RC § 3109.04: *In re Snider*, 14 OApp3d 353, 14 OBR 420, 471 NE2d 516.

16. (1984) Any time a dependent child is temporarily placed with someone other than a parent, a reunification plan should be formulated. In cases where the child is placed with a relative, pursuant to RC § 2151.353(A)(2), the court should formulate the reunification plan itself or appoint an agency with some expertise in the area to formulate one: *In re Patterson*, 16 OApp3d 214, 16 OBR 229, 475 NE2d 160.

17. (1985) Revised Code § 2151.412 does not require a juvenile court to order a reunification plan when it makes a dispositional order pursuant to RC § 2151.353(A)(4): *In re Baby Girl Baxter*, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

[§ 2151.35.4] § 2151.354 Disposition of unruly child.

Research Aids

Particular orders; unruly child:

O-Jur2d: Juv Cts § 168

[§ 2151.35.5] § 2151.355 Disposition of delinquent child.

(A) If a child is found by the court to be a delinquent child, the court may make any of the following orders of disposition:

(1) Any order that is authorized by section 2151.353 [2151.35.3] of the Revised Code;

(2) Place the child on probation under any conditions that the court prescribes. If the child is adjudicated a delinquent child because he violated section 2909.05, 2909.06, or 2909.07 of the Revised Code and if restitution is appropriate under the circumstances of the case, the court shall require the child to make restitution for the property damage caused by his violation as a condition of the child's probation. If the child is adjudicated a delinquent child because he violated any other section of the Revised Code, the court may require the child as a condition of his probation to make restitution for the property damage caused by his violation and for the value of the property that was the subject of the violation he committed, if it would be a theft offense, as defined in division (K) of section 2913.01 of the Revised Code, if committed by an adult. The restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim approximately equal to the value of the property damage caused by his violation or to the value of the property that is the subject of the violation if it would be a theft offense if committed by an adult, the performance of community service or community work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.

(3) Commit the child to the temporary custody of any school, camp, institution, or other facility for delinquent children operated for the care of delinquent children by the county, by a district organized under section 2151.34 or 2151.65 of the Revised Code, or by a private agency or organization, within or without the state, that is authorized and qualified to provide the care, treatment, or placement required;

(4) If the child was adjudicated delinquent by reason of having committed an act that would be an aggravated felony of the third degree or a felony of the third or fourth degree if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization for an indefinite term consisting of a minimum period of six months and a maximum period not to exceed the child's attainment of the age of twenty-one years;

(5) If the child was adjudicated delinquent by reason of having committed an act that would be an aggravated felony of the first or second degree or a felony of the first or second degree if committed

by an adult, commit the child to the legal custody of the department of youth services for institutionalization in a secure facility for an indefinite term consisting of a minimum period of one year and a maximum period not to exceed the child's attainment of the age of twenty-one years;

(6) If the child was adjudicated delinquent by reason of having committed an act that would be the offense of murder or aggravated murder if committed by an adult, commit the child to the legal custody of the department of youth services for institutionalization in a secure facility until the child's attainment of the age of twenty-one years;

(7) Impose a fine not to exceed fifty dollars and costs;

(8) Require the child to make restitution for all or part of the property damage caused by his delinquent act and for all or part of the value of the property that was the subject of any delinquent act that he committed and that would be a theft offense, as defined in division (K) of section 2913.01 of the Revised Code, if committed by an adult. If the court determines that the victim of the child's delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act, the court shall, regardless of whether or not the child knew the age of the victim, consider this fact in favor of imposing restitution, but that fact shall not control the decision of the court. The restitution may be in the form of a cash reimbursement paid in a lump sum or in installments, the performance of repair work to restore any damaged property to its original condition, the performance of a reasonable amount of labor for the victim, the performance of community service or community work, any other form of restitution devised by the court, or any combination of the previously described forms of restitution.

(9) Suspend or revoke the operator's license issued to the child, or suspend or revoke the registration of all motor vehicles registered in the name of the child;

(10) Make any further disposition that the court finds proper.

(B) At the dispositional hearing and prior to making any disposition pursuant to division (A) of this section, the court shall determine whether the victim of the delinquent act committed by the child was sixty-five years of age or older or permanently and totally disabled at the time the delinquent act was committed and whether the delinquent act would have been an offense of violence if committed by an adult. If the victim was sixty-five years of age or older or permanently and totally disabled at the time the act was committed, regardless of whether or not the child knew the age of the victim, and if the act would have been an offense of violence if committed by an adult, the court shall consider these facts in favor of imposing commit-

ment under division (A)(3), (4), (5), or (6) of this section, but these facts shall not control the court's decision.

(C)(1) When a juvenile court commits a delinquent child to the custody of the department of youth services pursuant to this section, the court shall not designate the specific institution in which the child is to be placed by the department, but instead shall specify that the child is to be institutionalized or that the institutionalization is to be in a secure facility if that is required by division (A) of this section.

(2) When a juvenile court commits a delinquent child to the custody of the department of youth services, the court shall provide the department with the child's social history, medical records, section or sections of the Revised Code violated and the degree of the violation, and any other records of the child that the department reasonably requests. The court at that time also shall give notice to the school attended by the child of the child's commitment by sending to that school a copy of the court's journal entry ordering the commitment. As soon as possible after receipt of the notice described in this section, the school shall provide the department of youth services with the child's school transcript. However, the department shall not refuse to accept a child committed to it, nor shall a child committed to it be held in a county or district detention home because of the court's failure to provide the records it is required to provide under this division or because of a school's failure to provide the records it is required to provide under this division. The department of youth services shall provide the court and the school with an updated copy of the child's school transcript and shall provide the court with a summary of the institutional record of the child when it releases the child from institutional care. The department also shall provide the court with a copy of any portion of the child's institutional record that the court specifically requests within five working days of the request.

(D) At any hearing at which a child is adjudicated delinquent, or as soon as possible after the hearing, the court shall notify all victims of the delinquent act, who may be entitled to a recovery under any of the following sections, of the right of the victims to recover, pursuant to section 3109.09 of the Revised Code, compensatory damages from the child's parents; of the right of the victims to recover, pursuant to section 3109.10 of the Revised Code, compensatory damages from the child's parents for willful and malicious assaults committed by the child; and of the right of the victims to recover an award of reparations pursuant to sections 2743.51 to 2743.72 of the Revised Code.

*HISTORY: 137 v H 1 (Eff 8-26-77); 137 v S 119 (Eff 8-30-78); 137 v H 565 (Eff 11-1-78); 139 v H 440 (Eff 11-23-81); 139 v H 209 (Eff 7-6-82); 140 v S 210. Eff 7-1-83.

The effective date of SB 210 is set by section 3 of the act.

Cross-References to Related Sections

Clerk of juvenile courts to maintain certain records in delinquency cases if victim was sixty-five years of age or older or permanently and totally disabled, RC § 2151.18.

Commitment, release; conditions for, RC §§ 2151.38, 5139.01, 5139.05, 5139.06, 5139.32, 5139.35.

Research Aids

Particular orders; delinquent child:

O-Jur2d: Juv Cts § 169

ALR

Validity of state statute providing for termination of parental rights. 22 ALR4th 774.

Law Review

H.B. 440: Ohio restructures its juvenile justice system. Note. 8 UDayLRev 237 (1982).

CASE NOTES AND OAG

1. (1980) A juvenile court's order requiring restitution but leaving the amount and method of payment to a later hearing is not an appealable order: In re Holmes, 70 OApp2d 75, 24 OO3d 93, 434 NE2d 747.

2. (1981) Revised Code § 2151.35.5(A)(9) which allows the juvenile court to "make any further disposition that the court finds proper" does not authorize the court to exercise unlimited discretion in sentencing a delinquent child: State v. Grady, 3 OApp3d 174, 3 OBR 199, 444 NE2d 51.

3. (1984) A prior adjudication of delinquency based on a theft offense constitutes a previous conviction of a theft offense under RC § 2913.02 for purposes of disposition: In re Russell, 12 OS3d 304, 12 OBR 377, 466 NE2d 553.

[§ 2151.35.6] § 2151.356 Disposition of juvenile traffic offender.

If the child is found to be a juvenile traffic offender the court may make any of the following orders of disposition:

(A) Impose a fine not to exceed fifty dollars and costs;

(B) Suspend the child's operator's license or the registration of all motor vehicles registered in the name of such child for such period as the court prescribes;

(C) Revoke the child's operator's license or the registration of all motor vehicles registered in the name of such child;

(D) Place the child on probation;

(E) Require the child to make restitution for all damages caused by his traffic violation or any part thereof.

If after making such disposition the court finds upon further hearing that the child has failed to comply with the orders of the court and his operation of a motor vehicle constitutes him a danger to himself and to others, the court may make any disposition authorized by section 2151.355 [2151.35.5] of the Revised Code.

A juvenile traffic offender is subject to sections 4509.01 to 4509.78 of the Revised Code.

*HISTORY: 137 v H 1 (Eff 8-26-77); 137 v H 222. Eff 10-4-77.

Research Aids

Particular orders; juvenile traffic offender:

O-Jur2d: Juv Cts § 170

CASE NOTES AND OAG

1. (1977) The statutory speedy trial provisions of RC § 2945.71 et seq. do not apply to juvenile traffic offenders: State v. Reed, 54 OApp2d 193, 8 OO3d 333, 376 NE2d 609.

2. (1983) Revised Code § 2501.02 grants the courts of appeals jurisdiction over appeals from juvenile court judgments and final orders rendered in juvenile traffic offender proceedings: In re Hartman, 2 OS3d 154, 2 OBR 699, 443 NE2d 516.

3. (1982) Fines imposed upon juvenile traffic offenders pursuant to RC § 2151.35.6(A) must be paid to the general fund of the county treasury pursuant to RC § 2949.11 rather than to the county law library association pursuant to RC §§ 3375.52 or 3375.53. (1943 Op. Att'y Gen. No.6406, p. 547, approved and followed in part): OAG No.82-062.

[§ 2151.35.7] § 2151.357 [Cost.]

In the manner prescribed by division (C)(2) of section 3313.64 of the Revised Code, the court shall, at the time of making any order that removes a child from his own home or that vests legal or permanent custody of the child in a person or government agency other than his parent, determine the school district that is to bear the cost of educating the child. Such determination shall be made a part of the order that provides for the child's placement or commitment.

Whenever a child is placed in a detention home established under section 2151.34 of the Revised Code or a juvenile facility established under section 2151.65 of the Revised Code, his school district as determined by the court shall pay the cost of educating the child based on the per capita cost of the educational facility within such detention home or juvenile facility. Whenever a child is placed by the court in a private institution, school, residential treatment center, or other private facility, the state shall pay to the court a subsidy to help defray the expense of educating the child in an amount equal to the product of the daily per capita educational cost of such facility and the number of days the child resides at the facility, provided that such subsidy shall not exceed five hundred dollars per year. The subsidy shall be paid quarterly to the court.

*HISTORY: 139 v S 140. Eff 7-1-81.

The effective date of SB 140 is set by section 3 of the act.

Cross-References to Related Sections

Education of handicapped children; definitions, RC § 3323.01.

Tuition to be paid by district determined by court, RC § 3313.64.

Research Aids

Cost of education:

O-Jur2d: Juv Cts § 189

CASE NOTES AND OAG

1. (1985) Revised Code § 2151.357 does not require the school district of residence of a child placed in a detention home by a juvenile court to pay the cost of nonacademic summer activities provided for the child by the detention home: OAG No. 85-028.

[§ 2151.35.8] § 2151.358 [Sealing, expungement of records.]

(A) As used in this section, "seal a record" means to remove a record from the main file of similar records and to secure it in a separate file that contains only sealed records and that is accessible only to the juvenile court. A record that is sealed shall be destroyed by all persons and governmental bodies except the juvenile court.

(B) The department of youth services and any other institution or facility that unconditionally discharges a person who has been adjudicated a delinquent or unruly child shall immediately give notice of the discharge to the court that committed the person. The court shall note the date of discharge on a separate record of such discharges.

(C) Two years after the termination of any order made by the court or two years after the unconditional discharge of a person from the department of youth services or other institution or facility to which the person may have been committed, the court that issued the order or committed the person shall:

(1) If the person was adjudicated an unruly child, order the record of the person sealed;

(2) If the person was adjudicated a delinquent child, either order the record of the person sealed or send the person notice of his right to have his record sealed.

The court shall send the notice within ninety days after the expiration of the two-year period by certified mail to the person at his last known address. The notice shall state that the person may apply to the court for an order to seal his record, explain what sealing a record means, and explain the possible consequences of not having his record sealed.

(D) At any time after the two-year period has elapsed, any person who has been adjudicated an unruly or delinquent child may apply to the court for an order to seal his record. The court shall hold a hearing on each application within sixty days after the application is received. Notice of the hearing on the application shall be given to the prosecuting attorney and to any other public office or agency known to have a record of the prior adjudication. If the court finds that the rehabilitation of the person who was adjudicated a delinquent child

has been attained to a satisfactory degree, the court may order the record of the person sealed.

(E) If the court orders the adjudication record of a person sealed pursuant to division (C) or (D) of this section, the court shall order that the proceedings in the case in which the person was adjudicated a delinquent or unruly child be deemed never to have occurred. All index references to the case and the person shall be deleted and the person and the court may properly reply that no record exists with respect to the person upon any inquiry in the matter. Inspection of records that have been ordered sealed may be permitted by the court only upon application by the person who is the subject of the sealed records and only by the persons that are named in his application.

(F) Any person who has been arrested and charged with being a delinquent child, and who is adjudicated not guilty of the charges against him in the case or who has the charges against him in the case dismissed, may apply to the court for an expungement of his record in the case. The application may be filed at any time after the person is adjudicated not guilty or the charges against the person are dismissed. The court shall give notice to the prosecuting attorney of any hearing on the application. The court may initiate the expungement proceedings on its own motion.

Any person who has been arrested and charged with being an unruly child, and who is adjudicated not guilty of the charges against him in the case or who has the charges against him in the case dismissed, may apply to the court for an expungement of his record. The court shall initiate the expungement proceedings on its own motion if an application for expungement is not filed.

If the court upon receipt of an application for expungement or upon its own motion determines that the charges against any person in any case were dismissed or that any person was adjudicated not guilty in any case, the court shall order that the records of the case be expunged and that the proceedings in the case be deemed never to have occurred. If the applicant for the expungement order, with the written consent of his parents or guardian if he is a minor and with the written approval of the court, waives in writing his right to bring any civil action based on the arrest for which the expungement order is applied, the court shall order the appropriate persons and governmental agencies to delete all index references to the case; destroy or delete all court records of the case; destroy all copies of any pictures and fingerprints taken of the person pursuant to the expunged arrest; and destroy, erase, or delete any reference to the arrest that is maintained by the state or any political subdivision of the state, except a record of the arrest that is maintained for compiling statistical data and that does not contain any reference to the person.

If the applicant for an expungement order does not waive in writing his right to bring any civil action based on the arrest for which the expungement order is applied, the court shall, in addition to ordering the deletion, destruction, or erasure of all index references and court records of the case and of all references to the arrest that are maintained by the state or any political subdivision of the state, order that a copy of all records of the case except fingerprints held by the court or a law enforcement agency be delivered to the court. The court shall seal all of the records delivered to the court in a separate file in which only sealed records are maintained. The sealed records shall be kept by the court until the statute of limitations expires for any civil action based on the arrest, any pending litigation based on the arrest is terminated, or the applicant files a written waiver of his right to bring a civil action based on the arrest. After the expiration of the statute of limitations, the termination of the pending litigation, or the filing of the waiver, the court shall destroy the sealed records.

After the expungement order has been issued, the court shall, and the person may properly, reply that no record of the case with respect to the person exists.

(G) The court shall send notice of the order to expunge or seal to any public office or agency that the court has reason to believe may have a record of the expunged or sealed record. An order to seal or expunge under this section applies to every public office or agency that has a record of the prior adjudication or arrest, regardless of whether it receives notice of the hearing on the expungement or sealing of the record or a copy of the order to expunge or seal the record. Upon the written request of a person whose record has been expunged or sealed and the presentation of a copy of the order to expunge or seal, a public office or agency shall destroy its record of the prior adjudication or arrest, except a record of the adjudication or arrest that is maintained for compiling statistical data and that does not contain any reference to the person who is the subject of the order to expunge or seal.

(H) The judgment rendered by the court under this chapter shall not impose any of the civil disabilities ordinarily imposed by conviction of a crime in that the child is not a criminal by reason of the adjudication, nor shall any child be charged or convicted of a crime in any court except as provided by this chapter. The disposition of a child under the judgment rendered or any evidence given in court is not admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of the child may be considered by any court only as to the matter of sentence or to the granting of probation. The disposition or evidence shall not operate to disqualify a child in any future

civil service examination, appointment, or application.

(I) In any application for employment, license, or other right or privilege, any appearance as a witness, or any other inquiry, a person may not be questioned with respect to any arrest for which the records were expunged. If an inquiry is made in violation of this division, the person may respond as if the expunged arrest did not occur, and the person shall not be subject to any adverse action because of the arrest or the response.

(J) An officer or employer of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or of any of its political subdivisions, any information or other data concerning any arrest, complaint, trial, hearing, adjudication, or correctional supervision, the records of which have been expunged or sealed pursuant to this section, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

***HISTORY:** 137 v H 315 (Eff 3-15-78); 139 v H 440 (Eff 11-23-81); 140 v H 37. Eff 6-22-84.

Research Aids

Expungement of record:

O-Jur2d: Juv Cts § 178

Restrictions on use of evidence or judgment in other proceedings:

O-Jur2d: Juv Cts § 149

CASE NOTES AND OAG

1. (1976) Evidence of acts by a defendant, which is otherwise admissible under RC § 2945.59 and which does not constitute part of a disposition or evidence given in court, is not barred by RC § 2151.35.8, even though the evidence tends to show the commission of another crime by the defendant when a juvenile: *State v. Bayless*, 48 OS2d 73, 2 OO3d 249, 357 NE2d 1035.

2. (1976) A mistrial is not required in a criminal case where the defendant on being cross-examined says he has never been convicted of a crime as an adult, then the prosecutor asks him about juvenile crimes, and the judge instructs the jury to disregard the question: *State v. Brewster*, 1 OO3d 372.

3. (1978) The accumulation of twelve or more traffic violation points within a period of two years as a juvenile driver will support a revocation of driving privileges by the registrar pursuant to RC § 4507.40(K) and is not prohibited by RC § 2151.35.8: *Gebell v. Dollison*, 9 OO3d 23.

4. (1982) A juvenile court delinquency adjudication cannot be used to impeach the general credibility of a witness under EvR 609, although it may be admissible in particular cases where it has special significance to possible bias of the witness. The restriction against using such evidence for impeachment of general credibility does not contravene an accused's right to confront and cross-examine adverse witnesses: *State v. White*, 6 OApp3d 1, 6 OBR 23, 451 NE2d 533.

5. (1983) Revised Code § 2105.19 does not preclude a juvenile adjudicated delinquent by reason of having mur-

dered his father from inheriting from his father's estate.:
In re Estate of Birt, 18 OMisc2d 7, 18 OBR 407, 481 NE2d
1387 (CP).

[§ 2151.35.9] § 2151.359 Control of conduct of parent, guardian, or custodian.

Research Aids

Orders restraining conduct of party:
O-Jur2d: Juv Cts § 171

§ 2151.36 Support of child.

Cross-References to Related Sections

Hearing to determine employment status, workers' compensation benefits or funds on deposit of person ordered to pay child support; withholding of support from assets, RC § 3113.21.

Research Aids

Expenses of committed child; payment by county:
O-Jur2d: Juv Cts § 192
Expenses of committed children; liability of county in legal settlement:
O-Jur2d: Juv Cts § 191
Expenses of committed children; liability of parent:
O-Jur2d: Juv Cts § 190
Jurisdiction in contempt:
O-Jur2d: Juv Cts § 56
Return of child to foreign state or country:
O-Jur2d: Juv Cts § 180

§ 2151.37 Institution receiving children required to make report.

Research Aids

Administrative and quasi-judicial powers:
O-Jur2d: Juv Cts § 21

§ 2151.38 [Custody of child; early release.]

(A) When a child is committed to the legal custody of the department of youth services, committed to the permanent custody of a county department of welfare that has assumed the administration of child welfare, a county children services board, or a certified organization, or committed pursuant to division (A)(4) of section 2151.353 [2151.35.3] or 2151.414 [2151.41.4] of the Revised Code, the jurisdiction of the juvenile court in respect to the child so committed shall cease and terminate at the time of commitment, except as provided in divisions (B) and (C) of this section and except that if the department of youth services or any county department, board, or certified organization having permanent custody makes a motion to the court for the termination of permanent custody, the court upon the motion, after notice and hearing and for good cause shown, may terminate

permanent custody at any time prior to the child's attainment of the age of twenty-one years. The court shall make disposition of the matter in whatever manner will serve the best interests of the child. All other commitments made by the court shall be temporary and shall continue for a period that is designated by the court in its order, until terminated or modified by the court, or until a child attains the age of twenty-one years.

(B)(1) If a child is committed to the department of youth services pursuant to division (A)(4) or (5) of section 2151.355 [2151.35.5] of the Revised Code, the department shall not release the child from institutional care or institutional care in a secure facility, whichever is applicable, and as a result shall not discharge the child, order his release on parole, or assign him to a family home, group care facility, or other place for treatment or rehabilitation, prior to the expiration of the prescribed minimum periods of institutionalization unless the department, the child, or the child's parent requests an early release from institutional care or institutional care in a secure facility, whichever is applicable, from the court that committed the child and the court approves the early release in a journal entry, or unless the court on its own motion grants an early release. A request for early release by the department, the child, or the child's parent shall be made only in accordance with division (B)(2) of this section.

If a child is committed to the department of youth services pursuant to division (A)(6) of section 2151.355 [2151.35.5] of the Revised Code, the department shall not release the child from institutional care in a secure facility, and as a result shall not discharge the child, order his release on parole, or assign him to a family home, group care facility or other place for treatment or rehabilitation, prior to the child's attainment of the age of twenty-one years unless the department, the child, or the child's parent requests an early release from institutional care in a secure facility from the court that committed the child and the court approves the early release in a journal entry, or unless the court on its own motion grants an early release. A request for early release by the department, the child, or the child's parent shall be made only in accordance with division (B)(2) of this section.

(2)(a) If the department of youth services desires to release a child committed to it pursuant to division (A)(4) or (5) of section 2151.355 [2151.35.5] of the Revised Code from institutional care or institutional care in a secure facility, whichever is applicable, prior to the expiration of the prescribed minimum periods of institutionalization or if it desires to release a child committed to it pursuant to division (A)(6) of that section from institutional care in a secure facility prior to the child's attainment of the age of twenty-one years, it shall request the

court that committed the child for an early release from institutional care or institutional care in a secure facility, whichever is applicable.

Upon receipt of a request for a child's early release filed by the department at any time, or upon its own motion at any time, the court that committed the child to the department shall either approve the early release from institutional care or institutional care in a secure facility, whichever is applicable, by journal entry or schedule a time within thirty days for a hearing on whether the child is to be released.

(b) If a child who has been committed to the department pursuant to division (A)(4), (5), or (6) of section 2151.355 [2151.35.5] of the Revised Code or the parents of such a child seek his release from institutional care or institutional care in a secure facility, whichever is applicable, prior to the expiration of the prescribed minimum period of institutionalization or prior to the child's attainment of the age of twenty-one years, whichever is applicable, the child or the child's parent shall request the court that committed the child to grant such an early release. No such request initially may be made prior to the expiration of thirty days from the day on which the child began his institutional care or institutional care in a secure facility, whichever is applicable. Upon the filing of such an initial request for early release, the court either shall approve the early release, by journal entry, shall schedule a time within thirty days for a hearing on whether the child is to be released, or shall reject the request without conducting a hearing. If an initial request for early release is rejected, the child or the child's parent may make one or more subsequent requests for early release, provided that no such request shall be made prior to the expiration of thirty days from the day on which a hearing was conducted on any previous request filed by the child or the child's parent, or, in relation to a request filed immediately after an initial request, prior to the expiration of thirty days from the day on which the initial request was rejected without hearing or the day on which a hearing was conducted on the initial request. Upon the filing of any request for early release subsequent to an initial request, the court shall either approve the early release, by journal entry, or schedule a time within thirty days for a hearing on whether the child is to be released.

(c) If a court schedules a hearing to determine whether a child committed to the department should be granted an early release, either upon receipt of a request filed by the department under division (B)(2)(a) of this section or filed by the child or the child's parent in accordance with the time periods prescribed in division (B)(2)(b) of this section, or upon its own motion, it shall order the department to deliver the child to the court on the

date set for the hearing and present to the court at that time a treatment plan for the child's post-institutional care. The court shall determine at the hearing whether the child should be released from institutionalization or institutionalization in a secure facility, whichever is applicable. If the court approves the early release, the department shall prepare a written treatment and rehabilitation plan for the child pursuant to division (D) of this section, which shall include the terms and conditions of his release. It shall send the committing court and the juvenile court of the county in which the child is placed a copy of the plan and the terms and conditions that it fixed. The court of the county in which the child is placed may adopt the terms and conditions set by the department as an order of the court and may add any additional consistent terms and conditions it considers appropriate. If a child is released under this division and the court of the county in which the child is placed has reason to believe that the child has not deported himself in accordance with any post-release terms and conditions established by the court in its journal entry, the court of the county in which the child is placed shall schedule a time for a hearing on whether the child violated any of the post-release terms and conditions. If the court of the county in which the child is placed determines at the hearing that the child violated any of the post-release terms and conditions established by the court in its journal entry, the court may, if it determines that the violation of the terms and conditions was a serious violation, order the child to be returned to the department for institutionalization or institutionalization in a secure facility, consistent with the original order of commitment of the child, or in any case, may make any other disposition of the child authorized by law that the court considers proper. If the court of the county in which the child is placed orders the child to be returned to a department of youth services institution, the time during which the child was institutionalized or institutionalized in a secure facility, whichever is applicable, prior to his early release shall be considered as time served in fulfilling the prescribed minimum period of institutionalization or institutionalization in a secure facility that is applicable to the child under his original order of commitment. If the court orders the child returned to a department of youth services institution, the child shall remain in institutional care for a minimum period of three months.

(C) If a child is committed to the department of youth services pursuant to division (A)(4) or (5) of section 2151.355 [2151.35.5] of the Revised Code and the child has been institutionalized or institutionalized in a secure facility, whichever is applicable, for the prescribed minimum periods of time under those divisions, the department, without approval of the court that committed the child, may release the child from institutional care or dis-

charge the child. If the department releases the child from institutional care and then orders his release on parole or assigns him to a family home, group care facility, or other place for treatment or rehabilitation, the department also shall prepare a written treatment and rehabilitation plan for the child pursuant to division (D) of this section, which shall include the terms and conditions of his release or assignment, and shall send the committing court and the juvenile court of the county in which the child is placed a copy of the plan and the terms and conditions that it fixed. The court of the county in which the child is placed may adopt the terms and conditions as an order of the court, and may add any additional consistent terms and conditions it considers appropriate. The release, discharge, release on parole, or assignment shall be in accordance with division (C) of section 5139.06 of the Revised Code. Upon notification of a pending release, discharge, release on parole, or assignment in accordance with that division, the committing court shall enter the notification in its journal. If a child is released on parole or is assigned subject to specified terms and conditions and the court of the county in which the child is placed has reason to believe that the child has not deported himself in accordance with any post-release terms and conditions established by the court in its journal entry, the court of the county in which the child is placed may, in its discretion, schedule a time for a hearing on whether the child violated any of the post-release terms and conditions. If the court of the county in which the child is placed conducts a hearing and determines at the hearing that the child violated any of the post-release terms and conditions established in its journal entry, the court may, if it determines that the violation of the terms and conditions was a serious violation, order the child to be returned to the department of youth services for institutionalization or in any case, may make any other disposition of the child authorized by law that the court considers proper. If the court of the county in which the child is placed orders the child to be returned to a department of youth services institution, the child shall remain institutionalized for a minimum period of three months.

(D) The department of youth services shall, prior to the release of a child pursuant to division (B) or (C) of this section:

(1) After reviewing the child's rehabilitative progress history and medical and educational records, prepare a written treatment and rehabilitation plan for the child, which shall include terms and conditions of the release;

(2) Completely discuss the terms and conditions of the plan prepared pursuant to division (D)(1) of this section and the possible penalties for violation of the plan with the child and his parents, guardian, or legal custodian;

(3) Have the plan prepared pursuant to division (D)(1) of this section signed by the child, his parents, legal guardian, or custodian, and any authority or person that is to supervise, control, and provide supportive assistance to the child at the time of the child's release pursuant to division (B) or (C) of this section;

(4) File a copy of the treatment plan prepared pursuant to division (D)(1) of this section, prior to the child's release, with the committing court and the juvenile court of the county in which the child is to be placed.

(E) The department of youth services shall file a written progress report with the committing court regarding each child released pursuant to division (B) or (C) of this section, at least once every thirty days unless specifically directed otherwise by the court. The report shall indicate the treatment and rehabilitative progress of the child and his family, if applicable, and shall include any suggestions and recommendations for alteration of the program, custody, living arrangements, or treatment. The department shall retain legal custody of a child so released until it discharges the child or until the custody is terminated as otherwise provided by law.

*HISTORY: 138 v H 695 (Eff 10-24-80); 139 v H 1 (Eff 8-5-81); 139 v H 440 (Eff 11-23-81); 140 v H 291. Eff 7-1-83.

Cross-References to Related Sections

Emergency release explained, RC § 5139.20.

Institutionalization of child, RC §§ 5139.05—5139.07, 5139.11.

Research Aids

Postdispositional proceeding; court's jurisdiction of child's commitment:

O-Jur2d: Juv Cts § 174

Law Review

H.B. 440: Ohio restructures its juvenile justice system. Note. 8 UDayLRev 237 (1982).

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require? Marvin M. Moore, *et al.* 16 AkronLRev 681 (1983).

CASE NOTES AND OAG

1. (1980) Juvenile Court consent to an agreement surrendering permanent custody of a child to a county children services board, pursuant to RC §§ 5103.15 and 5153.16(B), is not an adversary proceeding, nor is such judicial consent a "commitment" of the child into the board's custody for purposes of RC § 2151.38: In re Miller, 61 OS2d 184, 15 OO3d 211, 399 NE2d 1262.

2. (1979) Children of a family have a right to the companionship of their siblings. The role of the State should be to do everything that can be done to keep the children of a family together so that they may enjoy the advantages of mutual companionship, love and protection: In re Neglected Children, 18 OO3d 283 (CP).

§ 2151.39 [Placement of children from other states.]

Research Aids

Compact administrator; powers and duties:
O-Jur2d: Juv Cts § 17

§ 2151.40 Cooperation with court.

Research Aids

Cooperation of officials, etc., with juvenile court:
O-Jur2d: Juv Cts § 67

§ 2151.41 Repealed, 141 v H 349, § 2 [GC § 1639-45; 117 v 520; Bureau of Code Revision, 10-1-53; 133 v H 320]. Eff 3-6-86.

This section concerned abusing or contributing to delinquency of a child.

[§ 2151.41.1] § 2151.411 Liability of parents for acts of delinquent child.

Cross-References to Related Sections

Liability of parents for assaults by their children, RC § 3109.10.

Liability of parents for destructive acts or theft by their children, RC § 3109.09.

Research Aids

Required recognizance when child placed on probation:
O-Jur2d: Juv Cts § 166

ALR

Criminal responsibility of parent for act of child. 12 ALR4th 673.

CASE NOTES AND OAG

1. (1982) Section 3 of Am. Sub. H.B. No. 695, concerning the phase-in of RC §§ 2151.41.2, 2151.41.3 and 2151.41.4, requires that a written comprehensive reunification plan be included in the second annual review made after the effective date of the Act (October 24, 1980), of any child who is in temporary custody upon such effective date pursuant to court order under RC Chapter 2151. or pursuant to RC § 5103.15: In re Smith, 7 OApp3d 75, 7 OBR 88, 454 NE2d 171.

[§ 2151.41.2] § 2151.412 [Initial plan upon temporary commitment; revision; comprehensive reunification plan.]

(A) When a child is adjudicated an abused, neglected, or dependent child and the court, pursuant to division (A)(2) or (3) of section 2151.353 [2151.35.3] of the Revised Code, orders commitment of the child to the temporary custody of the department of public welfare, a county department of welfare that has assumed the administration of child welfare, a county children services board, or any certified organization, the department, county

department, board, or organization shall submit an initial plan to the court, after a reasonable attempt to consult with all parties, which initial plan shall be prepared in accordance with division (B) of this section. The court shall approve an initial plan prior to the execution of the order of disposition of the child, the approved initial plan shall be incorporated into the judgment entry setting forth the disposition made of the child, and copies of the judgment entry shall be sent to all parties.

(B) The initial plan submitted to the court as required by division (A) of this section shall include one of the following:

(1) If the child is not abandoned or orphaned or if the parents of an abandoned child are located, the following:

(a) A schedule for regular and frequent consultation between the parents and the department, county department, board, or certified organization to which the child is temporarily committed;

(b) If the child is to be removed from the home, the following:

(i) A parent and child visitation schedule that begins as soon as possible and that provides for regular and frequent visitation and communication or other contact between the parents and child, which schedule shall include only supervised visitation if unsupervised visitation may result in harm to the child;

(ii) A payment schedule, based upon the parents' ability to pay, that provides for payment by the parents of the cost of the substitute physical care and maintenance given to the child by the department, county department, board, or certified organization to which the child is temporarily committed;

(2) If the child is abandoned and there has been no contact with the parents, the efforts that will be taken to locate the parents and who will make the efforts. If the parents are located, a revised initial plan shall be submitted to the court, and the revised plan shall comply with division (B)(1) of this section.

(3) If the child is orphaned, the efforts that will be taken to determine whether any living relatives of the child are willing and able to accept permanent custody of the child and who will make the efforts.

(C) The department, county department, board, or certified organization that has temporary custody of a child who is not abandoned or orphaned or custody of a child for whom a revised initial plan is submitted pursuant to division (B)(2) of this section shall, within sixty days after the issuance of the temporary custody order or sixty days after approval of the revised initial plan, prepare and file with the court a comprehensive reunification plan for the child, which plan shall be prepared in accordance with division (D) of this section. The comprehensive plan shall be designed to rehabili-

tate and reunite the child's family. The court shall provide a copy of the comprehensive reunification plan to all parties in the action, and any party to the action may, within seven days after receiving a copy of the plan, file an objection to the plan. If any party files an objection to the plan, the court shall consider the issues raised by the objection, and may hold a hearing on the objection within fourteen days after it is filed. When all issues with respect to the plan are resolved, the court shall approve the plan and incorporate the plan into the judgment entry setting forth the disposition made of the child.

(D) The comprehensive reunification plan submitted to the court as required by division (C) of this section shall include all of the following:

(1) The services or treatment that will be provided or offered to the child's parents to facilitate rehabilitation;

(2) The actions that the parents are required to take to adjust their conduct or conditions so that the child will no longer be without adequate parental care;

(3) The services or treatment that will be provided or offered to the child;

(4) The requirements of division (B)(1) of this section.

(E) Any party to the action and the court may file a motion with the court requesting that an initial plan or comprehensive reunification plan prepared pursuant to this section be modified. The court shall notify all parties to the action that the motion has been filed, and any party to the action may, within seven days after receiving the notice, file an objection to the motion. The court shall incorporate the modification of the plan into the judgment entry setting forth the disposition made of the child if no objection to the modification is filed within the seven-day period. If any party files an objection to the modified plan, the court shall consider the issues raised by the objection, and may hold a hearing on the modified plan within fourteen days after the objection is filed. If the court approves any modification of the initial plan or the comprehensive reunification plan, the court shall incorporate the modification of the plan into the judgment entry setting forth the disposition made of the child.

HISTORY: 138 v H 695, Eff 10-24-80.

The provisions of § 3 of HB 695 (138 v —) read as follows:

SECTION 3. The second annual review made after the effective date of this act of any child who is in temporary custody upon the effective date of this act pursuant to a court order under Chapter 2151. of the Revised Code or pursuant to section 5103.15 of the Revised Code, which annual review is made pursuant to section 5103.151 of the Revised Code, shall include a comprehensive reunification plan prepared in accordance with division (D) of section 2151.412 of the Revised Code for the child if he is not abandoned or orphaned, a report on the attempts made to

locate the parents of the child if he is an abandoned child, or a report on the attempts made to find a relative of the child who will take permanent custody of the child if he is an orphaned child.

Upon the filing of the second such annual review made after the effective date of this act, the court shall hold a hearing to inquire into the future plans that the agency filing the report has for the placement of the child or for the return of the child to his parents.

ALR

Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.

Law Review

H.B. 695: updating Ohio's temporary and permanent custody procedures for child abuse, neglect and dependency cases. Note. 7 UDayLRev 293 (1981).

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require? Marvin M. Moore, *et al.* 16 AkronLRev 681 (1983).

CASE NOTES AND OAG

1. (1979) Where children are adjudged neglected under RC § 2151.03 and committed to the temporary custody of a social agency, the agency should plan for the rehabilitation and reunification of the children with their family and the court should insist that the agency make a conscientious effort to bring the plan to fruition before considering the alternative of adoptive placement: *In re Neglected Children*, 18 OO3d 283 (CP).

2. (1979) Where there are visitations and an ongoing relationship between children in foster home placement and their mother, the likelihood that the foster parents will become the "psychological parents" of these children is quite negligible: *In re Neglected Children*, 18 OO3d 283 (CP).

3. (1982) In a case in which a social welfare agency moves for permanent custody of a child for adoptive placement, if the record reveals that the non-custodial parent has maintained a continuing interest in his or her child's welfare, RC § 2151.41.2(C) places a mandatory duty on the social welfare agency to prepare a comprehensive reunification plan for that non-custodial parent: *In re Ball*, 5 OApp3d 56, 5 OBR 152, 449 NE2d 490.

4. (1982) Section 3 of Am. Sub. H.B. No. 695, concerning the phase-in of RC §§ 2151.41.2, 2151.41.3 and 2151.41.4, requires that a written comprehensive reunification plan be included in the second annual review made after the effective date of the Act (October 24, 1980), of any child who is in temporary custody upon such effective date pursuant to court order under RC Chapter 2151. or pursuant to RC § 5103.15: *In re Smith*, 7 OApp3d 75, 7 OBR 88, 454 NE2d 171.

5. (1984) Any time a dependent child is temporarily placed with someone other than a parent, a reunification plan should be formulated. In cases where the child is placed with a relative, pursuant to RC § 2151.353(A)(2), the court should formulate the reunification plan itself or appoint an agency with some expertise in the area to formulate one: *In re Patterson*, 16 OApp3d 214, 16 OBR 229, 475 NE2d 160.

6. (1985) Revised Code § 2151.412 does not require a juvenile court to order a reunification plan when it makes a dispositional order pursuant to RC § 2151.353(A)(4): *In*

re Baby Girl Baxter, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

7. (1984) Revised Code §§ 2151.412 and 2151.414 are applicable only where the child or children have previously been determined dependent, neglected or abused, their temporary custody has been committed to a children services board, a welfare department or a certified organization, and an order is sought changing temporary to permanent custody. These sections are not applicable where the original request was for permanent custody, and an order of temporary custody was issued pending hearing on the complaint as provided by RC § 2151.33: In re Covert, 17 OApp3d 122, 17 OBR 185, 477 NE2d 678.

[§ 2151.41.3] § 2151.413 [Agency may file motion requesting permanent custody.]

(A) A county department, board, or certified organization that is granted temporary custody pursuant to an order of disposition under division (A)(2) or (3) of section 2151.353 [2151.35.3] of the Revised Code of a child that is not abandoned or orphaned or of an abandoned child whose parents have been located may file a motion in the court that made the disposition of the child requesting permanent custody of the child if a period of at least six months has elapsed since the order of temporary custody was issued or the submission of the revised initial plan if the child is an abandoned child whose parents have been located.

(B) A county department, board, or certified organization that is granted temporary custody pursuant to an order of disposition under division (A)(2) or (3) of section 2151.353 [2151.35.3] of the Revised Code of a child that is abandoned or orphaned may file a motion in the court that made the disposition of the child requesting permanent custody of the child, if the child is abandoned, whenever it can show the court that the parents cannot be located and, if the child is orphaned, whenever it can show that no relative of the child is able to take permanent custody of the child.

HISTORY: 138 v H 695. Eff 10-24-80.

Text Discussion

Termination after disposition and lapse of six months. 2 Anderson Fam.L. § 11.32.2

Law Review

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require? Marvin M. Moore, *et al.* 16 AkronLRev 681 (1983).

CASE NOTES AND OAG

1. (1982) Section 3 of Am. Sub. H.B. No. 695, concerning the phase-in of RC §§ 2151.41.2, 2151.41.3 and 2151.41.4, requires that a written comprehensive reunification plan be included in the second annual review made after the effective date of the Act (October 24, 1980), of any child who is in temporary custody upon such effective date pursuant to court order under RC Chapter 2151. or pursuant to RC § 5103.15: In re Smith, 7 OApp3d 75, 7 OBR 88, 454 NE2d 171.

[§ 2151.41.4] § 2151.414 [Hearing on motion for permanent custody; notice; determinations necessary for granting motion.]

(A) Upon the filing of a motion for permanent custody of a child by a county department, board, or certified organization that has temporary custody of the child, the court shall give notice of the filing of the motion and of the hearing, in accordance with section 2151.29 of the Revised Code, to all parties to the action, which notice shall contain a full explanation that the granting of permanent custody permanently divests the parents of their parental rights and a full explanation of their right to be represented by counsel and to have counsel appointed pursuant to Chapter 120. of the Revised Code if they are indigent, and shall conduct a hearing to determine all of the following:

(1) If the county department, board, or certified organization has made a good faith effort to implement the initial and comprehensive reunification plans for the child that were approved by the court pursuant to section 2151.412 [2151.41.2] of the Revised Code;

(2) If the parents have acted in such a manner that the child is a child without adequate parental care, and will continue to act in the near future in such a manner that the child will continue to be a child without adequate parental care. In making this determination, the court shall consider all relevant factors, including but not limited to, the following considerations:

(a) The extent to which the parents of the child have conformed to the initial and comprehensive plans for the child that were approved by the court pursuant to section 2151.412 [2151.41.2] of the Revised Code and the extent to which the parents have fulfilled their obligations under the plans;

(b) Any existing emotional or mental disorders of the parents and the anticipated duration of the disorders;

(c) Any physical, emotional, or sexual abuse of the child by the parents that occurs between the date that the original complaint alleging abuse was filed and the date of the filing of the motion for permanent custody;

(d) Any existing excessive use of intoxicating liquor or drugs of abuse by the parents;

(e) Any physical, emotional, or mental neglect of the child by the parents that occurs between the date that the original complaint alleging neglect was filed and the date of the filing of the motion for permanent custody.

(3) If it is in the best interest of the child to permanently terminate parental rights.

(B) The court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that the child is not abandoned or orphaned and the parents have acted in such a manner that the child is a

child without adequate parental care, and will continue to act in the near future in such a manner that the child will continue to be a child without adequate parental care, that the child is abandoned and the parents cannot be located, or that the child is orphaned and there are no relatives of the child who are able to take permanent custody. The court may consider the wishes of the child in relation to the motion for permanent custody and the custodial history of the child as factors in making its determination, but the wishes and custodial history of the child shall not control the decision of the court. If the court grants permanent custody of a child to a movant under this division, the court, upon the request of any party, shall file a written opinion setting forth its findings of fact and conclusions of law in relation to the proceeding.

HISTORY: 138 v H 695. Eff 10-24-80.

Cross-References to Related Sections

See RC §§ 2151.28.1 and 2151.38 which refer to this section.

Text Discussion

Complaint and summons. 2 *Anderson Fam.L.* § 11.34
Counsel and guardian ad litem. 2 *Anderson Fam.L.* § 11.35

Procedures at permanent termination hearings. 2 *Anderson Fam.L.* § 11.33

Termination after disposition and lapse of six months. 2 *Anderson Fam.L.* § 11.32.2

Law Review

Constitutional law—due process of law—family law—burden of proof—before a state may sever permanently the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.—*Santosky v. Kramer*, 102 SCt 1388 (1982). Case note. 51 *CinLRev* 933 (1982).

H.B. 695: updating Ohio's temporary and permanent custody procedures for child abuse, neglect and dependency cases. Note. 7 *UDayLRev* 293 (1981).

Santosky v. Kramer [455 US 745 (1982)]: child neglect—fair preponderance or clear and convincing evidence. Case note. 10 *ONorthLRev* 405 (1983).

Standard of proof in proceedings to terminate parental rights. Note. 31 *ClevStLRev* 679 (1982).

SYMPOSIUM: Family law. Reunification planning for children in custody of Ohio's children services boards: what does the law require? Marvin M. Moore, et al. 16 *AkronLRev* 681 (1983).

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1. (1979) Children of a family have a right to the companionship of their siblings. The role of the State should be to do everything that can be done to keep the children of a family together so that they may enjoy the advantages of mutual companionship, love and protection: In re Neglected Children, 18 *OO3d* 283 (CP).

2. (1982) Section 3 of Am. Sub. H.B. No. 695, concerning the phase-in of RC §§ 2151.41.2, 2151.41.3 and 2151.41.4, requires that a written comprehensive reunification plan be included in the second annual review made after the effective date of the Act (October 24, 1980), of any child who is in temporary custody upon such effective date pursuant to court order under RC Chapter 2151. or pursuant to RC § 5103.15: In re Smith, 7 *OApp3d* 75, 7 *OBR* 88, 454 *NE2d* 171.

3. (1984) Lack of a RC § 3109.27 affidavit or pleading did not deprive the juvenile court of jurisdiction to grant permanent custody to the welfare department: In re Palmer, 12 *OS3d* 194, 12 *OBR* 259, 465 *NE2d* 1312.

4. (1982) Revised Code § 2151.41.4(A) lists numerous determinations to be made by the juvenile court during a hearing upon a motion for permanent custody, but the statute does not require these determinations to be listed in the court's judgment entry, and thus, the failure to do so is not error. Such determinations would be appropriately included within the court's findings of fact and conclusions of law, if they were requested by any of the parties pursuant to RC § 2151.41.4(B): In re Covin, 8 *OApp3d* 139, 8 *OBR* 196, 456 *NE2d* 520.

5. (1983) Hearsay is not admissible in adversarial juvenile court proceedings at which a parent, charged with neglecting his or her children, may lose custody of the children: In re Vickers Children, 14 *OApp3d* 201, 14 *OBR* 228, 470 *NE2d* 438.

6. (1983) Hearings for permanent custody under RC § 2151.41.4 must conform to the Rules of Juvenile Procedure. Hence, pursuant to JuvR 29 and 34, the proceedings should be bifurcated into separate adjudicatory and dispositional stages: In re Vickers Children, 14 *OApp3d* 201, 14 *OBR* 228, 470 *NE2d* 438.

7. (1983) In conducting the adjudicatory phase of the hearing under RC § 2151.41.4, the best interests of the child should not enter into the determination of whether the child is receiving adequate parental care. The focus, at this stage, is on the parents and on what they are providing in terms of food, shelter and care, as well as what they are capable of providing in the future: In re Vickers Children, 14 *OApp3d* 201, 14 *OBR* 228, 470 *NE2d* 438.

8. (1984) When a case concerning a child is transferred or certified from another court, the certification from the transferring court is deemed to be the complaint: In re Snider, 14 *OApp3d* 353, 14 *OBR* 420, 471 *NE2d* 516.

9. (1984) A certification does not constitute a complaint in the juvenile court that such child is neglected, dependent or abused and those dispositions provided for under RC § 2151.35.3 pertaining to neglected, dependent or abused children, including an award of permanent custody to a county welfare department which has assumed the administration of child welfare, are not applicable to such a child, disposition thereof being subject to and controlled by RC § 3109.04: In re Snider, 14 *OApp3d* 353, 14 *OBR* 420, 471 *NE2d* 516.

10. (1984) Revised Code §§ 2151.412 and 2151.414 are applicable only where the child or children have previously been determined dependent, neglected or abused, their temporary custody has been committed to a children

services board, a welfare department or a certified organization, and an order is sought changing temporary to permanent custody. These sections are not applicable where the original request was for permanent custody, and an order of temporary custody was issued pending hearing on the complaint as provided by RC § 2151.33: In re Covert, 17 OApp3d 122, 17 OBR 185, 477 NE2d 678.

[§ 2151.42.1] § 2151.421 [Report of child abuse or neglect; investigation; plan of cooperation.]

Any attorney, physician, including a hospital intern or resident, dentist, podiatrist, practitioner of a limited branch of medicine or surgery as defined in section 4731.15 of the Revised Code, registered or licensed practical nurse, visiting nurse, or other health care professional, licensed psychologist, speech pathologist or audiologist, coroner, administrator or employee of a child day-care center, administrator or employee of a certified child care agency or other public or private children services agency, school teacher or school authority, social worker, or person rendering spiritual treatment through prayer in accordance with the tenets of a well recognized religion, who is acting in his official or professional capacity, and has reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or condition of such a nature as to reasonably indicate abuse or neglect of the child, shall immediately report or cause reports to be made of such information to the children services board or the county department of human services exercising the children services function, or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred.

Anyone having reason to believe that a child less than eighteen years of age or any crippled or otherwise physically or mentally handicapped child under twenty-one years of age has suffered any wound, injury, disability, or other condition of such nature as to reasonably indicate abuse or neglect of the child may report or cause reports to be made of such information to the children services board, the county department of human services exercising the children services function, or to a municipal or county peace officer.

The reports shall be made forthwith by telephone or in person forthwith, and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

(A) The names and addresses of the child and his parents or person or persons having custody of the child, if known;

(B) The child's age and the nature and extent of the child's injuries, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect;

(C) Any other information which might be helpful in establishing the cause of the injury, abuse, or neglect.

Any person who is required to report cases of child abuse or neglect may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

When the attendance of the physician is pursuant to the performance of services as a member of the staff of a hospital or similar institution, he shall notify the person in charge of the institution or his designated delegate who shall make the necessary reports.

Upon the receipt of a report concerning the possible abuse or neglect of a child, the municipal or county peace officer shall refer the report to the appropriate county department of human services or children services board.

No child upon whom a report is made shall be removed from his parents, stepparents, guardian, or other persons having custody by a municipal or county peace officer without consultation with the children services board or the county department of human services exercising the children services function unless, in the judgment of the reporting physician and the officer, immediate removal is considered essential to protect the child from further abuse or neglect.

The county department of human services or children services board shall investigate, within twenty-four hours, each report referred to it under this section to determine the circumstances surrounding the injury or injuries, abuse, or neglect, the cause thereof, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency. The county department of human services or children services board shall report each case to a central registry which the state department of human services shall maintain in order to determine whether prior reports have been made in other counties concerning the child or other principals in the case. The department or board shall submit a report of its investigation, in writing to the law enforcement agency.

The county department of human services or children services board shall make any recommendations to the county prosecutor or city director of law that it considers necessary to protect any children that are brought to its attention.

Anyone or any hospital, institution, school, health department, or agency participating in the making of the reports, or anyone participating in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability that might otherwise be incurred or imposed as a result of such actions. Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the

cause thereof in any judicial proceeding resulting from a report submitted pursuant to this section.

Nothing in this section shall be construed to define as an abused or neglected child any child who is under spiritual treatment through prayer in accordance with the tenets and practice of a well-recognized religion in lieu of medical treatment.

Any report made under this section is confidential, and any person who permits or encourages the unauthorized dissemination of its contents is guilty of a misdemeanor of the fourth degree.

Reports required by this section shall result in protective services and emergency supportive services being made available by the county department of human services or children services board on behalf of children about whom the reports are made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The department of human services shall exercise rule-making authority under Chapter 119. of the Revised Code to aid in the implementation of this section.

There shall be placed on file with the juvenile court in each county and the department of human services an initial plan of cooperation jointly prepared and subscribed to by a committee consisting of the county peace officer, all chief municipal peace officers within the county, the prosecuting attorney of the county and the director of law of each city, and the children services board or county department of human services exercising the children services function as convened by the county director of human services. The plan shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (B) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code. The plan shall include a system for cross-referral of reported cases of abuse and neglect as necessary, and shall also include the name and title of the official directly responsible for making reports to the central registry.

*HISTORY: 137 v H 219 (Eff 11-1-77); 140 v S 321 (Eff 4-9-85); 141 v H 349. Eff 3-6-86.

Cross-References to Related Sections

Child abuse and child neglect prevention programs, RC § 3109.13 et seq.

Definitions, RC § 3113.31.

Social worker required to report information concerning child abuse, RC § 2317.02.

Summary removal of abused child by humane society agent, RC § 1717.14.

Text Discussion

Child abuse reporting. Baker § 9.55.1

Research Aids

Official report of abuse or neglect:

O-Jur2d: Juv Cts § 199

Law Review

Major evidentiary issues in prosecution of family abuse cases. Susan P. Mele. 11 ONorthLRev 245 (1984).

The outer limits of parental autonomy: withholding medical treatment from children. Comment. 42 OSLJ 813 (1981).

CASE NOTES AND OAG

1. (1978) The phrase "having reason to believe," as used in RC § 2151.42.1, is equivalent to "known or suspected" as used in 45 CFR 1340.3-3(d). The term "child neglect," as used in RC § 2151.42.1, applies to children without proper parental care or guardianship as defined by RC § 2151.05: OAG No.78-038.

2. (1979) The provisions of RC § 2151.42.1 impose the duties of investigation and disposition of reported cases of child abuse and neglect solely on children services boards and county welfare departments which have assumed the functions of a children services board, and, therefore, prohibit delegation of these duties to private entities: OAG No.79-067.

[§ 2151.42.2] § 2151.422 Repealed, 137 v H 565, § 2 [132 v S 316]. Eff 11-1-78.

This section dealt with mentally ill, deficient, or psychopathic adult offenders.

§ 2151.43 Charges against adults; defendant bound over to grand jury.

Research Aids

Amendments to indictment:

O-Jur2d: Juv Cts § 206

Complaint filed on order of juvenile court judge:

O-Jur2d: Juv Cts § 202

Sufficiency of charge:

O-Jur2d: Juv Cts § 204

§ 2151.44 Complaint after hearing.

Research Aids

Complaint filed on order of juvenile court judge:

O-Jur2d: Juv Cts § 202

§ 2151.45 Expense of extradition.

Research Aids

Costs, fees, expenses:

O-Jur2d: Juv Cts § 218

Expense of transporting children:

O-Jur2d: Juv Cts § 184

§ 2151.46 Bail.

Research Aids

Bail and recognizance:

O-Jur2d: Juv Cts § 208

§ 2151.47 Jury trial; procedure.**Research Aids**

Costs, fees, and expenses:

O-Jur2d: Juv Cts § 218

Trial by jury; waiver:

O-Jur2d: Juv Cts § 209

§ 2151.48 Commitment to women's reformatory in lieu of jail or workhouse.**Research Aids**

Commitment of female to women's reformatory:

O-Jur2d: Juv Cts § 214

§ 2151.49 Suspension of sentence.**Cross-References to Related Sections**

Hearing to determine employment status, workers' compensation benefits or funds on deposit of person ordered to pay child support; withholding of support from assets, RC § 3113.21.

Support payments to bureau of support as trustee for remittance, RC § 2301.36.

Research Aids

Suspension of sentence:

O-Jur2d: Juv Cts § 217

§ 2151.52 Appeals on questions of law.**Research Aids**

Appeals from prosecution of adults:

O-Jur2d: Juv Cts § 225

New trial:

O-Jur2d: Juv Cts § 219

§ 2151.53 Physical and mental examinations; records of examination; expenses.**Research Aids**

Compensation for physicians, etc.:

O-Jur2d: Juv Cts § 188

Physical and mental examinations:

O-Jur2d: Juv Cts § 133

§ 2151.54 Fees and costs.

The juvenile court shall tax and collect the same fees and costs as are allowed the clerk of the court of common pleas for similar services. No fees or costs shall be taxed in cases of delinquent, unruly, dependent, abused, or neglected children except as required by section 2743.70 of the Revised Code or when specifically ordered by the court. The expense of transportation of children to places to which they have been committed, and the transportation of children to and from another state by police or other officers, acting upon order of the

court, shall be paid from the county treasury upon specifically itemized vouchers certified to by the judge.

*HISTORY: 138 v H 238. Eff 8-8-80.

Research Aids

Costs, fees, and expenses:

O-Jur2d: Juv Cts §§ 181, 218

Expense of transporting children:

O-Jur2d: Juv Cts § 184

CASE NOTES AND OAG

1. (1983) The placing of a delinquent child, who is indigent and whose family is totally dependent upon welfare payments for income, in a detention center until court costs are paid violates Section 15, Article I of the Ohio Constitution (no person shall be imprisoned for debt): In re Rinehart, 10 OApp3d 318, 10 OBR 523, 462 NE2d 448.

§ 2151.56 Interstate compact on juveniles.**Research Aids**

Compact administrator:

O-Jur2d: Juv Cts § 17

Interstate compact on juveniles:

O-Jur2d: Juv Cts § 16

ALR

Extradition of juveniles. 73 ALR3d 700.

§ 2151.57 Compact administrator; powers and duties.**Research Aids**

Compact administrator:

O-Jur2d: Juv Cts § 17

§ 2151.58 Supplementary agreements.**Research Aids**

Compact administrator:

O-Jur2d: Juv Cts § 17

§ 2151.59 Financial obligations.

The compact administrator, subject to the approval of the director of budget and management, may make or arrange for any payments necessary to discharge any financial obligations imposed upon this state by the compact or by any supplementary agreement entered into thereunder.

*HISTORY: 141 v H 201. Eff 7-1-85.

Research Aids

Compact administration.

O-Jur2d: Juv Cts § 17

§ 2151.60 Enforcement by agencies of state and subdivisions.

Research Aids

Enforcement of compact:

O-Jur2d: Juv Cts § 18

§ 2151.61 Additional article.

Cross-References to Related Sections

Public office, definition, RC § 117.01.

Research Aids

Interstate compact on juveniles:

O-Jur2d: Juv Cts § 16

§ 2151.65 Single-county and joint-county juvenile facilities.

Upon the advice and recommendation of the juvenile judge, the board of county commissioners may provide by purchase, lease, construction, or otherwise a school, forestry camp, or other facility or facilities where delinquent, as defined in section 2151.02 of the Revised Code, dependent, abused, unruly, as defined in section 2151.022 [2151.02.2] of the Revised Code, or neglected children or juvenile traffic offenders may be held for training, treatment, and rehabilitation. Upon the joint advice and recommendation of the juvenile judges of two or more adjoining or neighboring counties, the boards of county commissioners of such counties may form themselves into a joint board and proceed to organize a district for the establishment and support of a school, forestry camp, or other facility or facilities for the use of the juvenile courts of such counties, where delinquent, dependent, abused, unruly, or neglected children, or juvenile traffic offenders may be held for treatment, training, and rehabilitation, by using a site or buildings already established in one such county, or by providing for the purchase of a site and the erection of the necessary buildings thereon. Such county or district school, forestry camp, or other facility or facilities shall be maintained as provided in sections 2151.01 to 2151.80 of the Revised Code. Children who are adjudged to be delinquent, dependent, neglected, abused, unruly, or juvenile traffic offenders, may be committed to and held in any such school, forestry camp, or other facility or facilities for training, treatment, and rehabilitation.

The juvenile court shall determine:

(A) The children to be admitted to any school, forestry camp, or other facility maintained under this section;

(B) The period such children shall be trained, treated, and rehabilitated at such facility;

(C) The removal and transfer of children from such facility.

*HISTORY: 138 v S 168. Eff 10-2-80.

Cross-References to Related Sections

Public office, definition, RC § 117.01.

Pupil entitled to free schooling, RC § 2151.35.7.

CASE NOTES AND OAG

1. (1983) Where a joint board of county commissioners is created for the purpose of constructing and maintaining a multicounty detention and treatment facility for the training and treatment of juveniles, the county prosecuting attorneys of the participating counties have no duty to provide legal counsel for the joint board of county commissioners. OAG No.83-064.

2. (1983) Where a joint board of county commissioners is created for the purpose of constructing and maintaining a multicounty detention and treatment facility for the training and treatment of juveniles, the joint board of county commissioners may employ legal counsel: OAG No.83-064.

[§ 2151.65.1] § 2151.651 State assistance for juvenile facilities.

The board of county commissioners of a county which, either separately or as part of a district, is planning to establish a school, forestry camp, or other facility under section 2151.65 of the Revised Code, to be used exclusively for the rehabilitation of children between the ages of twelve to eighteen years, other than psychotic or mentally retarded children, who are designated delinquent, as defined in section 2151.02 of the Revised Code, or unruly, as defined in section 2151.022 [2151.02.2] of the Revised Code, by order of a juvenile court, may make application to the department of youth services, created under division (B) of section 5139.01 of the Revised Code, for financial assistance in defraying the county's share of the cost of acquisition or construction of such school, camp, or other facility, as provided in section 5139.27 of the Revised Code. Such application shall be made on forms prescribed and furnished by the department.

*HISTORY: 138 v S 168 (Eff 10-2-80); 139 v H 440. Eff 11-23-81.

[§ 2151.65.2] § 2151.652 State assistance for operation and maintenance.

The board of county commissioners of a county or the board of trustees of a district maintaining a school, forestry camp, or other facility established under section 2151.65 of the Revised Code, used exclusively for the rehabilitation of children between the ages of twelve to eighteen years, other than psychotic or mentally retarded children, who are designated delinquent, as defined in section 2151.02 of the Revised Code, or unruly, as defined in section 2151.022 [2151.02.2] of the Revised Code, by order of a juvenile court, may make application to the department of youth services, created under division (B) of section 5139.01 of the Revised Code, for financial assistance in defraying the cost of operating and maintaining such school, forestry camp, or

other facility, as provided in section 5139.28 of the Revised Code.

Such application shall be made on forms prescribed and furnished by the department.

*HISTORY: 138 v S 168 (Eff 10-2-80); 139 v H 440. Eff 11-23-81.

§ 2151.77 Capital and current expenses of district.

CASE NOTES AND OAG

1. (1984) Revised Code §§ 2151.34.12 and 2151.77 require that the costs of operating and maintaining district juvenile detention and rehabilitation facilities be apportioned among the counties participating in the district on the basis of the counties' actual use of such facilities where no levy has been approved pursuant to RC § 5705.19(A). Neither a joint board of county commissioners formed pursuant to RC §§ 2151.34 and 2151.65 nor a district board of trustees appointed pursuant to RC §§ 2151.34.3 and 2151.68 has the authority to direct or permit the apportionment of such costs in any other manner: OAG No.84-052.

2. (1984) A board of county commissioners has the authority pursuant to RC § 305.26 to compound or release, in whole or in part, or otherwise settle payments due the county as a result of an erroneous apportionment of the costs of operating and maintaining district juvenile detention or rehabilitation facilities: OAG No.84-052.

§ 2151.85 [Unmarried minor may seek abortion without notice to parent, guardian or custodian.]

(A) A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents, guardian, or custodian may file a complaint in the juvenile court of the county in which she has a residence or legal settlement, in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or in the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, requesting the issuance of an order authorizing her to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian.

The complaint shall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

(3) A statement that the complainant wishes to have an abortion without the notification of her parents, guardian, or custodian;

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

(5) A statement as to whether the complainant has retained an attorney and, if she has retained an attorney, the name, address, and telephone number of her attorney.

(B)(1) The court shall fix a time for a hearing on any complaint filed pursuant to division (A) of this section and shall keep a record of all testimony and other oral proceedings in the action. The court shall hear and determine the action and shall not refer any portion of it to a referee. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this division is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such notification.

(2) The court shall appoint a guardian ad litem to protect the interests of the complainant at the hearing that is held pursuant to this section. If the complainant has not retained an attorney, the court shall appoint an attorney to represent her. If the guardian ad litem is an attorney admitted to the practice of law in this state, the court also may appoint him to serve as the complainant's attorney.

(C)(1) If the complainant makes only the allegation set forth in division (A)(4)(a) of this section and if the court finds, by clear and convincing evidence, that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

(2) If the complainant makes only the allegation set forth in division (A)(4)(b) of this section and if the court finds, by clear and convincing evidence, that there is evidence of a pattern of physical, sex-

ual, or emotional abuse of the complainant by one or both of her parents, her guardian, or her custodian, or that the notification of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

(3) If the complainant makes both of the allegations set forth in divisions (A)(4)(a) and (b) of this section, the court shall proceed as follows:

(a) The court first shall determine whether it can make the finding specified in division (C)(1) of this section and, if so, shall issue an order pursuant to that division. If the court issues such an order, it shall not proceed pursuant to division (C)(3)(b) of this section. If the court does not make the finding specified in division (C)(1) of this section, it shall proceed pursuant to division (C)(3)(b) of this section.

(b) If the court pursuant to division (C)(3)(a) of this section does not make the finding specified in division (C)(1) of this section, it shall proceed to determine whether it can make the finding specified in division (C)(2) of this section and, if so, shall issue an order pursuant to that division. If the court does not make the finding specified in division (C)(2) of this section, it shall dismiss the complaint.

(D) The court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion.

(E) If the court dismisses the complaint, it immediately shall notify the complainant that she has a right to appeal under section 2505.073 [2505.07.3] of the Revised Code.

(F) Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records under section 149.43 of the Revised Code.

(G) The clerk of the supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint under this section and by an appellant filing an appeal under section 2505.073 [2505.07.3] of the Revised Code. The clerk of each juvenile court shall furnish blank copies of the forms, without charge, to any person who requests them.

(H) No filing fee shall be required of, and no court costs shall be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under section 2505.073 [2505.07.3] of the Revised Code.

(I) As used in this section, "unemancipated" means that a woman who is unmarried and under

eighteen years of age has not entered the armed services of the United States, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian, or custodian.

HISTORY: 141 v H 319. Eff 3-24-86.

§ 2151.99 Penalties.

(A) Whoever violates division (D)(2) or (3) of section 2151.313 or section 2151.421 [2151.42.1] of the Revised Code is guilty of a misdemeanor of the fourth degree.

(B) Whoever violates division (D)(1) of section 2151.313 [2151.31.3] of the Revised Code is guilty of a minor misdemeanor.

***HISTORY:** 140 v H 258 (Eff 9-26-84); 141 v H 349. Eff 3-6-86.

Research Aids

Fingerprints and photographs of children:

O-Jur2d: Juv Cts § 71

Sentence and punishment:

O-Jur2d: Juv Cts § 213

§ 2153.01 Juvenile court division established.

Research Aids

Juvenile court and juvenile judge defined:

O-Jur2d: Juv Cts § 19

§ 2153.02 Judges; qualifications.

The juvenile court shall consist of six judges, each of whom, at the time of his election or appointment, shall be a qualified elector and resident of Cuyahoga county and shall have been admitted to practice as an attorney at law in this state for a period of at least six years immediately preceding his appointment or commencement of his term. They shall be elected and designated as judges of the court of common pleas, juvenile court division, and shall exercise the same powers and jurisdiction and receive the same compensation as other judges of the court of common pleas.

***HISTORY:** 140 v H 113. Eff 1-8-85.

§ 2153.03 Election of judges; terms of office; administrative judge.

Each of the judges of the juvenile court division shall be elected for six years at the general election next preceding the year in which the term, as provided in this section, commences, and his successor shall be elected at the general election next preceding the expiration of such term.

Each judge shall be elected by the electors of Cuyahoga county in the same manner as is provided for the election of judges of the court of common pleas. The terms of office of the judges of the juvenile court shall begin as follows: January 1,

1959, January 2, 1959, January 1, 1963, January 2, 1963, January 3, 1977, and January 3, 1987. Each of the judges of the juvenile court shall have the same judicial duties.

In addition to his regular judicial duties, one of the judges shall be the administrator of the juvenile court's subdivisions and departments.

The administrative judge shall be elected in the manner provided by rule 3 of the rules adopted by the supreme court of Ohio for the superintendence of the common pleas court. During any absence from the court by the administrative judge, he may designate one of the other judges to serve in his place and stead as the clerk of the court and as the administrator of the court's subdivisions and departments.

*HISTORY: 140 v H 113. Eff 1-8-85.

§ 2153.07 Accommodations for court.

Research Aids

Terms and sessions of court:

O-Jur2d: Juv Cts § 20

§ 2153.08 Administrative judge to be clerk of court; may appoint deputies and clerks; bonds.

Research Aids

Court personnel:

O-Jur2d: Juv Cts § 24

§ 2153.11 Bailiffs; compensation.

Research Aids

Court personnel:

O-Jur2d: Juv Cts § 24

§ 2153.12 Calendar of court; term.

Research Aids

Terms and sessions of court:

O-Jur2d: Juv Cts § 20

§ 2153.13 Contempt proceedings.

Research Aids

Jurisdiction in contempt:

O-Jur2d: Juv Cts § 56

§ 2153.14 Seal of court; form.

Research Aids

Administrative and quasi-judicial powers:

O-Jur2d: Juv Cts § 21

§ 2153.15 May vacate and modify judgments.

Research Aids

Modification or vacation of order:

O-Jur2d: Juv Cts § 175

Rules governing practice and procedure:

O-Jur2d: Juv Cts § 22

§ 2153.16 Jurisdiction of court.

Research Aids

Jurisdiction; generally:

O-Jur2d: Juv Cts § 39

§ 2153.17 Laws now in force to apply.

Research Aids

Appellate review; generally:

O-Jur2d: Juv Cts § 220

OHIO RULES OF JUVENILE PROCEDURE

(Including latest amendments effective July 1, 1985)

RULE 1. Scope of rules; applicability; construction; exceptions

CASE NOTES AND OAG

1. (1983) The Rules of Civil Procedure have no applicability to a custody proceeding in the court of common pleas, juvenile division. Rather, the Rules of Juvenile Procedure govern such proceedings: *Squires v. Squires*, 12 OApp3d 138, 12 OBR 460, 468 NE2d 73.

RULE 2. Definitions

Text Discussion

Evidence. 2 *Anderson Fam.L.* § 11.36

Procedures at permanent termination hearings. 2 *Anderson Fam.L.* § 11.33

RULE 3. Waiver of rights

ALR

Validity and efficacy of minor's waiver of right to counsel—modern cases. 25 *ALR4th* 1072.

RULE 4. Right to counsel; guardian ad litem

Text Discussion

Counsel and guardian ad litem in permanent termination proceedings. 2 *Anderson Fam.L.* § 11.35

ALR

Right of juvenile court defendant to be represented during court proceedings by parent. 11 *ALR4th* 719.

Law Review

The representation of juveniles before the court: a look into the past and the future. Note. 31 *CaseWresLRev* 580 (1981).

CASE NOTES AND OAG

1. (1973) The guarantee of the right to be represented by counsel set forth in Juvenile Rule 4(A) does not, as to a nonindigent party, require that trial be continued indefinitely until counsel can be obtained, but merely requires, if it does not appear that counsel cannot be obtained through the exercise of reasonable diligence and a willingness to enter into reasonable contractual arrangements for counsel's services, that a reasonable opportunity be given to the party before trial to employ such counsel: *In re Bolden*, 37 OApp2d 7, 66 OO2d 26, 306 NE2d 166.

2. (1977) The guardian ad litem appointed for a child in a dependency action where the interest of the child and the parent may conflict must have no ties or loyalties to anyone with an adversary interest in the outcome such as a natural parent or the prospective adoptive parents: *In re Christopher*, 54 OApp2d 137, 8 OO3d 271, 376 NE2d 603.

3. (1977) Where an infant child has been in the custody of prospective adoptive parents as a result of a permanent order of custody in a dependency action and that permanent order is subsequently vacated and the parent moves to terminate temporary custody, it appears that the interests of the child and parent may conflict and a guardian ad litem must be appointed for the child pursuant to Juvenile Rule 4(B) prior to the hearing on the mother's motion to terminate custody: *In re Christopher*, 54 OApp2d 137, 8 OO3d 271, 376 NE2d 603.

4. (1984) Pursuant to RC § 2151.35.2, a child, his parents, custodian, or other persons in loco parentis, if indigent, is entitled to be represented in all juvenile proceedings by a public defender in accordance with the comprehensive system set forth in RC Chapter 120., regardless of whether the outcome of the proceeding could result in a loss of liberty: OAG No.84-023.

5. (1985) An attorney should not serve as both guardian ad litem and appointed counsel where there is a conflict in such roles: *In re Baby Girl Baxter*, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

RULE 7. Detention and shelter care

CASE NOTES AND OAG

1. (1979) A parent, alleging that he failed to receive notice of a hearing concerning the shelter care of his child, must move the juvenile court for a rehearing, pursuant to Juv. R. 7(G), before seeking a writ of habeas corpus: *Linger v. Weiss*, 57 OS2d 97, 11 OO3d 281, 386 NE2d 1354.

2. (1979) Juvenile Rule 7(G) provides that a party may move for a rehearing on a decision relating to detention or shelter care; thus habeas corpus relief is not available: *Petry v. McGinty*, 60 OS2d 92, 14 OO3d 331, 397 NE2d 1190.

RULE 10. Complaint

CASE NOTES AND OAG

1. (1975) While the certification shall be deemed to be the complaint in the juvenile court, such certification does not constitute a complaint in the juvenile court that such child is dependent or neglected and those dispositions provided for under RC §§ 2151.35.3, 2151.35.4, and 2151.35.5 pertaining to unruly, delinquent, dependent, or neglected children are not applicable to the disposition of such a child, disposition thereof being subject to and controlled by RC § 3109.04: *In re Height*, 47 OApp2d 203, 1 OO3d 279, 353 NE2d 887.

2. (1983) In proving its case in a neglect and dependency proceeding, the state is not limited to those faults and habits of the custodial parent which are specifically listed in the complaint. It is not the intent of JuvR 10(B) to force a complainant to state in the complaint every fact surrounding each incident described: *In re Sims*, 13 OApp3d 37, 13 OBR 40, 468 NE2d 111.

3. (1984) Even though a complaining witness may designate a particular statute or statutes as being violated by a child, a juvenile court is free to find, on the basis of the

facts alleged and proved, a violation of an additional statute and that the accused is a delinquent child: In re Burgess, 13 OApp3d 374, 13 OBR 456, 469 NE2d 914.

4. (1984) Such certification does not constitute a complaint in the juvenile court that such child is neglected, dependent or abused and those dispositions provided for under RC § 2151.35.3 pertaining to neglected, dependent or abused children, including an award of permanent custody to a county welfare department which has assumed the administration of child welfare, are not applicable to such a child, disposition thereof being subject to and controlled by RC § 3109.04: In re Snider, 14 OApp3d 353, 14 OBR 420, 471 NE2d 516.

5. (1984) When a case concerning a child is transferred or certified from another court, the certification from the transferring court is deemed to be the complaint: In re Snider, 14 OApp3d 353, 14 OBR 420, 471 NE2d 516.

RULE 11. Transfer to another county

CASE NOTES AND OAG

1. (1983) Juvenile Rule 11 governs venue in a custody proceeding in the juvenile division, and JuvR 11(A) states, in essence, that if the child resides in one county and the proceeding is commenced in another county, transfer to the county of the child's residence is optional: Squires v. Squires, 12 OApp3d 138, 12 OBR 460, 468 NE2d 73.

RULE 13. Temporary disposition; temporary orders; emergency medical and surgical treatment

Law Review

The outer limits of parental autonomy: withholding medical treatment from children. Comment. 42 OS LJ 813 (1981).

RULE 22. Pleadings and motions; defenses and objections

(A) **Pleadings and motions.** Pleadings in juvenile proceedings shall be the complaint and the answer, if any, filed by a party. A party may move to dismiss the complaint or for other appropriate relief.

(B) **Amendment of pleadings.** Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties, or if the interests of justice require, upon order of court. Such order shall where requested grant a party reasonable time in which to respond to an amendment.

(C) **Answer.** No answer shall be necessary. A party may file an answer to the complaint, which, if filed, shall contain specific and concise admissions or denials of each material allegation of the complaint.

(D) **Prehearing motions.** Any defense, objection or request which is capable of determination without hearing on the allegations of the complaint may be raised before the adjudicatory hearing by motion. The following must be heard before the adjudicatory hearing, though not necessarily on a separate date:

(1) Defenses or objections based on defects in the institution of the proceedings;

(2) Defenses or objections based on defects in the complaint (other than failure to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence on the ground that it was illegally obtained;

(4) Motions for discovery.

(E) **Motion time.** All prehearing motions shall be filed by the earlier of (1) seven days prior to hearing, or (2) ten days after the appearance of counsel. The court in the interest of justice may extend the time for making prehearing motions.

The court for good cause shown may permit a motion to suppress evidence under subsection (D)(3) to be made at the time such evidence is offered.

(F) **State's right to appeal upon granting a motion to suppress.** In delinquency proceedings the state may take an appeal as of right from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that (1) the appeal is not taken for the purpose of delay and (2) the granting of the motion has rendered proof available to the state so weak in its entirety that any reasonable possibility of proving the complaint's allegations has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the juvenile court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal which may be taken under this rule shall be diligently prosecuted.

A child in detention or shelter care may be released pending this appeal when the state files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

(Amended, eff 7-1-77)

CASE NOTES AND OAG

1. (1977) In a juvenile proceeding an objection, raised after trial and submission, based on a failure of the testimony to establish the age of the accused juvenile relates to jurisdiction over the person and not to jurisdiction in the court, and is waived under Juvenile Rule 22(D)(2): *In re Fudge*, 59 OApp2d 129, 13 OO3d 176, 392 NE2d 1262.

2. (1981) Where the state has timely filed a notice of appeal from the granting of a motion to suppress, but has failed to make a proper certification as required by JuvR 22(F), a court of appeals may, pursuant to AppR 3(E), allow the amendment of the timely filed notice of appeal and certification so that there may be full compliance with JuvR 22(F): *In re Hester*, 1 OApp3d 24, 1 OBR 85, 437 NE2d 1218.

3. (1981) Inasmuch as JuvR 22(A) provides that a party may move "for other appropriate relief," a juvenile presumably may move to limit the court's use of social histories before and during the adjudication. If it does not authorize such relief, then JuvR 45 provides the procedure when no procedure is specifically prescribed: *J. P. v. DeSanti*, 653 F2d 1080 (6th Cir.).

4. (1982) The state is not barred from prosecution following an unsuccessful appeal from the sustaining of a motion to suppress so long as the state's certification upon appeal pursuant to JuvR 22(F) [or CrimR 12(J)], that the evidence suppressed was of such nature that the prosecution could not be successful without it, was made in good faith. If such certification were not made in good faith, the time consumed in determining the appeal from the motion to suppress must be charged to the state as undue delay in prosecution of the accused with respect to a determination of whether there has been a violation of the accused's right to a speedy trial: *In re Hester*, 3 OApp3d 458, 3 OBR 539, 446 NE2d 202.

RULE 29. Adjudicatory hearing

CASE NOTES AND OAG

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1. (1976) The time limits of RC § 2945.71 et seq., for the prosecution of criminal offenders do not apply to an adjudicatory hearing on a complaint alleging a child to be a juvenile traffic offender. The only applicable time limit, outside JuvR 29, is the six months limitation for prosecution of a minor misdemeanor stated in RC § 2901.13(A)(3): *In re TLK*, 2 OO3d 324.

2. (1977) The ten day period of limitations in JuvR 29(A) is procedural only and such rule confers no substantive right upon an accused to have his case dismissed if he is not tried within the designated time: *In re Therklidsen*, 54 OApp2d 195, 8 OO3d 335, 376 NE2d 970.

3. (1979) The juvenile court has exclusive original jurisdiction, pursuant to RC § 2151.23(A), concerning any

child who is alleged in a proper complaint to be neglected, and the court does not lose jurisdiction by failing to adhere to the time limits set forth in JuvR 29(A) and 34(A): *Linger v. Weiss*, 57 OS2d 97, 11 OO3d 281, 386 NE2d 1354.

4. (1978) When, in an adjudicatory hearing held pursuant to Juv. R. 29, the only evidence of guilt utilized by the court is testimony presented at the preliminary hearing, where the accused exercised adequate rights of cross-examination, he is denied no constitutional right: *In re Gantt*, 61 OApp2d 44, 15 OO3d 67, 398 NE2d 800.

5. (1982) The procedure for pleas in Juvenile Court in relation to a delinquency complaint differs substantially from the pleas provided by CrimR 11 in an adult criminal proceeding. There is no statement in CrimR 11 that a no contest plea results in a waiver of a defendant's right to challenge evidence against him as is specifically provided for by JuvR 29(D)(2) in relation to an admission of allegations of the complaint: *In re Green*, 4 OApp3d 196, 4 OBR 300, 447 NE2d 129.

6. (1982) The no contest plea in a juvenile proceeding is not the unequivocal admission of the allegations of the complaint contemplated by JuvR 29(D). Being something less than an admission, it must be construed as a denial and the prosecuting attorney must prove the issues of delinquency beyond a reasonable doubt. (JuvR 29(E)): *In re Green*, 4 OApp3d 196, 4 OBR 300, 447 NE2d 129.

7. (1982) Where a juvenile enters a no contest plea to a delinquency complaint apparently on the basis that she would be able to appeal the juvenile court's ruling on the pretrial motion to suppress, as would be true in an adult criminal case, the court erroneously disposes of the case on such plea. (JuvR 29, construed): *In re Green*, 4 OApp3d 196, 4 OBR 300, 447 NE2d 129.

8. (1983) Parent may be denied custody only if a preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that his custody would be detrimental to the child: *Reynolds v. Ross Cty. Children's Service Agency*, 5 OS3d 27, 5 OBR 87, 448 NE2d 816.

9. (1983) Despite the mandate of JuvR 29 that juvenile proceedings be conducted in an informal manner, otherwise inadmissible hearsay evidence is not admissible at the adjudicatory stage of a neglect and dependency proceeding, because the importance of the parental interests involved demand an accurate determination of the facts surrounding a complaint alleging neglect or dependency and requires substantial compliance with the Rules of Evidence: *In re Sims*, 13 OApp3d 37, 13 OBR 40, 468 NE2d 111.

10. (1983) Where a complaint is filed alleging that a child is dependent or neglected in violation of RC §§ 2151.03(B) and 2151.04(A), (B) and (C), JuvR 29(D)(2) does not prohibit the child's mother from participating in the adjudicatory hearing just because she entered a plea of "admitted" to the allegations in the complaint: *In re Sims*, 13 OApp3d 37, 13 OBR 40, 468 NE2d 111.

11. (1983) Hearings for permanent custody under RC § 2151.41.4 must conform to the Rules of Juvenile Procedure. Hence, pursuant to JuvR 29 and 34, the proceedings should be bifurcated into separate adjudicatory and dispositional stages: *In re Vickers Children*, 14 OApp3d 201, 14 OBR 228, 470 NE2d 438.

12. (1984) A party seeking to modify a dispositional custody order must prove by clear and convincing evidence that the modification is in the best interests of the child: *In re Patterson*, 16 OApp3d 214, 16 OBR 229, 475 NE2d 160.

13. (1985) In proceedings where parental rights are subject to termination, both the Juvenile Rules and the Revised Code prescribe that such proceedings be bifurcated into separate adjudicatory and dispositional hearings. (RC § 2151.35 and JuvR 29 and 34, construed and applied.): In re Baby Girl Baxter, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

RULE 30. Relinquishment of jurisdiction for purposes of criminal prosecution

Law Review

Juvenile law—the waiver of juvenile court jurisdiction. *State v. Adams*, 69 OS2d 120 (1982). Case note. 16 AkronLRev 324 (1982).

Relinquishment of jurisdiction for purposes of criminal prosecution of juveniles. Comment. 8 NoKyLRev 377 (1981).

CASE NOTES AND OAG

1. (1982) Once a juvenile is bound over in any county in Ohio pursuant to RC § 2151.26 and Juv. R. 30, that juvenile is bound over for all felonies committed in other counties of this state, as well as for future felonies he may commit: *State v. Adams*, 69 OS2d 120, 23 OO3d 164, 431 NE2d 326.

2. (1982) When the juvenile court makes a determination as to a juvenile offender's amenability to rehabilitation, it must consider the five factors set forth in JuvR 30(E); however, the juvenile court need not resolve all of these factors against the juvenile to warrant the court in relinquishing its jurisdiction and transferring him for prosecution as an adult: *State v. Oviedo*, 5 OApp3d 168, 5 OBR 351, 450 NE2d 700.

3. (1982) Pursuant to JuvR 30(G), an order of transfer is sufficient if it demonstrates that the statutory requirement of "full investigation" has been met and that the issue has received the full attention of the juvenile court: *State v. Oviedo*, 5 OApp3d 168, 5 OBR 351, 450 NE2d 700.

4. (1982) The duty upon the juvenile court before ordering a relinquishment of jurisdiction for purposes of criminal prosecution is, after investigation, to find there are reasonable grounds to believe that the child is one who will not be readily brought to yield, submit and respond to care, supervision and rehabilitation in any facility designed for such care of delinquent children and that the requirement as to legal restraint exists. (RC § 2151.26(A), construed): *State v. Whiteside*, 6 OApp3d 30, 6 OBR 140, 452 NE2d 332.

5. (1985) In ordering a bind-over, a juvenile court is not required to make written findings as to the factors listed in JuvR 30(E): *State v. Douglas*, 20 OS3d 34, 20 OBR 282, 485 NE2d 711.

RULE 32. Social history; physical examination; mental examination; custody investigation

CASE NOTES AND OAG

1. (1981) Disclosure of juvenile court records, including social histories, to appropriate governmental and social agencies is not unconstitutional: *J. P. v. DeSanti*, 653 F2d 1080 (6th Cir.).

2. (1982) Where the court granted a motion that the father undergo a psychological evaluation, the court did not abuse its discretion in refusing to order the father's second wife to also undergo an evaluation: In re Reynolds, 2 OApp3d 309, 2 OBR 341, 441 NE2d 1141.

3. (1984) An indigent parent in a custody hearing who has the right to a free court-ordered psychological evaluation may not limit disclosure of adverse results of such testing unless the court order granting the evaluation limits the purpose of the report solely for the parent's defense: In re Green, 18 OApp3d 43, 18 OBR 155, 480 NE2d 492.

RULE 34. Dispositional hearing

CASE NOTES AND OAG

1. (1973) Error cannot be predicated on the juvenile court's holding a dispositional hearing immediately following an adjudicatory hearing and its failure to continue the dispositional hearing for a reasonable time to enable the party to obtain or consult counsel, as prescribed by Juvenile Rule 34(A), unless it affirmatively appears in the record that the affected non-indigent party has requested such continuance: In re Bolden, 37 OApp2d 7, 66 OO2d 26, 306 NE2d 166.

2. (1979) The juvenile court has exclusive original jurisdiction, pursuant to RC § 2151.23(A), concerning any child who is alleged in a proper complaint to be neglected, and the court does not lose jurisdiction by failing to adhere to the time limits set forth in Juv. R. 29(A) and 34(A): *Linger v. Weiss*, 57 OS2d 97, 11 OO3d 281, 386 NE2d 1354.

3. (1983) Hearings for permanent custody under RC § 2151.41.4 must conform to the Rules of Juvenile Procedure. Hence, pursuant to JuvR 29 and 34, the proceedings should be bifurcated into separate adjudicatory and dispositional stages: In re Vickers Children, 14 OApp3d 201, 14 OBR 228, 470 NE2d 438.

4. (1984) A party seeking to modify a dispositional custody order must prove by clear and convincing evidence that the modification is in the best interests of the child: In re Patterson, 16 OApp3d 214, 16 OBR 229, 475 NE2d 160.

5. (1984) A further dispositional order continuing an original temporary custody order, issued pursuant to JuvR 34, constitutes a final appealable order: In re Patterson, 16 OApp3d 214, 16 OBR 229, 475 NE2d 160.

6. (1985) In proceedings where parental rights are subject to termination, both the Juvenile Rules and the Revised Code prescribe that such proceedings be bifurcated into separate adjudicatory and dispositional hearings. (RC § 2151.35 and JuvR 29 and 34, construed and applied.): In re Baby Girl Baxter, 17 OS3d 229, 17 OBR 469, 479 NE2d 257.

7. (1984) An indigent parent in a custody hearing who has the right to a free court-ordered psychological evaluation may not limit disclosure of adverse results of such testing unless the court order granting the evaluation limits the purpose of the report solely for the parent's defense: In re Green, 18 OApp3d 43, 18 OBR 155, 480 NE2d 492.

RULE 37. Recording of proceedings

CASE NOTES AND OAG

1. (1984) Under RC § 1347.08, a juvenile court must permit a juvenile or a duly-authorized attorney who repre-

sents the juvenile to inspect court records pertaining to the juvenile unless the records are exempted under RC § 1347.04(A)(1)(e) or RC § 1347.08(C) or (E)(2). Under JuvR 37(B), the records may not, however, be put to any public use except in the course of an appeal or as authorized by order of the court: OAG No.84-077.

2. (1984) Revised Code § 1347.04 does not operate to exempt juvenile courts from the provisions of RC Chapter 1347. with respect to the courts' records of matters pertaining to juveniles; however, if a juvenile court has any personal information systems which are comprised of investigatory material compiled for law enforcement purposes, such systems are exempt from RC Chapter 1347. under RC § 1347.04(A)(1)(e): OAG No.84-077.

RULE 40. Referees: appointment; powers; duties

(A) **Appointment.** The juvenile judge may appoint one or more referees. The appointment of a referee may empower him to act in a single proceeding or in a specified class of proceedings or portions thereof. The juvenile judge shall not appoint as referee any person who has contemporaneous responsibility for working with, or supervising the behavior of children who are subject to dispositional orders of the appointing court or any other juvenile court.

(B) **Powers.** An order of reference to a referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power of the court to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call parties to the action and examine them upon oath. The referee shall make a report of the proceeding, including evidence offered and excluded, in the same manner and subject to the same limitations as provided in Rule 37 for hearings by the court.

(C) Proceedings.

(1) **Meetings.** When a special reference is made in a specific case, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys, or for the hearing of the case, to be held promptly after the date of the order of reference and shall notify the parties or their attorneys or both. When a general reference has been made for a specified class of proceedings or portions thereof, the clerk or the referee shall forthwith upon receiving the case set a time and place for hearing of the case, to be held promptly after receiving the case, and shall notify the parties or their attorneys or both.

Any party, on notice to the other parties and to the referee, may apply to the court for an order requiring the referee to expedite the matter and to make his report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte, or, in his discretion, may take appropriate steps to have the absent party brought before him forthwith or at a future day, or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 17. If without adequate excuse a witness fails to appear or to give evidence, he may be punished as for a contempt and be subject to the consequences, penalties, and remedies provided in Rule 17.

(D) Report.

(1) **Contents and filing.** The referee shall prepare a report upon the matters submitted by the order of reference or otherwise. The referee shall file the report with the judge and forthwith provide copies to the parties. The report shall set forth the findings of the referee upon the case submitted, together with a recommendation as to the judgment or order to be made in the case in question, but the referee shall file with the report a transcript of the proceedings and of the evidence only if the court so directs.

(2) **Objections to report.** A party may, within fourteen days of the filing of the report, serve and file written objections to the referee's report. Such objections shall be con-

sidered a motion. Objections shall be specific and state with particularity the grounds therefor. Upon consideration of the objections the court may: adopt, reject or modify the report; hear additional evidence; return the report to the referee with instructions; or hear the matter itself.

(3) **Stipulation as to findings.** The effect of a referee's report is the same whether or not the parties have consented to the reference. When the parties stipulate in writing that a referee's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) **Draft report.** Before filing the report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The referee shall sign any findings or decision and file it together with any exceptions.

(5) **When effective.** The report of a referee shall be effective and binding only when approved and entered as a matter of record by the court. The referee's findings of fact must be sufficient for the court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment order. The court may adopt the referee's recommendations about appropriate conclusions of law and the appropriate resolution of any issues. However, the court shall determine whether there is any error of law or other defect on the face of the referee's report even if no party objects to such an error or defect. The court shall enter its own judgment on the issues submitted for action and report by the referee.

(6) **Factual findings.** A party may not assign as error the court's adoption of a referee's finding of fact unless an objection to that finding is contained in that party's written objections to the referee's report. The court may adopt any finding of fact in the referee's report without further consideration unless the party who objects to that finding supports that objection with a copy of all relevant portions of the transcript from the referee's hearing or an affidavit about evidence submitted to the referee if no transcript is available. In deciding whether to adopt a referee's finding of fact, the court may disregard any evidence which was not submitted to the referee unless the complaining party demonstrates that with reasonable diligence

he or she could not have discovered and produced that evidence for the referee's consideration.

(7) **Permanent and interim orders.** The court may enter judgment on the basis of findings of fact contained in the referee's report without waiting for timely objections by the parties, but the filing of timely written objections to the referee's report shall operate as an automatic stay of execution of that judgment until the court disposes of those objections and thereby vacates, modifies or adheres to the judgment previously entered. The court may make an interim order on the basis of findings of facts contained in the referee's report without waiting for or ruling on timely objections by the parties where immediate relief is justified and such an interim order shall not be subject to the automatic stay caused by the filing of timely objections to the report, but no interim order shall extend more than twenty-eight (28) days, unless within that time, for good cause shown, the court extends it for one like period.

(Effective 7-1-75; amended, eff 7-1-85)

CASE NOTES AND OAG

1. (1984) Where a juvenile, adjudged to be delinquent by a referee, files objections to the referee's report, and where the court then reserves judgment on the objections and requests the referee to supply a statement as to the evidence in the hearing, and where a supplemental report of the referee is then filed with court, but no copy of the supplemental report is served on the juvenile or his counsel, it is error for the court to then approve the referee's report, as supplemented, for the juvenile was not given an opportunity to object to the supplemental report in compliance with JuvR 40(D): *In re Weimer*, 19 OApp3d 130, 19 OBR 219, 483 NE2d 173.

RULE 42. Consent to marry

(A) **Application where parental consent not required.** When a minor desires to contract matrimony and has no parent, guardian, or custodian whose consent to the marriage is required by law, the minor shall file an application under oath in the county where the female resides requesting that the judge of the juvenile court give consent and approbation in the probate court for such marriage.

(B) **Contents of application.** The application required by subdivision (A) shall contain:

(1) The name and address of the person for whom consent is sought;

(2) The age of said person;

(3) The reason why consent of a parent is not required; and

(4) The name and address, if known, of the parent, where the minor alleges that his parent's consent is unnecessary because the parent has neglected or abandoned him for one year or longer immediately preceding the application.

(C) Application where female pregnant or delivered of child born out of wedlock. Where a female is pregnant or delivered of a child born out of wedlock and the parents of such child seek to marry even though one or both of them is under the minimum age prescribed by law for persons who may contract marriage, such persons shall file an application under oath in the county where the female resides requesting that the judge of the juvenile court give consent in the probate court to such marriage.

(D) Contents of application. The application required by subdivision (C) shall contain:

(1) The name and address of the person or persons for whom consent is sought;

(2) The age of such person;

(3) An indication of whether the female is pregnant or has already been delivered;

(4) An indication of whether or not any applicant under eighteen years of age is already a ward of the court; and

(5) Any other facts which may assist the court in determining whether to consent to such marriage.

If pregnancy is asserted, a certificate from a physician verifying pregnancy shall be attached to the application. If an illegitimate child has been delivered, the birth certificate of such child shall be attached.

The consent to the granting of the application by each parent whose consent to the marriage is required by law shall be indorsed on the application.

(E) Investigation. Upon receipt of an application under subdivision (C), the court shall set a date and time for hearing thereon at its earliest convenience and shall direct that an inquiry be made as to the circumstances surrounding the applicants.

(F) Notice. If neglect or abandonment is alleged in an application under subdivision (A) and the address of the parent is known, the court shall cause notice of the date and time of hearing to be served upon such parent.

(G) Judgment. If the court finds that the allegations stated in the application are true,

and that the granting of the application is in the best interest of the applicants, the court shall grant the consent and shall make the applicant referred to in subdivision (C) a ward of the court.

(H) Certified copy. A certified copy of the judgment entry shall be transmitted to the probate court.

(Amended, eff 7-1-80)

RULE 44. Jurisdiction unaffected

CASE NOTES AND OAG

1. (1979) The juvenile court has exclusive original jurisdiction, pursuant to RC § 2151.23(A), concerning any child who is alleged in a proper complaint to be neglected, and the court does not lose jurisdiction by failing to adhere to the time limits set forth in Juv. R. 29(A) and 34(A): *Linger v. Weiss*, 57 OS2d 97, 11 OO3d 281, 386 NE2d 1354.

RULE 45. Procedure not otherwise specified

CASE NOTES AND OAG

1. (1981) Inasmuch as JuvR 22(A) provides that a party may move "for other appropriate relief," a juvenile presumably may move to limit the court's use of social histories before and during the adjudication. If it does not authorize such relief, then JuvR 45 provides the procedure when no procedure is specifically prescribed: *J. P. v. DeSanti*, 653 F2d 1080 (6th Cir.).

RULE 47. Effective date

(A) Effective date of rules. These rules shall take effect on the first day of July, 1972. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(B) Effective date of amendments. The amendments submitted by the supreme court to the general assembly on January 12, 1973, shall take effect on the first day of July, 1973. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(C) **Effective date of amendments.** The amendments submitted by the supreme court to the general assembly on January 10, 1975, and on April 29, 1975, shall take effect on July 1, 1975. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(D) **Effective date of amendments.** The amendments submitted by the supreme court to the general assembly on January 9, 1976 shall take effect on July 1, 1976. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(E) **Effective date of amendments.** The amendments submitted by the supreme court

to the general assembly on January 14, 1980, shall take effect on July 1, 1980. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(F) **Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on December 24, 1984 and January 8, 1985 shall take effect on July 1, 1985. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(Amended, eff 7-1-73; 7-1-75; 7-1-76; 7-1-80; 7-1-85)

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